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THE
PROVINCIAL INSOLVENCY ACT,
V OF 1920

As amended up to date

WITH INTRODUCTION STATEMENT OF OBJECTS AND REASONS
NOTES ON CLAUSES PROCEEDINGS IN COUNCIL CIVIL JUSTICE
COMMITTEE REPORT RULINGS UNDER THE BANKRUPTCY ACTS
THE PRESIDENCY TOWNS INSOLVENCY ACT OF THE
PRIVY COUNCIL OF THE HIGH COURTS AND CHIEF
COURTS IN INDIA & BURMA COMPARATIVE
TABLES RULES FRAMED BY THE DIFFERENT
HIGH COURTS MODEL FORMS OF PETI
TIONS AND PLEADINGS &c &c &c

BY

A. GHOSH, B A, B L,

Advocate, High Court, Calcutta, Author of "Law of Endowments
—Hindu & Mahomedan," "Law of Benami Transactions,"
"Land Acquisition Act," &c, &c

ELEVENTH EDITION
(Revised & Enlarged)

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1940

PREFACE.

It need hardly be mentioned that legal ideas and conceptions undergo changes like any other thing in nature. There was a time when law zealously protected the interest of the creditors without any regard to the interest of the debtors. The present age, however, is remarkable in that it has brought about a complete revolution in the idea of relationship between debtor and creditor. The Civil Procedure (Amendment) Act, XXI of 1936 is the outcome of the recommendation of the Royal Commission on Labour in India to the effect that in the case of individual workers in receipt of wages less than Rs 100 a month arrest or imprisonment for debt should be abolished except when the debtor has been proved to be both able and unwilling to pay. The Act was passed to amend the Civil Procedure Code, 1908, so as to protect debtors of all classes and not the industrial worker class only from detention in Civil prison and to confine such detention to debtors proved to be recalcitrant or fraudulent. Several other Acts have been passed one after another both by the Central as well as the Provincial legislatures, (e.g., the Usurious Loans Act, the Interest Act, the Money Lenders Act, The Agricultural Debtors Relief Act,) all with the object of giving relief to the debtors and absolving them from liability under contracts utterly ignoring the rights of the creditors thereunder. As a result the economic structure of the society has been rudely shaken. The capital has become shy and free circulation of money has been restricted. Agriculture, trade and commerce have suffered a check and set-back unprecedented in the annals of the country. The debtor finds it to his advantage to have recourse to the above laws for his protection rather than to the law of insolvency which holds the balance even between the debtor on the one hand and the creditor on the other and does not allow either to obtain any unfair advantage over the other. This accounts, to some extent, for the fall in popularity of the law of insolvency in India and elsewhere.

Besides the Provincial Insolvency Act, V of 1920, has been on the statute book for twenty years and beyond occasional attempts at reforms by piecemeal legislation, the law of insolvency is

PREFACE TO THE TENTH EDITION.

Fifteen years have passed since the enactment of the Provincial Insolvency Act V of 1920. During these years only a few changes have taken place from time to time in the text of the Act. These changes do not represent any material departure from the original idea underlying the passing of Act V of 1920. They represent for the most part a revision and re-statement of it with amendments and additions in points of detail.

If "the over-riding intention of the Legislature in all Bankruptcy Acts is that the debtor giving up the whole of the property, shall be a free man again able to earn his livelihood and having the ordinary inducements to industry", as has been said by Lord Justice Vaughan Williams be correct, the treatment of the subject in the present Act requires to be revised in the light of the accepted principles of law, and not otherwise.

In so far as the realisation and distribution of the assets of the insolvent are concerned the Act seems to be lacking in precision of the English Bankruptcy Act or the Presidency-towns Insolvency Act and there is room for considerable improvement. The Act cannot be said to have fulfilled the purpose for which it was intended. Something should be done in the way of ameliorating the lot of creditors by limiting the time within which a Receiver will have to declare a dividend as in the Bankruptcy Act and the Presidency Towns Insolvency Act.

There has been an endeavour in the present edition not only to state the law of insolvency as it is and trace it to its source and origin but also to point out the defects and short-comings which stand in the way of its efficient administration. An endeavour has also been made to suggest means and ways by which the Act may be improved so as to be really useful to the public for whom intended. The case law has also been brought upto date.

PREFACE TO THE FIRST EDITION

The object of compiling this edition is not merely to present, in a handy volume, the principles of the law of insolvency in India, but also to attempt at solution* of the many difficult questions that frequently arise in its practical application. The principles have been explained, as far as possible, in the words of the judges and at the suggestion of several members of the profession a set of petitions and pleadings under the present Act have been appended, mostly adapted from records of decided cases.

The New Rules under the present Act, V of 1920, could not be published in this edition, as they have not yet been framed. Some of the old Rules under Act III of 1907 have therefore been incorporated for purposes of reference.

In the compilation of this work I derived considerable benefit from such standard works as Robson on Bankruptcy, Williams on Bankruptcy and Lord Halsbury's Laws of England. I cannot but take this opportunity to express my heart felt thanks to the learned authors.

In conclusion, I acknowledge my indebtedness to my friend Mr I N De, M A , B L., Vakıl, but for whose untiring attention, from start to finish, in the compilation and get-up of this book, it would never have seen the light of day.

I will consider myself highly rewarded if this edition proves useful to those for whom it is intended.

Calcutta, }
31st July, 1920 }

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TABLE OF CONTENTS.

Introduction	xi
Statement of Objects and Reasons to the Bill to amend Act III of 1907	xvi
Notes on Clauses	xviii
Proceedings in Council	xxi
Civil Justice Committee Report	xxvi
Comparative Tables	xxxiv
Table of Cases	xli
Provincial Insolvency Act—(Contents)	cxxxix
Provincial Insolvency Act—(Text and Commentaries)	1—761
Schedule I	762
Schedule II	763
Schedule III	764
The Provincial Insolvency Rules—	
Calcutta High Court	765
Allahabad High Court	778
Madras High Court	784
Bombay High Court	794
Lahore High Court	816
Model Petitions and Pleadings	839
Subject Index	857

INTRODUCTION.

Bankruptcy is a proceeding by which, when a debtor cannot pay his debts or discharge his liabilities or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the State, in certain circumstances takes possession of his property by an officer appointed for the purpose, and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities—*Blackstone*. The debtor at the same time becomes bankrupt, he is during the bankruptcy, subject to certain disqualifications as a citizen. Although no longer looked upon as a crime, as it once was, bankruptcy is considered to involve a change of status and to carry with it quasi penal consequences.

The English law of bankruptcy is entirely a creation of Statute law there was no such thing as a common law of bankruptcy. The Statutes which govern the present law of bankruptcy in England are the Statutes 46 & 47 Vict. C. 52 and 53 and 54 Vict. C. 71 (i.e., the Bankruptcy Acts of 1883, 1890), and the Bankruptcy Act of 1914 as amended by the Bankruptcy (Amendment) Act, 1926. These are only supplemented by Rules framed under powers given by these Acts, which provide only for the legal procedure and administrative machinery of bankruptcy proceedings.

The English Bankruptcy Acts form the basis of Indian insolvency legislation from the earliest times to the enactment of Act V of 1920. Before the passing of the Presidency Towns Insolvency Act, III of 1909, the law of insolvency as administered in the Presidency towns and Rangoon was governed by the Indian Insolvent Act, 1848 11 & 12 Vict. C. 21, and before the passing of the Provincial Insolvency Act, III of 1907, the law of provincial insolvency in India was governed by the Code of Civil Procedure, and the provisions of all these enactments are based upon the English statutes, which have gradually been adapted to suit Indian requirements.

The first enactment on the law of Provincial Insolvency in British India is to be found in the Insolvency chapter of the Civil Procedure Code of 1859. These provisions were somewhat extended by the C. P. Codes of 1877 and 1879, but from 1877 till the amendments of Act III of 1907 they remained in the C. P. Code unchanged and in the words of *Hobhouse*, as "a germ and more than a germ of an insolvency law."

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The scope of the insolvency chapter of the Code of Civil Procedure was limited to creditors *who had obtained decrees for the payment of money* and to judgment debtors *who had been arrested or imprisoned or whose property had been attached in execution of such decrees*. No protection was placed upon the rights of an individual creditor until the debtor's property had actually vested in the Receiver appointed under section 354 and in the interim suits might proceed and decrees might be executed with the result that while the petition was pending the whole of the property of the debtor might be sold for the benefit of a single decree holder and to the exclusion of the rest of his creditors who might have refrained from embarrassing the estate with litigation because their claims had been duly scheduled. On the other hand the relief to the insolvent was most inadequate since it was strictly confined to discharge from the scheduled debts all liability for which was terminated by a rough and ready procedure through the satisfaction of one third or the efflux of twelve years. For the Punjab there was a special but incomplete law contained in eleven sections of the Punjab Laws Act IV of 1872. In the words of Hon'ble Mr (now Sir) Earle Richards K.C. the law for the Punjab was quite inadequate for creditors.

To remedy these defects the Government of India considered that the insolvency provisions may with advantage be separated from the Code of Civil Procedure and passed as a separate enactment. In introducing the Bill on the 28th September 1906 to the Imperial Council the Hon'ble Mr (now Sir) Earle Richards observed: "The Bill removed these restrictions by declaring that an insolvency petition might be presented by any creditor or by any debtor if the debtor had committed an act of insolvency and an act of insolvency was defined in the Bill (following English law and to some extent the law of Presidency Towns) to include acts which have the effect of placing the debtor in a position in which his creditors are unable to obtain satisfaction of their claims. The scope of the Bill was more extensive than that of the present law. The debtor was released from prison and his insolvent estate was placed under the control of a Receiver. The order adjudging a debtor insolvent was generally no protection of any debts provable against him. Then as regards creditors it would be found that the rights of the creditor were much better secured under the Bill than under the existing law. The order of adjudication was to relate back to the date of the presentation of the petition and from that time the property of the debtor was to be available only for the payment of the debts under the insolvency. Provisions had also been added following English law for the appointment of a Receiver to take possession of the property of the insolvent debtor."

dishonesty on the part of the debtors had been made more stringent. In addition to this, clauses had been added to provide for compositions, summary administration, etc."

The general result of the Bill which was passed into Act III of 1907 was to provide an insolvency law based on the lines of the English law of bankruptcy, but in a greatly simplified form, a form which it was hoped would be suitable to the requirements of the Mofussil and to the capacities of the Courts which would have to administer them.

During the eleven years that Act III of 1907 remained in force its various defects and shortcomings were brought to light, and the necessity for a new and amended Provincial Act began to be keenly felt. To remedy these defects a Bill to amend the Provincial Insolvency Act, 1907, was introduced in the Indian Legislative Council in September, 1919. The various defects in Act III of 1907 which this Bill was intended to cure and the various improvements that were introduced and effected in the Bill in view of the then conditions have been particularly set forth in the Statement of Objects and Reasons, Notes on Clauses and Sir George Lowndes' speech quoted verbatim, *infra*. The Bill was passed as the Provincial Insolvency Act, V of 1920, and having received the assent of the Governor General on the 25th February, 1920, became the law relating to insolvency in British India, outside the Presidency Towns and Rangoon.

While this Act V of 1920 was in force, the Government of India, by its Resolution No. 100 of January, 1924, constituted a committee of the substantive and adjective law whether enacted or otherwise, followed by the Courts in India in the disposal of civil suits, appeals, applications for revision and other civil litigation (including the execution of decrees and orders), with a view to ascertaining and reporting whether any and what changes and improvements should be made so as to provide for the most speedy, economical and satisfactory despatch of the business transacted in the Courts and for the more speedy, economical and satisfactory execution of the processes issued by the Courts." This Committee known as a Civil Justice Committee submitted their Report dated 2nd July 1925 and recommended the changes in Chapter 14, Part I of their Report as regards insolvency. The Government of India, in pursuance of the recommendation of the Committee introduced the Bills for the amendment.

The Bills were passed into law as Act IX of 1926, which received the assent of the Governor General on the 26th February, 1926 and 9th September, 1926. The Act was further amended by Act XXXIV of 1927, the Insolvency (Amendment) Act X of 1927, the Insolvent Act XI of 1927, the Repealing Act XII of

Amending Act XVIII of 1928 Notwithstanding the above amendments sec 53 of the Provincial Insolvency Act gave rise to conflicting judicial decisions as to whether the terminus *a quo* for the calculation of the period of two years referred to therein should be the date of the order of adjudication or the date of the presentation of the insolvency petition To remove the above defect Bill No X of 1930 was introduced in the Legislative Assembly and was passed into Act X of 1930 as the Insolvency Law (Amendment) Act and received the assent of the Governor General on the 20th March, 1930 In 1935 a Bill to further amend the Provincial Insolvency Act 1920

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Act, 1909 "

The Bill was passed into Act A of 1935 and received the assent of the Governor General on the 28th September 1935 The Provincial Insolvency Act V of 1920 is amended by the above Amending and Repealing Acts, is now the law relating to insolvency in British India outside the Presidency Towns and the towns of Rangoon and Karachi

With a view to further amend the Provincial Insolvency Act, 1920 a Bill, being L A Bill No 22 of 1939 has been introduced in the Legislative Assembly on the 18th February 1839 'to provide for a certain procedure to safeguard the interests of the creditors, purchasers and members of the joint Hindu Mitakshara family other than the insolvent As the Receiver represents both the parties confidence must be reposed in him and, to bind the the right title and interest of members of joint Hindu Mitakshara family other than the insolvent, he should be authorised to institute a regular civil suit against all those who may possibly lay adverse claim to such properties of the joint family so that there may be proper adjudication, and such of the assets as may be proved liable for the just debts may be made available to the Receiver for the satisfaction of the proved debts of the insolvent" In the Statement of Chatter and De - - - - - stated that the Civil Justice

Chapter XIV (pages 225-45), in pr

culty in laying down the procedure to bind the right, title and interest of the member of a Hindu Joint Milakshara family other than the insolvent because some decisions of the High Courts appeared to make the whole property of the insolvent vest in the Receiver At that time the Civil Justice Committee was not armed with varieties of discussions on so thorny a subject and wished to elicit opinion But in course of a dozen years sufficient opinion has clustered round it in the shape of conflicting decisions among several High Courts and even the Privy Council in *Sat Narain v Behari Lal* 6 Lah 1 AIR 1925 PC. 18 does not lay down any definite procedure The result is that the wearied creditor is driven from Court to Court and is

entrapped in a compromise with the insolvent on disadvantageous terms. The minor sons of the insolvent, who are always legally protected, often raise their heads to litigate at any stage during insolvency proceedings or after it, which involves a direct breach of the first duties of allegiance and respect from Hindu sons towards their insolvent fathers and is rarely instituted without collusion on the part of the latter. Consequently a claim by a son alleging the immorality or illegality of a debt incurred by his father as the ground of setting aside a transaction entered into by the latter must always be viewed with great suspicion, especially where the interests of a *bona fide* purchaser for value at an auction sale have to be considered. The members of the joint family other than the minor also put obstacles in the way. It is, therefore necessary to stop that vexatious claims based on inequitable pleas and interference by all members of the joint Hindu Mitakshara family and to safeguard both the creditors and the insolvent debtors that a definite procedure be laid down and the present uncertain condition must be ended." The Bill has not as yet been passed

STATEMENT OF OBJECTS AND REASONS.

Bill No. 14 of 1918.

A Bill further to amend the Provincial Insolvency Act, 1907.

The object of the Bill is to amend the Provincial Insolvency Act, (III of 1907), which contains the law of Insolvency in force in British India outside the Presidency-towns and the town of Rangoon. The Act came into force on the 1st January, 1908, and since then with the exception of a few unimportant amendments made in 1914, it has not been amended. Ten years' experience of the practical working of the Act has brought to light many defects which have from time to time provoked criticism from most of the Local Governments and not a few of the Judges who have had to administer its provisions. Numerous suggestions for the amendment of the Act on various points have also been received from time to time from the commercial communities and members of the legal profession.

2. The chief indictment of the Act is that it lends itself to the protection of fraudulent debtors, that it subjects an undischarged insolvent to little or no practical inconvenience, and that its provisions for the punishment of fraudulent insolvents are not effective in practice.

3. One of the principal defects in the existing law arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court, and at which most of the provisions affecting a fraudulent insolvent would operate, is when he applies for his discharge. But there is nothing in the Act which requires him to apply for his discharge, and in practice such applications are rare. To remedy this unsatisfactory state of the law, it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to annul the prescribed period and when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, a fresh petition on the same facts will be barred. These proposed changes are effected by the proviso to proposed new section (6) C in clause 4 of the Bill, new sub-section (1) A (ii) in clause 10, the amendments in clause 11 (1), (3) and (4), and the amendments in clause 20.

4. It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of a debtor on the ground that the application is an abuse of the law. While admitting

that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine*, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case the debtor being required to show that he is in fact unable to pay his debts and that he has not concealed his property. These changes in the existing law are effected by the amendments in clauses 9, and 19 (2) and by clause 12 which inserts a new section 16A as to protection orders on the lines of section 25 of the Presidency Towns Insolvency Act, 1909.

A further defect in the Act is the absence of provisions sufficient to enable the Court to pass orders, and section 47 defines the general powers of the Court in regard to proceedings under the Act, but nowhere is a general power conferred on the Court to deal with and decide any question which may arise in the course of proceedings, and the Calcutta High Court (22 C W N 704), the Allahabad High Court dissenting from the Allahabad High Court held that the Insolvency Court has no such power, and a question of title to property should be tried in a separate suit. It is obviously desirable that this conflict between the two High Courts should be terminated, and having regard to the prevalence of *benami* transactions in India and the importance of arming Courts with adequate powers for the speedy realisation of assets in the interests of creditors, the Government of India are of opinion that the Courts should be given full power to decide all questions raised in insolvency proceedings. Clause 3 of the Bill accordingly enacts a provision on the lines of section 7 of the Presidency Towns Insolvency Act.

6 Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires to take action. The wording of sub-section (2) of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence, and experience has shown that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43A and 43B of the Bill, which are similar to those in the existing Act. It

seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted

7 The summary administration of petty insolvencies is now largely governed by rules made by the High Courts under section 51 (2) (e) of the Act but it seems desirable that the Act itself should contain more detailed provisions than it present, and that further simplification of procedure should be effected. It is proposed therefore that, in addition to any further modifications to be made by rules, section 48 should contain certain definite provisions and it is thought that if these changes are made, it would be well to confine summary administration to cases where the limit of Rs 200 instead of the existing limit of Rs 500 is fixed. It is thought desirable to direct the ordinary court to direct the summary court in such a course

desirable

8 These amendments will it is hoped, go far to check the abuses rendered possible by the defects in the existing law.

9 Opportunity has been taken to effect certain minor amendments in the Act, and an explanation of the reasons for the changes proposed will be found in the Notes on Clauses—Published in India Gazette, dated 7th September, 1918, Part V, page 63

NOTES ON CLAUSES

Clause 2—The expression 'available act of insolvency' is not used anywhere else in the Act and a definition therefore seems unnecessary. No such definition is to be found in the Presidency Towns Insolvency Act. The amendment in the definition of property makes it clear that trust property is not to be dealt with under the Act as property of the insolvent. It is proposed to include a definition of the expression 'transfer of property' on the lines of the definition in section 2 of the Presidency Towns Act.

Clause 4—is principally a drafting amendment. The opportunity has been taken to split up section 6 into five separate sections with a view to re arrange its different parts in their logical order. New section 6 (a) merely reproduces existing section 6 (6). New section 6 (b) deals with the conditions on which a creditor may petition and reproduces existing section 6 (4) and (5). New section 6 (c) deals with the debtor's petition. New section 6 (d) deals with the creditor's petition. New section 6 (e) deals with the debtor's petition in the event of the petition being presented but the petition being

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presented in the wrong Court. The point was raised in *Madho Pershad v. Walton* (18 C W N 1050), where the insolvent successfully presented in appeal on the ground that the petition had been presented in the wrong Court. The proposed proviso is intended to stop this loophole in the existing law.

New section 6 (c) merely reproduces existing section 6 (1)

Clause 5—amends section 10 to make it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property.

Clause 6—This amendment appears to be necessary in view of the proviso to section 6 (c) in clause 4 and section 1 (a) (ii) in clause 10

Clause 7.—Section 13 (2) gives power to appoint an *interim* receiver at any time between the admission of the petition and the order of adjudication, but the Act is silent as to the powers of an *interim* receiver. It is considered desirable that an *interim* receiver should normally be appointed when the petition is admitted, and should be armed with such of the powers confertable on a receiver under the Code of Civil Procedure as the Court may direct (cf section 16 of the Presidency Towns Insolvency Act). It is thought, however, that these provisions would come more appropriately into section 12 of the Act

Clause 8—is consequential to the amendment in clause 7.

Clause 11.—The first amendment is consequential to the first amendment in clause 14

The amendment of section 16 (2) is consequential to the first amendment in clause 12, which inserts a new section as to protection order

The other amendments in this clause are explained in paragraphs 3 and 4 of the Statement of Objects and Reasons

Clause 13—The first amendment is one of drafting, and the second is designed to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings.

Clause 14—Both section 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in section 28, on the other hand, only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication, or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, in dealing with compositions or schemes prior to adjudication. It is,

presented in the wrong Court. The point was raised in *Madho Pershad v. Walton* (18 C W N 1050), where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court. The proposed proviso is intended to stop this loophole in the existing law.

New section 6 (e) merely reproduces existing section 6 (1).

Clause 5—amends section 10 to make it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property.

Clause 6—This amendment appears to be necessary in view of the proviso to section 6 (c) in clause 4 and section 1 (a) (u) in clause 10.

Clause 7—Section 13 (2) gives power to appoint an interim receiver at any time between the admission of the petition and the order of adjudication, but the Act is silent as to the powers of an interim receiver. It is considered desirable that an interim receiver should normally be appointed when the petition is admitted, and should be armed with such of the powers conferrable on a receiver under the Code of Civil Procedure as the Court may direct (cf section 16 of the Presidency Towns Insolvency Act). It is thought, however, that these provisions would come more appropriately into section 12 of the Act.

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Clause 14—Both section 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in section 28, on the other hand, only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication, or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, in dealing with compositions or schemes prior to adjudication. It is,

seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge, or after a composition submitted by him has been accepted

7 The summary administration of petty insolvencies is now largely governed by rules made by the High Courts under section 51 (2) (e) of the Act, but it seems desirable that the Act itself should contain more detailed provisions than at present and that further simplification of procedure should be effected. It is proposed therefore that, in addition to any further modifications to be made by rules, section 48 should contain certain definite provisions and it is thought that, if these changes are made, it would be well to confine summary administration to cases where the assets do not exceed Rs 200 instead of the existing limit of Rs 500, and to reserve a discretion to the Court to direct the ordinary procedure to be followed in cases where it thinks such a course desirable

8 These amendments will, it is hoped, go far to check the abuses rendered possible by the defects in the existing law

9 Opportunity has been taken to effect certain minor amendments—the reasons for the changes
 Clauses—Published in India
 page 63

NOTES ON CLAUSES.

Clause 2—The expression "available act of insolvency" is not used anywhere else in the Act, and a definition therefore seems unnecessary. No such definition is to be found in the Presidency Towns Insolvency Act. The amendment in the definition of "property" makes it clear that trust property is not to be dealt with under the Act as property of the insolvent. It is proposed to include a definition of the expression "transfer of property" on the lines of the definition in section 2 of the Presidency Towns Act

6 (b) deals with the conditions on which a creditor may petition and reproduces existing section 6 (4) and (5). New section 6 (c) reproduces existing section 6 (3) with the addition of a proviso which is designed to cure a defect. Section 6 (2) lays down where an insolvency petition is to be presented, but does not contain any saving in the event of the petition being

New section 6 (d) reproduces existing section 6 (2) with the addition of a proviso which is designed to cure a defect. Section 6 (2) lays down where an insolvency petition is to be presented, but does not contain any saving in the event of the petition being

presented in the wrong Court. The point was raised in *Madho Pershad v. Walton*, (18 CWN 1050), where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court. The proposed proviso is intended to stop this loophole in the existing law.

New section 6 (e) merely reproduces existing section 6 (1)

Clause 5—amends section 10 to make it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property.

Clause 6—This amendment appears to be necessary in view of the proviso to section 6 (c) in clause 4 and section 1 (a) (ii) in clause 10

Clause 7—Section 13 (2) gives power to appoint an interim receiver at any time between the admission of the petition and the order of adjudication, but the Act is silent as to the powers of an interim receiver. It is considered desirable that an interim receiver should normally be appointed when the petition is admitted, and should be armed with such of the powers conferrable on a receiver under the Code of Civil Procedure as the Court may direct (*cf* section 16 of the Presidency Towns Insolvency Act). It is thought, however, that these provisions would come more appropriately into section 12 of the Act.

Clause 8—is consequential to the amendment in clause 7

Clause 11—The first amendment is consequential to the first amendment in clause 14

The amendment of section 16 (2) is consequential to the first amendment in clause 12, which inserts a new section as to protection order

The other amendments in this clause are explained in paragraphs 3 and 4 of the Statement of Objects and Reasons

Clause 13—The first amendment is one of drafting, and the second is designed to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings

Clause 14—Both section 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in section 28, on the other hand, only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication, or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, dealing with compositions or schemes prior to adjudication

therefore, proposed to follow in this respect the procedure under the Presidency Towns Insolvency Act and allow composition and schemes only after adjudication. This is effected by the first two amendments.

The third amendment in this clause is a drafting one—cf sub-section (7) of section 27.

Clause 15—As it stands, section 34 would not prevent the whole of the debtor's property from being sold for the benefit of an individual creditor after the filing of the petition and before the order of adjudication is made. The amendment prevents this and brings the section into line with section 53 of the Presidency Towns Insolvency Act.

Clause 16—This amendment is consequential to the proposed definition of "transfer of property" in section 2.

Clause 17—makes it clear that the transactions referred to in section 38 are *bona fide* transactions. There appears to be no doubt that this is the intention.

Clause 18—Apparently the duties imposed on the debtor by subsection (1) of section 43 arise as soon as the Court has made an order under section 12(1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub-section (1), and to relegate to a separate subsection the provisions which impose on the debtor the duty of aiding in the distribution of his property. Clause 18 effects these changes.

Clause 21—The effect of existing section 45 is to release a discharged insolvent from liability under an order of maintenance made under section 488 of the Code of Criminal Procedure, 1898, and in this respect the section is in conflict with section 45 of the Presidency Towns Insolvency Act. It is proposed to bring it into accord with the later Act.

Clause 22—In view of the power which the proposed new section 3A would confer on Courts exercising insolvency jurisdiction, it is proposed to provide specifically that decisions in the exercise of this power shall be appealable.

Clause 24—Under the Indian law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person in this position, but it appears desirable that the sense of the community should be stimulated by providing certain statutory disqualification in addition to those already imposed, e.g., by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in section 32 of the Bankruptcy Act, 1883 (46 and 47 Vict., c. 52).

Clause 25 — These amendments are introduced with a view to curtail the excessive number of notices which are at present required to be published in the Gazette — *India Gazette*, dated 7th September, 1918, Part V page 65

PROCEEDINGS IN COUNCIL.

The Hon'ble Sir George Lowndes —

My Lord, I beg to move for leave to introduce a Bill to amend the Provincial Insolvency Act, 1907. The Act in question was introduced and passed shortly before the passing of the new Civil Procedure Code of 1908, in order that it might take the place of the very rudimentary provisions for dealing with insolvents outside the Presidency towns which were contained in that Act. As members of this Council are aware the other Insolvency Act we have in India, the Presidency Towns Act, applies only to the Presidency Towns and Districts. That Act has been extended to other large towns and districts, and it is clearly necessary for us to have a Provincial Act to deal with insolvencies in a more simple way outside bigger towns. The Act of 1907 passed, and my predecessor the Report of the Select Committee was not altogether a satisfactory measure. I think we may say that the experience of ten years or eleven years now, has shown that this was not an unwise forecast. During the ten years we have had criticisms of the provisions of the Act both from the Courts and from the general public, and not very long ago, it was thought desirable to address Local Governments on the subject. The replies we received showed that complaints were frequent, and that there were many defects in the Act which it was obvious ought to be remedied. As a result, last September, we convened in Simla a small informal Committee to deal with questions which were then before us. We had the assistance of various Hon'ble Members of this Council, including my Hon'ble legal friends, Mr Chanda and Mr Krishna Sahay, my Hon'ble colleague, Sir William Vincent, attended the Committee and we also had the benefit of Sir Asutosh Mukherji's great experience. We had two District Judges, if I remember aright, on the Committee, and we had a Sub-Judge up from Madras. The matter was carefully considered and very valuable recommendations were made to Government by the Committee, the outcome of which is the present Bill. The Committee thought that it would be unwise to repeal the existing Act, and that it would be sufficient to amend it, though as Hon'ble Members will see the amendments come to a considerable number, and we of course accepted that view. The present Bill is to some extent complementary to the Usurious Loans Act, which was passed in the last session of the Council. Hon'ble Members may remember that my predecessor

colleague, the Home Member, then in dealing with the Usurious Loans Act pointed out that it would be necessary and indeed only fair alongside of the Usurious Loans Act either to pass a new Provincial Insolvency Act, or to amend the existing Act and this Bill is now introduced in fulfilment of the promise which I may say was then made

"The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors against dishonest creditors, so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. Under the present Act it is comparatively easy for a dishonest debtor to evade his responsibilities. As many Hon'ble Members will

have execution against his person stayed, and we shall undoubtedly have to consider whether that section of the Civil Procedure Code will not have to be amended if this Bill is passed in its present or any other form. But I will pursue for the moment the course of the dishonest debtor: he files his petition, and if he is in jail he under the existing Act, and he is to jail again. That is sufficient for he wishes is to escape the penalty of jail. It is not necessary for his discharge, and until he applies for it, the Court has practically no power over his misdoings. The existing Act, it is true, lays insolvent, but these do not not borrow money without first place, he probably does not know that there are any such disabilities at all, if he does, he borrows all the same in disregard of the Act, and no body takes the trouble to prosecute him. Then again no stigma whatever apparently attaches to being an undischarged bankrupt under the conditions. Of course in other parts of the world the stigma is great, but apparently among provincial insolvents there is no feeling at all on the subject and they can go on borrowing for years. This is the state of things that we have tried to remedy by this Amendment. We propose in the first place to make it compulsory that discharge within 1 e, will in most not apply for his so will enable the Court to deal with any mispractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled, and it is provided that he cannot file another petition on the same facts. That in the first place. In the second

place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication, the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit. Then, in the third place, we propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. This, if I may say so, is fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of others. It will be for the Select Committee to consider whether in this respect we have gone far enough.

'The Bill is rather a long one, and owing to its being in the usual form of amending Acts is rather a difficult one to follow, and we have therefore made the Objects and Reasons and the Notes on Clauses rather more complete and full than they would ordinarily be. I do not propose to go through the various amendments in detail, but there are one or two points to which I think, I ought to refer very shortly. The first is that the present Act gives no precise power to an Insolvency Court to decide question of law or fact that arise incidentally in the course of insolvency proceedings. With regard to this there have been conflicting decisions in the Allahabad and Calcutta Courts, and we think that the point should be definitely settled by the Amending Bill. It is not altogether easy to see which is the wisest course to follow. If the power to decide questions of law and fact does exist, a summary decision by a Court of Insolvency may have more far reaching effects than was intended at the time. On the other hand, if the power does not exist, all that the Court can do, is to refer the parties to separate suit and the result is interminable delay during which the wearied creditor may be driven from Court to Court, and eventually may have to come to a compromise with the debtor on disadvantageous terms. We have chosen what we think is at present advised to be the better of two alternatives, and have provided that the Court shall have power to decide any, questions that arise incidentally in the insolvency, but leaving it to its discretion whether it should do so in a particular case or should refer the parties to a separate suit. Between this Scylla and Charybdis we hope that the Select Committee will be able to steer our bark to safety. I may say that in regard to this point, as in many others where we have proposed amendments of the Acts, we have adopted the corresponding provisions of the Presidency Towns Insolvency Act. The Act was passed just two years after the Provincial one and seems to have been rather better considered, and in many cases, I may say, better drafted. We think that there is no reason why there should be any material difference in minor provisions between

colleague, the Home Member, then in dealing with the Usurious Loans Act pointed out that it would be necessary and indeed only fair alongside of the Usurious Loans Act either to pass a new Provincial Insolvency Act, or to amend the existing Act and this Bill is now introduced in fulfilment of the promise which I may say was then made

"The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors against dishonest creditors, so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. Under the present Act it is comparatively easy for a dishonest debtor to evade his responsibilities. As many Hon'ble Members will know, it is quite a common thing for a man when cornered, so that he has either to go to jail or pay, or to file his petition in insolvency. There is a provision (sec 55 (4), I think) of the Civil Procedure Code which entitles him on giving notice that he will file his petition to have execution against his person stayed, and we shall undoubtedly have to consider whether that section of the Civil Procedure Code will not have to be amended if this Bill is passed in its present or any other form. But I will pursue for the moment the course of the dishonest debtor, he files his petition, and if he is in jail he under the existing Act, and he is to jail again. That is sufficient for he wishes is to escape the penalty of jail. It is not necessary for his discharge, and until he applies for it, the Court has practically no power over his misdoings. The existing Act, it is true lays certain disabilities on an undischarged insolvent, but these do not affect the dishonest debtor. He cannot borrow money without disclosing his conditions. But, in the first place, he probably does not know that there are any such disabilities at all, if he does, he horrors all the same in disregard of the Act, and no body takes the trouble to prosecute him. Then again no stigma whatever apparently attaches to being an undischarged bankrupt under the conditions. Of course in other parts of the world the stigma is there is no feeling of shame for years. This Bill by this Amendment we propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court, which we hope, will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so will enable the Court to deal with any malpractices he may have committed, he will lose the protection of the Act. His adjudication cannot file another petition in the first place. In the second

place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication, the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit. Then, in the third place, we propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. This, if I may say so is fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of others. It will be for the Select Committee to consider whether in this respect we have gone far enough.

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hope that the Select Committee will be able to steer our bark to safety. I may say that in regard to this point, as in many others where we have proposed amendments of the Acts, we have adopted the corresponding provisions of the Presidency Towns Insolvency Act. The Act was passed just two years after the Provincial one and seems to have been rather better considered, and in cases, I may say, better drafted. We think that there is no reason there should be any material difference in minor provisions.

the two Acts, and therefore in many cases, where we wanted a better model, we have gone to the Presidency Towns Act and adopted provisions from it.

"The next point to which I should like to refer very shortly, is the amendment which we proposed in section 12, that in every case, unless for reasons to be recorded in writing the Court otherwise directs, on a petition of insolvency being admitted, an *interim* receiver should be appointed at once, in order that he may be in a position from the very outset to get hold of the assets of the insolvent. In this connection, I ought also to refer to the question of Official Receivers. No doubt for the efficient administration of any insolvency a competent Official Receiver is necessary and if we could provide Official Receivers throughout India for all the *mosussil* Insolvency Courts, we should be very glad to do so. But as Hon'ble Members are aware, Official Receivers have to look to fees for their remuneration, or at all events Government would have to consider the question of fees in fixing their remunerations, and the fees in most District Courts in insolvency matters would be very small. Therefore, though we recognise that it would be very desirable to have Official Receivers, if we could, throughout India, the cost would practically make it impossible, and we do not look forward at present to any great extension of the system of appointing Official Receivers. Where there is an Official Receiver he would no doubt nominally be appointed *interim* receiver. We have provided that no *interim* receiver should have all the powers that are conferrable on the receiver under the Civil Procedure Code. In this respect, again, we have followed the model of the Presidency Towns Act.

"The next point I should like to refer to is the penal provisions of the Act. Section 43 of the existing Act is lacking in precision, and clearly wants a re-modelling. Its form has led to many difficulties and we therefore propose to re-cast it, again resorting to the model of the Presidency Towns Act, which seems to us to be better. I should like to say in this connection that the ideal state of affairs would undoubtedly be that an Insolvency Act should itself deal only with what I may call the special offences under the Act, such as refusal or neglect to comply with orders of the Court or statutory requirements, and that all graver offences, such as fraud, gross misconduct and the like, should be left to be dealt with under the provisions of the general law. I should like myself to see a chapter of the Penal Code dealing with all such offences, and in that case we should be able to omit both from our Provincial Insolvency Act and the Presidency Towns Act a good many of the present penal provisions. The Insolvency Court would then only deal with special offences, and in respect of any graver offences which come to its notice during the enquiry, it would only order prosecution in a Criminal Court. That is, I will not say, an utopian idea,—I think it is an idea that we may be able

to bring into practice before very long. It has not, of course, been possible to deal with it in this Bill, as it would have meant amendment not only of this Act but of the Presidency Towns Act and of the Penal Code, but I look forward to it as a possible piece of Legislation in the future.

"There is one other point, My Lord, I should like to deal with, and that is the question of summary administration of small insolvent estates. We propose to simplify the procedure further in order that there may be a more expeditious winding up and distribution of the assets. The committee to which I have already referred recommended that the present limit of Rs 500 for summary administration should be reduced to Rs 200, and we have adopted this in the Bill. At the same time, it has been suggested to us that the right policy would rather be the other way, to bring in rather bigger estates, and instead of reducing limit, to extend it from Rs 500 to Rs 2,000. Here again, we hope that the advice of the Select Committee will assist us. I should state that it is not proposed to proceed with the Bill at present, but merely to publish it and take it up again next session.

"I regret that I have taken so long over the explanation of this Bill, a very dull matter in this exciting time, but it is one in which I have taken great interest, and I hope we may look forward to its being a useful, and at the same time, a non contentions piece of Legislation.

"My Lord, I beg to introduce the Bill, and to move that the Bill, together with the Statements of Objects and Reasons relating thereto be published in the Gazette of India in English and in the local official gazettes in English and in such other languages as Local Governments think fit."

Published in the Indian Gazette, dated 14th September, 1918 in Part VI, page 76

CIVIL JUSTICE COMMITTEE REPORT.—1924-25.

CHAPTER XIV INSOLVENCY.

1 Provincial

1 The English law of bankruptcy has passed through many changes. Some of the principles of modern bankruptcy may be dated from Mr. Chamberlain's report in 1869. It is difficult to state the general idea without entangling the exposition with qualifications and exceptions. In its simplest form, however, the general idea is that if a person cannot pay his debts as they become due his creditor should have the right to insist in all the debtor's assets being impounded and applied towards the payment of all his debts in a due course of administration. An obvious and necessary condition is that if all a man's property be taken from him and made to vest in a receiver or trustee for the benefit of his creditors it is hardly as a form of punishment. It is to be a means of settling all his claims against the insolvent's estate, and not any longer claims against the individual.

As you happen that different creditors pursuing each his own remedies on his own behalf might waste the debtor's assets, bring his business to the ground, or increase the load of debt by unnecessary costs of law suits. It is generally considered also that the right to present a petition in insolvency must be allowed to a debtor because of the liability to imprisonment for debt, whether under the old 'ca sa' principle which in effect obtains still in India or under the judgment summons principle introduced into England by the Debtor's Act of 1869.

2 Obvious dangers attend the practice of allowing a complete release from all ordinary debts upon a mere condition that the debtor hands over his assets, whatever they may be. An Insolvency Act is apt to become a "debt paying made easy" contrivance. From the time of Elizabeth II. down to the nineteenth century the law was not very different. In the nineteenth century were painfully evolved administrative experiments. At present, one still hears of fraudulent bankruptcy as being a paying game but in fact it is a highly dangerous

one and is but seldom plied with any great success. Particular cases in which bankrupts live to all appearance been somewhat clever than their trustees, or in which members of the bankrupt's family succeed in claims which reek of suspicion are certainly to be met with. But broadly speaking bankruptcy in England is very well administered, especially in the High Court in London, and the bankruptcy court is a real terror to evildoers.

3 In India insolvency law is very little understood. This is true not only of the public but of many of the courts which have to take part in its administration. The jurisdiction is a very special kind of jurisdiction and the principles underlying it are not seldom completely bewildering even to people who are by no means badly versed in diverse other branches of the law. The reason of this is that modern liquidation principles are quite new in India. The law of insolvency was introduced by the Insolvency Act, 1882 (11 & 12 Vict., c. 21), in a very early phase of bankruptcy administration. As regards the rest of India the law of insolvency prior to 1907 was represented by certain provisions in the Code of Civil Procedure, 1882, which dated from 1859 with some revision in 1877.

4 The provisions of the old Code were introduced to enable honest judgment debtors who are imprisoned for debt or threatened with such imprisonment, to retain their liberty on giving up their property. The Court has to examine the debtor and hear the decreeholder and other persons and their evidence and may only declare the debtor to be an insolvent if satisfied that he has not fraudulently concealed or transferred property, recklessly contracted debts, or given an unfair preference to any creditor, and so on. If, however, the Court thought it proved that the debtor has been guilty of any fraudulent concealment or transfer of property or had made false statements in his application or had been guilty of any bad faith in the matter, the Court had power to give the debtor a year's imprisonment then and there instead of declaring him insolvent. If a declaration of insolvency was made, the Court might either discharge the debtor then and there or it might appoint a receiver. When the receiver certified that the insolvent had placed him in possession of the insolvent's property, or done everything in his power for that purpose, then the Court might discharge the insolvent on such condition as it might think fit. The discharge did not affect the insolvent's liability for any unscheduled debts and even as to scheduled debts did not end his liability unless and until one third had been paid or twelve years had elapsed from the date of the order of discharge.

5 Whatever the demerits of this rough and ready system, it would not appear to have unduly favoured debtors or to have made insolvency a method of defying creditors. Indeed in some respects

CIVIL JUSTICE COMMITTEE REPORT.—1924-25.

CHAPTER XIV.

INSOLVENCY.

1. Provincial

1 The English law of bankruptcy is of some antiquity and has passed through many phases. The broad principles of modern bankruptcy administration in England may be dated from Mr. Chamberlain's Bankruptcy Act of 1883. It is difficult to state the general idea without entangling the exposition with qualifications and exceptions. In its simplest form, however, the general idea is that if a person cannot pay his debts as they become due his creditor should have the right to insist in all the debtor's assets being impounded and applied towards the payment of all his debts in a due course of administration. An obvious and necessary condition is that if all a man's property be taken from him and made to vest in a receiver or trustee for the benefit of his creditors, it is hardly reasonable to make him liable to imprisonment for debt as a form of execution. Indeed all ordinary debts must, if there is to be a living if he can, and must, in general, be free to make a new start in life. Just as this liquidation of the debtor's assets can be enforced by a creditor, so too it must in general be allowed on the prayer of the debtor himself, otherwise it might well happen that different creditors pursuing each his own remedies on his own behalf might waste the debtor's assets, bring his business to the ground, or increase the load of debt by unnecessary costs of law suits. It is generally considered also that the right to present a petition in insolvency must be allowed to a debtor because of the liability to imprisonment for debt, whether under the old "ca sa" principle which in effect obtains still in India or under the judgment summons principle introduced into England by the Debtor's Act of 1869.

2 Obvious dangers attend the practice of allowing a complete release from all ordinary debts upon a mere condition that the debtor hands over his assets, whatever they may be. An Insolvency Act, however, is a "contrivance" From the nineteenth century were painfully evolved administrative experience, one still hears of fraudulent bankruptcy as being a paying game, but in fact it is a highly dangerous

one and is but seldom played with any great success. Particular cases in which bankrupts have to all appearance been somewhat clever than their trustees or in which members of the bankrupt's family succeed in claims which reek of suspicion are certainly to be met with. But broadly speaking bankruptcy in England is very well administered, especially in the High Court in London, and the bankruptcy court is a real terror to evildoers.

3 In India insolvency law is very little understood. This is true not only of the public but of many of the courts which have to take part in its administration. The jurisdiction is a very special kind of jurisdiction and the principles underlying it are not seldom completely bewildering even to people who are by no means badly versed in diverse other branches of the law. The reason of this is that modern liquidation principles are quite new in India. As regards the Presidency Towns and Port Cities the law of insolvency (11 & 12 Vict., c. 21), i.e., very early phase of bankruptcy administration. As regards the rest of India the law of insolvency prior to 1907 was represented by certain provisions in the Code of Civil Procedure, 1882, which dated from 1859 with some revision in 1877.

4 The provisions of the old Code were introduced to enable honest judgment debtors who are imprisoned for debt, or threatened with such imprisonment, to retain their liberty on giving up all their property. The Court has to examine the debtor and hear the decreeholder and other persons and their evidence and might only declare the debtor to be an insolvent if satisfied that he had not fraudulently concealed or transferred property, recklessly contracted debts, or given an unfair preference to any creditor, and so on. If, however, the Court thought it proved that the debtor had been guilty of any fraudulent concealment or transfer of property, or had made false statements in his application or had been guilty of any bad faith in the matter, the Court had power to give the debtor a year's imprisonment then and there instead of declaring him insolvent. If a declaration of insolvency was made, the Court might either discharge the debtor then and there or it might appoint a receiver. When the receiver certified that the insolvent had placed him in possession of the insolvent's property, or done everything in his power for that purpose, then the Court might discharge the insolvent on such condition as it might think fit. The discharge did not affect the insolvent's liability for any unscheduled debts and even as to scheduled debts did not end all liability unless and until one third had been paid or twelve years had elapsed from the date of the order of discharge.

5 Whatever the demerits of this rough and ready system, would not appear to have unduly favoured debtors or to have insolvency a method of defying creditors. Indeed in some

it was unduly hard on the honest debtor. It was defective too in that pending the actual order vesting the insolvent's property in the receiver there was no interim protection given to the insolvent's estate. Accordingly, by the Act of 1907 an endeavour was made to put in force in India, a simplified form of the English bankruptcy law. The result of this endeavour may be seen from the Statement of Objects and Reasons of the Bill which ultimately became Act V of 1920, the present law. "The chief indictment of the Act (i.e., of 1907) is that it lends itself to the protection of fraudulent debtors, that it subjects an undischarged insolvent to little or no practical inconvenience, and that its provisions for the punishment of fraudulent insolvents are not effective in practice."

6. It is a little early to say dogmatically whether the Act of 1920 has been or is likely to be successful in any great degree in respect of any of these matters. Its general tendency was to bring the Provincial Act closer still to the Presidency Towns Act of 1909 and to English practice. The main changes introduced by it were —

- (1) Provisions to compel a debtor to apply for his discharge ;
- (2) Provisions enabling the Court to withhold or cancel protection orders ,
- (3) provisions to facilitate the prosecution of fraudulent debtors

In all the Provinces of India we have had from the witnesses loud complaint of the practical effect of the law of insolvency as operating to defeat and delay creditors and to enable judgment-debtors to snap their fingers at debtors. There is a very wide opinion to the effect that the English bankruptcy practice is unsuited to mofussil India and that the introduction, more and more, of English principles has been a mistake. It is generally conceded on the other hand that these principles are but little understood, that the machinery for administration of insolvent estates has not so far been effectively provided, and that the creditors are apt to give up all hope and take no further interest the moment their debtor is adjudicated.

7. We might usefully set out here a passage from the valuable memorandum of Mr H F Dunkley, ICS —

"District Judges in Burma, I regret to say, appear to take but little pains over their insolvency cases and show a surprisingly scanty knowledge of insolvency law. Recently I saw a case where a debtor, having gone bankrupt, showed debts amounting to over Rs 60,000, and his assets, when realised, came to a sum of about Rs 9,030. Out of some twenty creditors only three appeared and proved their debts, amounting to about Rs 5,000. Out of the assets the District Judge paid the claims of these three creditors in full, and then, without issuing the notices required by sec-

tion 64 of the Provincial Insolvency Act to the remaining creditors, handed over the balance of the assets to the insolvent, and discharged him. This was, of course, an extreme case, but almost equally bad cases occur with frequency."

8 It may be useful to ask what are the features of English Bankruptcy practice which prevent the fraudulent debtor from resorting to as sure and easy means of defeating his creditors and to consider how far the same conditions operate, or may be made to operate in India. The chief features we take to be these —

- (1) A debtor is made to give up all his assets
- (2) Everything coming to him before his discharge whether in possession, reversion or remainder, goes to his trustee for the benefit of his creditors
- (3) He is treated as a person who for some time before his adjudication was really in possession, not of his own property but of his creditor's property. Accordingly some of his previous transactions are ripped up as being fraudulent preferences or otherwise fraudulent transfers. Also voluntary settlements are set aside. *Prima facie* all his transactions since the act of bankruptcy are invalid, though there is protection for those who take without notice and for value
- (4) Bankruptcy of itself amounts to "*Capitis diminutio*," and involves a certain measure of disgrace
- (5) The bankrupt has to make a complete disclosure of his affairs according to a highly elaborate set of schedules which include a deficiency account
- (6) He has to attend on the Official Receiver and on the trustee appointed for him by his creditors, give assistance and information
- (7) He is exposed to public examination conducted before the Court. The Official Receiver represents the public, any creditor can take part. The trustee in bankruptcy can and usually does take part
- (8) The bankrupt, his relatives, and any one who can give information may be examined before the Court in private under the inquisitorial provisions of the private examination section
- (9) Until he obtains his discharge he commits a criminal offence if he obtains credit over £20 from any one person without revealing that he is undischarged
- (10) A whole series of acts are made criminal offences if committed by a bankrupt, and with respect to them the law is put upon the bankrupt to show that there was no intent to defraud e.g., failure to deliver up or disclose

documents, material omissions in any statement, failure to inform of false debt, etc., etc

(11) When the bankrupt comes to apply for his discharge he finds that it is granted suspended or refused according as he has or has not committed certain bankruptcy offences

(12) There are provisions whereby a certain portion of the earnings of a bankrupt even after his adjudication can be earmarked for his creditors

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Provincial Act, e.g., the title of the receiver does not relate back to the act of insolvency, but only to the presentation of the petition, persons other than the insolvent cannot be examined before the Court in private. In neither Act are the criminal offences special to the insolvency law, defined quite so elaborately as in England. There are other differences between the Indian and English law, but so far as the main features above referred to, are concerned the differences are in no wise fundamental, and the policy of the law is to give a complete system on the analogy of the law in England. Yet though the law would seem to be practically the same, in practice the difference is enormous. The circumstances in India make it much more difficult to administer the law, administration both in method and in personnel is much feeble.

While in England there is an official of the Board of Trade necessary and estates where by the creditors to wind up the estates, in India no receiver need be appointed until after adjudication and he usually has no official position but is merely an officer of Court who receives little or no help, in funds or otherwise, from the creditors

In introducing the Bill which became the Act of 1920, the Hon'ble Sir George Lowndes is reported to have said —

"In this connection, I ought also to refer the question of the Official Receiver. No doubt, for the efficient administration of any insolvency, a competent Official Receiver is necessary and if we could provide Official Receivers throughout India for all the mofussil Insolvency Courts, we should be very glad to do so. But as Hon'ble Mr. ... Receivers have to look to all events Government should of fees in fixing their remuneration, and the fees in most District Courts in insolvency matters would be very small. Therefore, though we recognise that it will be very desirable to have Official Receivers, if we could, throughout India,

the cost would practically make it impossible, and we do not look forward at present at any great extension of the system of appointing Official Receivers."

We set out later in this chapter the steps that have so far been taken in this connection and make our recommendations but we would only add here that a system of law requiring a considerable amount of administrative machinery cannot be expected to develop on satisfactory lines, unless such machinery is supplied

10 In India it is much more difficult than in England to ascertain what the debtor's property is or has been. A host of the debtors seem to have no assets whatsoever. They come into Court under pressure of imprisonment for debt, declare themselves to be possessed of no assets save their clothes and a lota, produce a lota in confirmation of their statement, and request (successfully in many cases) to be white washed. In an enormous number of cases accordingly there is no need to appoint a receiver, and no receiver is appointed because there is nothing to receive. Again, it is much more difficult in India to trace transactions in the absence of books of account, or at least of reliable books of account. In view of the joint family system and the prevalence of benami transactions the task of tracing assets involves more trouble, more difficulty and more outlay. Just as many concerns become insolvent by reason of the difficulty and expense of collecting outstanding debts by means of the law courts so, though the legal machinery is complete (since 1920) for the purpose of ripping up past transactions if fraudulent, the trouble, expense, and delay of putting it in motion are prohibitive. The risk of abuse and other reasons having prevented the Legislature from establishing in the provinces any inquisitorial receiver acting for the benefit of creditors, the risk is less than a trustee in bankruptcy in bringing a bankruptcy motion in an English Court. Again, the Legislature has hedged round with special safeguards the methods of prosecution for insolvency offences. These make conviction very difficult to secure, especially as in an Indian Court the seriousness of an insolvency offence is almost certain to be lightly estimated. Indeed here is but slender chance before the tribunals in India of a debtor receiving a really

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9 Under the Presidency Towns Insolvency Act, 1909, an insolvent is liable in substance to all these disabilities, risk or burdens which are under the English law. There are very few exceptions, to the rule that the insolvent does not relate back to the date of the presentation of the petition, persons other than the insolvent cannot be examined before the Court in private. In neither Act are the criminal offences special to the insolvency law, defined quite so elaborately as in England. There are other differences between the Indian and English law, but so far as the main features above referred to, are concerned the differences are in no wise fundamental, and the policy of the law is to give a complete system on the analogy of the law in England. Yet the administration of the law in India seems to be practically the same as in England. The circumstances in which the law is administered both in method and in personnel is much feebler.

While in England there is always the receiver, an official of the Board of Trade, to represent the public and administer estates where necessary and in other cases the trustee in bankruptcy appointed by the creditors to wind up the estates, in India no receiver need be appointed until after adjudication and he usually has no official position but is merely an officer of Court who receives little or no help, in funds or otherwise, from the creditors.

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e creditor to keep in jail an adjudicated insolvent is, or is not, every admirable device, or logically defensible, it was one of the amendments introduced into law in 1920, for the purpose preventing debtors whose petition for adjudication could not be refused from defying execution creditors. In this respect, no doubt the new principle of giving complete discretion to the Court promises to work better. It remains, however, to be seen upon what principles the judicial discretion to grant or refuse protection will be applied in the mofussil. It is certainly anomalous that a man may be adjudicated an insolvent and comply with all requirements of the insolvency law, be convicted of no criminal offence in connection with insolvency, and yet be liable to go to prison for an indefinite number of times at the discretion of the Insolvency Court. As, however, the great need is to protect creditors and prevent debtors from abusing the insolvency law in their own interests, we are not disposed, at present, to recommend any change in the recent Act.

15 It has been pressed upon us that the private examination clause, viz., section 36 of the Presidency Towns Insolvency Act, could be made applicable to the mofussil, not that there is not already ample power under the Provincial Act to examine the debtor, but in order that a receiver may be able to examine a third party and thus to obtain, in a comparatively inexpensive manner, reliable information as to the debtor's conduct and affairs. The ordinary course in England and in Presidency Towns is for the receiver to obtain, under the section, evidence as to the dealings between the insolvent and the third party. He would as a rule, be careful to utilize his powers under the section before launching a motion to set aside a fraudulent preference or to recover property. In the like manner he would use the section, if necessary, to enable him to deal with doubtful proofs of debt. In the absence of such powers it is only to be expected that the setting aside of past transactions, under special principles of insolvency law, will be regarded whether by creditor or by receiver as a hazardous expenditure of time and money.

Sub-section 4 of section 36 of the Presidency Towns Act gives the Court power, if on the examination of any person the Court is satisfied that he is indebted to the insolvent, to order him to pay, in like manner if the Court is satisfied that a person examined as in his possession any property belonging to the insolvent, the Court may order him to deliver it up. The wording of the section is slightly different from that of section 27 of the Bankruptcy Act of 1883, which gives these powers to the Court only where a person examined admits that he is indebted to the debtor or that he has in his possession property belonging to the debtor. The new wording would seem to avoid the necessity of actual admission and to enable the Court to act where on the answers of the person examined it is quite clear that he owes the money.

property in his possession although he refuses a complete admission in set terms. Some of the witnesses before us have, we think, mistaken the limit of the power intended to be conferred by the section. In any case we are not satisfied that for the purpose of the mohussil these particular powers could safely be, or need be, entrusted to the Courts. It would be quite enough that the receiver should afterwards bring a motion before the Court using the evidence taken under section 36 against the third person.

The power of examining the third persons, however is, very valuable. It is discretionary on the part of the Court to grant the application for examination and it is discretionary in the Court to allow, or to disallow, any particular questions. The Court can close the examination whenever it likes. The real trouble in the mohussil in such cases is that there is no officer apart from the Judge himself, e.g., Munsif or Subordinate Judge or District Judge, before whom such examination can be conducted. The Official Receiver is not a proper person to do so. Any considerable use of the powers of the section might hopelessly interrupt the ordinary business either of the District Court or some Court subordinate to it. If the system of having a registrar at a headquarters station is brought into force, we think that the holding of such examinations at any rate in special cases, might be made part of the duties of such a registrar. We suggest that when the insolvency law is next amended powers analogous to those of section 36 of the Presidency Towns Insolvency Act might be given, subject to the opinion of the Local Government to bring them into force for particular courts.

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judge takes upon himself the duties of a magistrate, trying a warrant case, has in the past been highly unsatisfactory. The prosecution is in the hands of the Official Assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the Court. By the Act of 1920 however, section 70, sub section 5, the Insolvency Court instead of proceeding itself to try the case, as a warrant case tried by a magistrate, may make a complaint to the nearest first class magistrate, who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency Towns Insolvency Act by an amendment of section 104. We think, moreover, that the necessity for notice to the insolvent might well be discarded altogether, and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy court, without consulting the bankrupt on the subject, the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of

arrangement would seem to be that the receiver or, if he refuses, the creditor should be given power to apply to the Court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried on by the Local Government through such officer as it may appoint for the purpose. In England it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution, he can abandon it if he thinks on investigation that the case cannot be proved, the insolvent is only concerned with the proceedings as any ordinary accused is concerned with criminal proceedings against him—namely to defend them when they have been instituted.

17. A chief feature of the 1920 Act was a provision that the discharge should be limited by the Court in every case within which the insolvent must apply for his discharge. The intention of the Legislature was to ensure that the conduct of the insolvent should be in all cases brought under the scrutiny of the Court. The penalty for not applying for discharge is that the insolvent is liable to have his adjudication annulled with the result that he would not get back any property distributed among his creditors but on the other hand would necessarily be liable to imprisonment and any other mode of execution for debt at the instance of judgment creditors.

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16 As regards the criminal offences created by the Act of 1920 these are in substance the same as those created by the Presidency Act of 1909. In practice the procedure whereby the insolvency Judge takes upon himself the duties of a magistrate trying a warrant case has in the past been highly unsatisfactory. The prosecution is in the hands of the Official Assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the Court. By the Act of 1920 however section 70 sub-section 5 the Insolvency Court instead of proceeding itself to try the case as a warrant case tried by a magistrate may make a complaint to the nearest first class magistrate who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency Towns Insolvency Act by an amendment of section 104. We think moreover that the necessity for notice to the insolvent might well be discarded altogether and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy court without consulting the bankrupt on the subject the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of

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The following table gives the number of insolvents adjudicated in each province during 1922 with the number discharged or whose insolvency has been annulled (so far as available) —

Province	No of persons adjudicated insolvent	Discharged or died	Annulled
Bengal	664	195	149
Assam	48	14	8
Bihar and Orissa	126	68	121
Madras	1 479	56	Not given
Bombay	314	56	
Sind—			
(i) District Courts	34	9	
(ii) Judicial Commissioner's Court	75	19	
Agra	510	112	
Oudh	82	9	
Punjab	285	287	47
Burma	404	84	Not given
Central Provinces	1 085	126	
North West Frontier Province	49	4	
Coorg	6		

It will be seen that except in the Punjab the number discharged bears only a small proportion to the number newly adjudicated during the year. These

of 352 and 4 608 in the Punjab. These figures however apparently

include ' ' ' ' 'er the previous Acts who
 were no It would be very use-
 full if in be given separately with
 regard to the Act of 1920

We incline to think that the time within which application for discharge should be made is either being extended with undue frequency or that this matter is being ignored by receivers and by Courts. Possibly, too, there is some misunderstanding by reason of which creditors, who have compromised with the insolvent, are being allowed some say in the matter. It cannot be too strongly emphasised that unless an insolvency is in due form annulled the insolvent should in every case be proceeded against unless he applies for his discharge within the time limited. It may be that receivers postpone or agree to the postponement of the date for application for discharge, because the discharge when granted terminates the time during which any property accruing to the insolvent enures for the benefit of his creditors. In such cases, however, the proper course as a rule is not to postpone the application for discharge, but to make the application, the Court being able to suspend the discharge for such period as is proper. We think that the importance of insisting on the provisions of section 43 of the Act of 1920 might in all provinces emphasised by circular orders of the High Courts as any failure in this respect will do much to render nugatory the administration of insolvency.

18 If a debtor presents his own petition he has, by section 30 of the Act as part of his petition to give a statement of his affairs. When creditor presents a petition there is much difficulty in getting a schedule or statement of affairs from the debtor within a reasonable time. This is a main cause of bad administration. By section 22 the debtor on the making of an order admitting a petition is required to produce books of accounts and to give an inventory of his property and list of his creditors and debtors if required to do so by the Court or the receiver. Failure to comply with section 22 renders the debtors punishable on conviction by the Court with imprisonment which may extend to one year. It seems plain that no insolvent failing in this duty could be regarded as having any right to protection against arrest and execution. The interval between the order admitting the petition, and the hearing should not, especially in the case of a creditor's petition, be too long.

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 to the provisions of the Presidency
 inspection in sections 88 and 89
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tion Under the Presidency Towns Act a committee of inspection does not come into existence unless the Court thinks fit to authorise the creditors, who have proved, to appoint one We should very much like to see a commencement made in this respect, at all events in some of the larger towns which come under the Provincial Act

20 A judgment creditor in India regards insolvency as defeating him because it puts a creditor, who has not obtained a judgment, on the same footing as himself He is very apt, therefore, to try to make special terms for his own benefit in reference to prosecuting the insolvency proceeding which are necessarily maintained for the benefit of all creditors In like manner, there seems to be much confusion of mind as regards the proper step to be taken when a defendant is adjudicated insolvent during the pendency of the suit In any case in which the suit is merely one to establish a claim which in insolvency would be a provable debt or liability, the correct course clearly is to stay the suit in order that the plaintiff's claim may be proved in the insolvency and to give leave to prove for the costs incurred in the suit It is much better that it should be proved in the insolvency than that a law suit should go on either against the insolvent who has no interest or his receiver The only case in which suits should be allowed to go on against the insolvent or his receiver are cases in which the insolvent has an interest of his own, or cases in which the plaintiff is insisting upon a right which is not a mere claim to a provable debt, e.g., where the plaintiff is a mortgagee insisting upon his security Section 29 of the Act of 1920 is new In our experience many Courts are much in need of instruction as to the principles upon which that section is to be applied

21 The provisions with regard to the proofs of debt under the Act of 1920 may be satisfactory for many of the cases which arise in the mofussil It is quite clear to us, however, that in any insolvency where claims are numerous and disputable, as for example in commercial insolvencies such as may readily arise in towns like Karachi or Cawnpore the provisions as to the Court settling the schedule of debts, with or without the aid of the receiver, are completely inadequate The only practicable method of dealing with proofs of debt in complicated or difficult cases is for the trustee or receiver to regard himself primarily as a business man in charge of an estate, not as a tribunal deciding a large number of complicated suits When proofs are lodged he should within a limited time admit them or reject them or call for further items of proof, creditors, if not satisfied, can move the Court on motion Under the Act of 1920, section 33, the arrangement is that the creditor should tender a proof and that the Court should, by order, frame a schedule of creditors and the amount of their debts For this purpose, no doubt, where there is an Official Receiver, and directions have been given under section 80

(b) the Official Receiver may be utilised for the assistance of the Court but an ordinary receiver cannot be. The provision however of subsection 3 is that any creditor may apply for an order directing his name to be entered in the schedule and that the Court after causing notice to be served on the insolvent and other creditors who have proved their debts, and hearing their objections if any, shall comply with or reject the application. This seems to involve that under this Act the insolvent is a person who is to be heard upon the admission of any proof of debt. The notion that an insolvent is to be considered as a person entitled to litigate with proving creditors about the amount of their debts is unfortunate. A main principle of bankruptcy in England is that the insolvent goes out of the picture for such purposes altogether, all his property is vested in the receiver, the receiver stands in his shoes, the other creditors, not the insolvent are interested in the distribution of the insufficient fund.

22 The inadequacy of the provisions of the 1920 Act as regards proof of debts was brought to our notice very forcibly in Karachi. Of late years, in Karachi insolvents on the part of commercial firms have occurred in which there have been presented numerous claims—claims for very large amounts requiring for their adjustment considerable legal capacity and knowledge of commercial law and business. The 1920 Act has applied to Karachi since October 1920. The Official Receiver, as we were informed holds enquiries into proofs of debt on the analogy of the proceedings in a suit under the Code. Written statements are filed, the insolvent or his pleader is allowed to take part, also other creditors and their pleaders. No rules have been framed by the Judicial Commissioner's Court under the Act. There are no provisions for proofs being admitted or rejected within a given time. The result appears to be that unless the whole procedure is radically altered, important claims in which English firms, Punjab firms and Karachi firms have different interests have no chance, whatever of being settled within ten times the reasonable time.

In the case of Karachi we desire to make a very strong recommendation that the Presidency Towns Insolvency Act should be applied with as little delay as may be possible. In 1922 the number of cases was 75, in all of which the Official Receiver was engaged. We consider the Act of 1920 to be quite unsuitable to the conditions of a mercantile seaport. Apart altogether from any unnecessary misunderstandings of the procedure under the Act of 1920 we think that the best rules which could be framed by any High Court to carry out the intention of the Legislature would necessarily fall short of providing a workable scheme for the purpose of dealing with a complicated commercial insolvency. It is true, in a sense, that a receiver trustee in bankruptcy admitting or rejecting a proof is acting

quasi-judicial manner. But the whole object of insolvency administration is that proof of debt may be admitted when the receiver is satisfied and that unfounded litigation may thereby be avoided. When it cannot be avoided it should take place directly before the Court on a motion to expunge the proof or to admit the proof. In no ordinary circumstances should the insolvent still less his pleader be allowed any say in the matter save that the insolvent is obliged to give due information to the receiver or trustee. We consider that the accommodation provided for the Official Receiver in Karachi is insufficient. This branch of legal administration in Karachi should be made the subject of a special effort at radical reform. So far as we can see there are estates which after the expiry of a long time do not get apparently nearer to being liquidated.

23. In certain parts of India land tenures and the desirability of protecting the agriculturist operate in a special way to create difficulties as regards insolvency administration. When holdings are non-transferable insolvency law is apt to be a means whereby

just debts notwithstanding
 make a sharp contrast between

In Berar the land revenue system is a form of ryotwari system under which the cultivators hold land direct from Government and pay land revenue. The holdings are transferable and heritable and are for all practical purposes full estates in landed property. In the Central Provinces proper most of the cultivated land is held by occupancy tenants.

By the Central
 b section (2) the
 g and forbidden

the appointment of a receiver under section 51 of the Code and declared that the rights of an occupancy tenant shall not vest in the Court or in any receiver under the Provincial Insolvency Act 1907. An occupancy tenant who receives a loan of money gets the loan on the security of the succession of his crops. He can however apply to the Insolvency Court get adjudicated keep possession of his holding and avoid payment altogether unless the Court can seize his crops. A man holding fifty or sixty acres may declare his assets to be a few cooking vessels worth about five rupees. We have no reason to suppose that the policy which prevents an occupancy tenant's holding from being transferable is likely to be reversed. Under the Act of 1920 an occupancy tenant might in such circumstances as we have described be allowed to go to jail at the instance of any judgment creditor. Similar difficulties arise in the case of lands being under the Punjab Land Alienation Act 1900 and of occupancy holdings in Bengal and Bihar under the Bengal Tenancy Act 1885. We think however that the insolvency law requires special adaptation to the circumstances of the kind above described. This has never been attempted.

24 The main difficulty with respect to provincial insolvency is however the difficulty of getting suitable persons to act as receivers. By section 57 of the Act of 1920 (reproducing section 19 of the Act of 1907) the Local Government may appoint persons to be Official Receivers. When this is done the Government is to be credited with the commissions fixed under section 50, and the Official Receiver is to be paid out of the funds so credited and receive no other remuneration for winding up the estates. When such Official Receivers are appointed the High Court has power under section 80 to make rules giving them the power to hear petitions examine the debtor, make adjudication orders, frame the schedule of debts grant discharges determine unopposed applications and other small matters. Where there is no Official Receiver the Court may at the time of adjudication or afterwards, appoint a proper person on giving security to be a receiver. It may also, under section 20 in cases of urgency, appoint an *ad interim* receiver at the time of the admission of the petition. Little use has hitherto been made of the power of Local Governments to appoint Official Receivers.

We feel bound to express the opinion that the person who is likely to become trustee of the debtor's estate is not a suitable person to exercise such powers as are mentioned in clauses (a), (c) or (d) of section 80. In his capacity as receiver he has interests adverse to the debtor and should not be allowed to preside over the debtor's examination still less does it seem proper in a contested case that he should decide as to acts of insolvency. Section 80 seems to us to introduce much confusion into insolvency practice. In Madras trouble has been caused by the discovery after much time had elapsed that the Official Receiver had never been appointed receiver of the estate by any order of the Court.

In about nine districts in Madras pleaders were appointed Official Receivers on a salary of Rs. 50 a month and were paid a certain amount for a clerk and postage. In Sind there is an Official Receiver of the Karachi Judicial Commissioner's Court at Rs. 500 a month to whose work reference is made elsewhere in this chapter. In the United Provinces there are nine at stations where insolvency proceedings are more numerous their remuneration being five per cent of assets coming into their hands, subject to a minimum of five rupees in each case. In Berar there are two who appear to do fairly well and in addition to their insolvency work get their receivership. We received however, several complaints that the works in Madras by these receivers was unsatisfactory, the pleaders in question being practising lawyers who had more interest in their own cases than in pressing forward their insolvency work. It appears that recently the Local Government has ordered that they shall no longer receive a fixed pay, but be paid by commission. In other provinces and districts the ordinary custom is that where a

quasi-judicial manner. But the whole object of insolvency administration is that proof of debt may be admitted when the receiver is satisfied and that unfounded litigation may thereby be avoided. When it cannot be avoided it should take place directly before the Court on a motion to expunge the proof or to admit the proof. In no ordinary circumstances should the insolvent, still less his pleader, be allowed any say in the matter save that the insolvent is obliged to give due information to the receiver or trustee. We consider that the accommodation provided for the Official Receiver in Karachi is insufficient. This branch of legal administration in Karachi should be made the subject of a special effort at radical reform. So far as we can see there are estates which after the expiry of a long time do not yet apparently nearer to being liquidated.

23 In certain parts of India land tenures and the desirability of protecting the agriculturist operate in a special way to create difficulties in regards insolvency administration. When holdings are non transferable, insolvency law is apt to be a means whereby agriculturists can evade the payment of just debts notwithstanding their ability to pay. There is for example a sharp contrast between Berar and the Central Provinces proper. In Berar the land revenue system is a form of ryotwari system under which the cultivators hold land direct from Government and pay land revenue. The holdings are transferable and heritable and are for all practical purposes full estates in landed property. In the Central Provinces proper most of the cultivated land is held by occupancy tenants whose rights though heritable are not transferable. By the Central Provinces Tenancy Act (I of 1920) section 12, sub-section (2), the Legislature has prohibited any transfer of holding and forbidden the appointment of a receiver under section 51 of the Code and declared that the rights of an occupancy tenant shall not vest in the Court, or in any receiver, under the Provincial Insolvency Act, 1907. An occupancy tenant who receives a loan of money sets the loan on the crops. crops. He can, however, apply adjudicated keep possession of his either unless the Court can sell sixty acres may declare his assets to be a few cooking vessels worth about five rupees. We have no reason to suppose that the policy which prevents an occupancy tenant's holding from being transferable is likely to be reversed. Under the Act of 1920 an occupancy tenant might, in such circumstances as we have described be allowed to go to jail at the instance of any judgment creditor. Similar difficulties arise in the case of lands being under the Punjab Land Alienation Act, 1900, and of occupancy holdings in Bengal and Bihar under the Bengal Tenancy Act, 1885. We think, however that the insolvency law requires special adaptation to circumstances of the kind above described: this has never been attempted.

24 The main difficulty with respect to provincial insolvency is, however, the difficulty of getting suitable persons to act as receivers. By section 57 of the Act of 1920 (reproducing section 19 of the Act of 1907), the Local Government may appoint persons to be Official Receivers. When this is done the Government is to be credited with the commissions fixed under section 56, and the Official Receiver is to be paid out of the funds so created and receive no other remuneration for winding up the estates. When such Official Receivers are appointed the High Court has power under section 80 to make rules giving them the powers to hear petitions examine the debtor, make adjudication orders, frame the schedule of debts grant discharges, determine unopposed application and other small matters. Where there is no Official Receiver the Court may at the time of adjudication or afterwards, appoint a proper person on giving security to be a receiver. It may also, under section 20, in cases of urgency, appoint an *ad interim* receiver at the time of the admission of the petition. Little use has hitherto been made of the power of Local Governments to appoint Official Receivers.

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receiver is appointed at all (it being necessary in a larger number of cases where the estate is summarily wound up—the estate not being worth five hundred rupees) local pleaders from the Bar are appointed. Particular judges no doubt, make a practice of giving all such receiverships to the same pleader in order that the less remunerative and the more remunerative work may go to the same man, and that he may have some experience of the work. We recognise that in a large number of districts there can never be enough work to require as Official Receiver a whole time officer of Government. But in certain districts, or groups of districts it might be possible to appoint a person who should really be an official who should be able not only to take receiverships in insolvency but also be appointed to other receiverships which may arise in ordinary suits, and possibly take over guardianship cases or appear as guardian ad litem for minor defendants in suits. The system employed in Madras of appointing as an Official Receiver a local pleader who continues his practice does not appear to us to be desirable. He would naturally attend to his private practice and frequently would not be available to carry out the business of his receivership. There would seem to be special danger under the Madras system of profits being made by receivers beyond their legitimate commission. We appreciate that accounts are examined periodically by the Accountant General's Department. We consider that where it is possible to have an Official Receiver, he should be a whole time officer, and we suggest that he should be selected as munsiffs are selected, and if possible, included in the munsiffs cadre with a chance of promotion to judicial office.

25 It is also for consideration whether if such Official Receivers are appointed, as they would be by the Local Government under the Act, they should not be supervised by Government in the same way as the Board of Trade supervises the work of the Official Receivers in England. As to the work of receivers generally we would only remark that possibly much of the unsatisfactory work that has taken place in the administration of estates is due to the inexperience, not only of the Court and pleaders generally, but especially of those who have been appointed to be receivers. We have come across in several provinces more than one instance where the ordinary method of the receiver in dealing with assets has obtained to auction, with the result that they are bought by speculators at a low figure, the purchaser taking the risk of realising what he can by suits or otherwise. This is hardly what the Act contemplates as an ordinary method of administration. It is not administration at all. Doubtless this course may be necessary in some instances but it should be regarded as a last resort.

26 Finally we would advert to the difficulty there is in applying ordinary English principles to the case of an insolvent who is the

father or Karta of a joint Mitakshara family. Some decisions would appear to make the whole family property vest in the receiver. This again is a matter which has given rise to special difficulty in Madras. It is no easy matter to lay down rules as to so thorny a subject but an attempt should be made to elicit opinion and to give some other better guidance to the Courts.

COMPARATIVE TABLES

showing corresponding sections of Act V of 1920 and Act III of 1907
and vice versa

Sections in Act V of 1920	Sections in Act III of 1907	Sections in Act III of 1907	Sections in Act V of 1920
1	1	1	1
2	2	2	2
3	3	3	3
4	New	4	6
5	47	5	7
6	4	6 (1)	12 & 18
7	5	6 (2)	11
8	6 (6)	6 (3)	10
9	6 (4) and (5)	6 (4)	9 (1)
10	6 (3)	6 (5)	9 (2)
11	6 (2)	6 (6)	8
12	6 (1)	7	14
13	11	8	15
14	7	9	16
15	8	10	17
16	9	11	18
17	10	12	19
18	6 (1)	13	21
19	12	14	24
20	New	15 (1)	25
21	13 (1) (3) (4)	15 (2) (3)	25 (1) (2)
22	43 (1)	16 (1)	27
23	New	16 (2) (3) (4) (5) (6)	28
24	14	16 (7)	30
25	15 (1)	17	35
26	15 (2) and (3)	18	56
27	16 (1)	19	57
28	16 (2), (3), (4) (5) and (6)	20	59
29	New	21	60
31	16 (7)	22	68
31	New	23	53
32	New	24	33
33	24	25	49
34	28	26	50
35	42 (1)	27	38, 39 & 40
36	17	28	34
37	42 (2) and (3)	29	45
38	27 (1), (2), (3), (4), (5), (6) & (9)	30	46
39	27 (7)	31	47
40	27 (8)	32	48
41	44 (1) and (2)	33	61
		34	51
		35	52

Comparative Tables—cont'd

Sections in Act V of 1920	Sections in Act III of 1907	Sections in Act III of 1907.	Sections in Act V of 1920
42	44 (3), (4) & (5)	36	53
43	New	37	54
44	45	38	55
45	29	39	62
46	30	40	66
47	31	41	67
48	32	42	35
49	25	43	22 & 69
50	26	44	41
51	34	45	44
52	35	46	75
53	36	47	5
54	37	48	74
54A	New	49	76
55	38	50	77
56	18	51	79
57	19	52	80
58	23	53	72
59	20	54	81
59A	New	55	82
60	21	56	Schedule III
61	33		
62	39 (1) and (2)		
63	39 (3)		
64	39 (4)		
65	39 (5)		
66	40		
67	41		
67A	New		
68	22		
69	Cf. 43 (2)		
70	New		
71	New		
72	53		
73	New		
74	48		
75	46		
76	49		
77	50		
78	New		
79	51		
80	52		
81	54		
82	55		
83	56		

COMPARATIVE TABLES

showing corresponding sections of Act V of 1920 and Act III of 1907
and vice versa

Sections in Act V of 1920	Sections in Act III of 1907	Sections in Act III of 1907	Sections in Act V of 1920
1	1	1	1
2	2	2	2
3	3	3	3
4	New	4	6
5	47	5	7
6	4	6 (1)	12 & 18
7	5	6 (2)	11
8	6 (6)	6 (3)	10
9	6 (4) and (5)	6 (4)	9 (1)
10	6 (3)	6 (5)	9 (2)
11	6 (2)	6 (6)	8
12	6 (1)	7	14
13	11	8	15
14	7	9	16
15	8	10	17
16	9	11	18
17	10	12	19
18	6 (1)	13	21
19	12	14	24
20	New	15 (1)	25
21	13 (1) (3) (4)	15 (2) (3)	26 (1) (2)
22	43 (1)	16 (1)	27
23	New	16 (2) (3) (4) (5) (6)	28
24	14	16 (7)	30
25	15 (1)	17	35
26	15 (2) and (3)	18	56
27	16 (1)	19	57
28	16 (2), (3), (4) (5) and (6)	20	59
29	New	21	60
30	16 (7)	22	68
31	New	23	58
32	New	24	33
33	24	25	49
34	28	26	50
35	42 (1)	27	38, 39 & 40
36	17	28	34
37	42 (2) and (3)	29	45
38	27 (1), (2), (3), (4), (5), (6) & (9)	30	46
39	27 (7)	31	47
40	27 (8)	32	48
41	44 (1) and (2)	33	61
		34	51
		35	52

COMPARATIVE TABLES

xiv

Comparative Tables—contd

Sections in Act V of 1920	Sections in Act III of 1907	Sections in Act III of 1907	Sections in Act V of 1920
42	44 (3), (4) & (5)	36	53
43	New	37	54
44	45	38	55
45	29	39	62
46	30	40	66
47	31	41	67
48	32	42	35
49	25	43	22 & 69
50	26	44	41
51	34	45	44
52	35	46	75
53	36	47	5
54	37	48	74
54A	New	49	76
55	38	50	77
56	18	51	79
57	19	52	80
58	23	53	72
59	20	54	81
59A	New	55	82
60	21	56	Schedule III
61	33		
62	39 (1) and (2)		
63	39 (3)		
64	39 (4)		
65	39 (5)		
66	40		
67	41		
67A	New		
68	22		
69	Cf 43 (2)		
70	New		
71	New		
72	53		
73	New		
74	48		
75	46		
76	49		
77	50		
78	New		
79	51		
80	52		
81	54		
82	55		
83	56		

COMPARATIVE TABLES

showing corresponding sections of Act V of 1920 and Act III of 1907
and vice versa.

Sections in Act V of 1920	Sections in Act III of 1907	Sections in Act III of 1907	Sections in Act V of 1920
1	1	1	1
2	2	2	2
3	3	3	3
4	New	4	6
5	47	5	7
6	4	6 (1)	12 & 18
7	5	6 (2)	11
8	6 (6)	6 (3)	10
9	6 (4) and (5)	6 (4)	9 (1)
10	6 (3)	6 (5)	9 (2)
11	6 (2)	6 (6)	8
12	6 (1)	7	14
13	11	8	15
14	7	9	16
15	8	10	17
16	9	11	18
17	10	12	19
18	6 (1)	13	21
19	12	14	24
20	New	15 (1)	25
21	13 (1) (3) (4)	15 (2) (3)	25 (1) (2)
22	43 (1)	16 (1)	27
23	New	16 (2) (3) (4) (5) (6)	28
24	14	16 (7)	30
25	15 (1)	17	35
26	15 (2) and (3)	18	56
27	16 (1)	19	57
28	16 (2), (3), (4) (5) and (6)	20	59
29	New	21	60
31	16 (7)	22	63
31	New	23	58
32	New	24	33
33	24	25	49
34	28	26	50
35	42 (1)	27	38, 39 & 40
36	17	28	34
37	42 (2) and (3)	29	45
38	27 (1), (2), (3) (4), (5), (6) & (9)	30	46
39	27 (7)	31	47
40	27 (8)	32	48
41	44 (1) and (2)	33	61
		34	51
		35	52

COMPARATIVE TABLES

xlv

Comparative Tables—cont.

Sections in Act V of 1920.	Sections in Act III of 1907	Sections in Act III of 1907.	Sections in Act V of 1920.
42	44 (3), (4) & (5)	36	53
43	New	37	54
44	45	38	55
45	20	39	62
46	30	40	66
47	31	41	67
48	32	42	35
49	25	43	22 & (9)
50	26	44	41
51	34	45	44
52	35	46	75
53	36	47	5
54	37	48	74
54A	New	49	76
55	38	50	77
56	18	51	79
57	19	52	80
58	23	53	72
59	20	54	81
59A	New	55	82
60	21	56	Schedule III
61	33		
62	39 (1) and (2)		
63	39 (3)		
64	39 (4)		
65	39 (5)		
66	40		
67	41		
67A	New		
68	22		
69	Cf 43 (2)		
70	New		
71	New		
72	53		
73	New		
74	48		
75	46		
76	49		
77	50		
78	New		
79	51		
80	52		
81	54		
82	55		
83	56		

TABLE OF CASES.

A

	Page
Abaji Vithal v. Narhari Keshava 51 B 809 29 Bom L R 947	35
Abbi Reddi v. Venkata Reddi 51 MLJ 60 1926 M W N 256 94 IC 351 (1927) AIR (M) 175	75, 723
Abbott In re, (1894) 1 QB 442	180
Abdul Aziz v. Habib Mistry 49 Ind Cas 229	71, 127, 172
Abdul Aziz v. Khirode 41 Ind Cas 411	541
Abdul Hafiz v. Mool Chand 9 O W N 529 1932 AIR (Oudh) 77	536
Abdul Jabbar v. Din Muhammad 35 PLR 786 1934 AIR (L) 659	428
Abdul Kareem v. Official Assignee 28 Mad 168 17 MLJ 347	305, 310, 428
Abdul Khaden v. Chidambara Chettiyar 32 Mad 276	26
Abdul Kuddes Gazi v. Mutual Indemnity & Finance Corporation 51 CLJ 545 128 IC 182, 1930 AIR (C) 576	242 246 372, 421
Abdul Latiff v. J. R. Percival 1 LR (1937) 1 Cal 264 40 C W N 1229 1936 AIR (C) 573	392
Abdul Majeeth v. Krishnamachariar, 40 Mad 243	26
Abdul Majid v. Abdul Huq, 36 C W N 621 1933 AIR (C) 263	66
Abdul Rahaman v. Nihar Chand, 1 LR 58 All 132	633
Abdul Rahaman Mia v. Gojendra Lal Saha, 1 LR (1938) 1 Cal 132 41 C W N 1288 66 CLJ 346	18
Abdul Rahim v. Sital Prasad 41 All 658	616
	92 IC 620 638, 741
	All 194 356
	1 LR 58 All 132 1935
	1935 AIR (All) 675
(L D) 15/ IC 41	310
Abdul Razih v. Basiruddin, 14 C W N 586 11 CLJ 435	72, 81, 213
Abdul Re-ak v. Basiruddin Ahmed, 17 C W N 405 15 CLJ 457	163
Abdul Re-ak v. Basiruddin Ahmed, 17 C W N 405	646
	Firm, 10 Rang 215
	101
Abdul Sattar v. Onkarnath, 1936 ALJ 698 163 IC 831	115
Abhoy Ch Bhattacharjee v. Sachindra N Das, 43 C W N 421	569, 608, 639
	521

Abraham v Sukias	51 Cal 337	81 Ind Cas 584	1924
AIR (Cal)	777		249, 250 449, 451
Abubacker v Madarsa Labbai	1 LR (1938) M 460	1938	
MWN	190 47 LW 154	174 IC 587	1938 AIR
Mad	264		203
Abu Baker Haji Abdulla, In Re	48 Bom 580	26 Bom LR	272
628			
Abu Haji Sulaiman v Haji Jan Muhammad,	8 Bom LR		101
648			
Abul Hassan Khan v Rajbir Prasad,	8 OWN 147	131	
IC 433	1931 AIR (O) 124		47
Aburabammal v Official Assignee, Madras,	47 Mad 215		304
Achambir Lal v Chhanga Mal,	32 Ind Cas 429		500, 597
Achuta Ramaya Garu v Official Receiver, East Godavari,	1 LR 58 Mad 1032	1935 AIR (M) 817	1935
MWN	716		593
Adakammil Achil, M P R M P v Official Assignee, 11			
Rang 489			565, 568, 575
Adamali Mahomedali Nulvala In re,	34 Bom LR 1162		85, 93, 98
Adamson, Exp In re Coolie, (1878)	8 Ch 807		662
Administrator General of Madras v Official Assignee,	32		
Mad 462	3 Ind Cas 163	6 MLJ 188	186, 189
Agar Chand v Prithvi Singh,	38 PLR 448	1936 AIR	
(L) 885			191, 504
Ah Fwaik v Receiver,	12 Rang 352		728
Ahmad Haji Doosad Moosa v Mackenzie Stuart & Co,			
105 IC 366	1928 AIR (S) 40		76, 494, 662
Ahmed Almahomed Khoja, In re,	34 Bom LR 1398		319, 320
Ahmed Maraikayar v Thangiah Nadar,	47 MLW 653		
1938-1 MLJ 760	1938 MWN 528	1938 AIR	
(M) 590			436
Aiyaparaju v Venkatakrishnaya,	44 MLJ 303	1923	
MWN	195 72 Ind Cas 488	1923 AIR (M)	
462			147, 745, 747
Aiyaswamy Chetty v Official Assignee, Madras,	57 Mad		
616	1934 MWN 81	67 MLJ 59	39 LW 541
Ajodhia Prasad v Sita Ram,	8 OWN 1125	134 IC	12, 602
1013	1931 AIR (O) 405		580, 603
Ajodhyarath v Anantdas,	3 All 799		667
Akhoy Chand Begwan v The Emperor,	61 Cal 537	38	
CWN	642 149 IC 352	1934 AIR (C) 409	207, 210 695, 697
Akhoy Kumar v Corporation of Calcutta,	42 Cal 625	21	
CLJ 177	19 CWN 37	27 IC 261	23
Akla v Delhi	28 Mad 157		634
Alagappa Chettiar v Vellachami Serval,	112 IC 623	(1928)	
AIR (M) 918			

Anilbala Chaudhuran v Dharendra Nath Saha, 32 C L J 314	162
Anna Latesia De Silva v Govind Balwant Parasher, 22 Bom L R 987 58 Ind Cas 411	197, 326, 605
Anna Laticia v E V David (1924) A I R (All) 40	613
Annamalai Chetty v Official Assignee Madras (1925) A I R (M) 243	736
Annamalai Chettiar v R K Binerjee 14 R 254 163 I C 217 1936 A I R (R) 234 (F B)	385, 388, 393
Anupama Debi v Gurudas Chatterjee, 57 Cal 1274 131 I C 590 1931 A I R (Cal) 264	86
Apothorai Odhyar v Official Receiver, Tanjore, 99 Ind Cas 683	590
39 41 M L J 606	23
	589
	375
653 491, 664, 667, 672	484
	627
(C) 444 257, 358, 467	626
Arman Sardar v Sakhira Jt Stock Co Ltd, 18 C L J 564	468, 734
Armani v Castrique, 13 M & W 447	63
Armitage, Ex parte (1881) 17 Ch D 13	95
Armstrong, Re, (1888) 21 Q B D 264	381
Arnavyl In Re, 21 Bom 297	164
Arnold Gantzer, In Re, 42 C W N 350	356
	M L W 513
	517
Tanjore, 22	
4 L J 562 91	99, 565, 567, 575
Aruna Chellam v Maung Po Thin, 9 Ind Cas 461	236
Aruna Giri Mudaliar v Kandaswami Mudaliar, 83 Ind Cas 955	74, 247, 249, 387, 449, 450, 723
Receiver, (1926) M W N	387
41 C W N 804	230
695 1933 A I R (L)	187
997	449, 628
Asa Nand v Jugul Kishore, 1933 A I R (L) 1008	289
Ind Cas 534	532
	355
929 . 44 C L J	
149	711

TABLE OF CASES

li

	Page
Aslaji Dh raji Bro t Sunni Lal, 9 Mys LJ 222	18, 124, 466
Assarim Metti Ram In re, 126 IC 477 1930 AIR (S)	654
244	
Assomal Application of, In Re, 4 SLR 222 9 Ind Cas	396
724	
Assudamal, In Re, 101 IC 848 1927 AIR (S) 194	505
Atair Ahmad t Syid Hasan, 57 All 900	547
Ata Mohammad t Official Receiver, Sargodha, I LR 16 Lah	
1013 156 IC 1018 1935 AIR (L) 1068	50, 544
Atmaram v Dayaram, 1929 AIR (S) 94 115 IC 330	48, 54, 555
Attar Chand t Muhammad Mobin, 13 Lah 396 1932	
AIR Lah 121	190
Avanashi v Muthulkaruppam, 34 MLJ 319 1918 MWN	
345 44 Ind Cas 885	628, 688
Ayyasami Chetty t The Official Receiver Coimbatore, 61	
MLJ 719 1932 AIR (M) 63 135 IC 750	71, 75
Azruddin Fero'din t Niamat Ali 31 PLR 944 129 IC	
213 1930 AIR (L) 970	519, 724
Aziz un nissa Bibi t O M Chiene 42 All 593	307

B

Baboo Jivan Hansraj, In re v Irrawadi Flotilla Co, 11	
Rang 116	317
Babu Lal Sahu t Krishna Prasad, 4 Pat 128 85 Ind Cas	
543 (1925) AIR (P) 438	358, 480
Bachu Mallikarjuna Rao t Official Receiver, Kistna, I LR	
1938 Mad 1063 1938 AIR (M) 449	513
Badcock Re (1886) 3 Morr 138	422
Badham In Re, Exp Palmer (1893) 10 Morr 252	597
Badri Das t Chetty, 45 Ind Cas 918	480
Badri Narain t Sheo Koer 17 IA 1 17 Cal 512 (PC)	74, 453
Bagi Ram t Chanan Mal, 10 LLJ 180 IC 603 (1928)	
AIR (L) 453	561
Bagley Re (1911) I KB 317	91
Bahadur Khan t Official Receiver 1936 AIR (Pesh) 109	313
Bai Bani t Maganlal, 34 Bom LR 1217	55
Bai Nath t Gajadhar Prasad 1935 O W N 374 154 IC 908	
1935 AIR (O) 406	16, 19, 105, 730
Bajnath Rameshwar Lal t Atul Prasad, 16S IC 154 1937	
AIR (Pat) 134	570, 585
Baj Ram t Chanan Mal 10 LLJ 180 108 IC 603 1928	
AIR (L) 453	392
Baily t Johnson, LR 7 Ex 263	371, 384, 448
Bajirao t Daulatrao 1930 AIR (Nag) 215 128 IC 404 20 95, 269	
Bakaram Bapontji t Manglya Adkus, I LR (1937) N 461 166	
IC 956 1937 AIR (Nag) 7	436, 453

Anilbala Chudhurani v Dharendra Nath Saha, 32 C L J 314	162
Anna Latesia De Silva v Govind Balwant Parasher, 22 Bom L R 987 58 Ind Cas 411	197, 326, 605
Anna Laticia v E V David (1924) A I R (All) 40	613
Annammalai Chetty v Official Assignee Madras (1925) A I R (M) 243	736
Annamalay Chettiar v R K Banerjee, 14 R 254 163 I C 217 1936 A I R (R) 234 (F B)	385, 388, 393
Anupama Devi v Gurudas Chatterjee, 57 Cal 1274 131 I C 590 1931 A I R (Cal) 264	86
Apothorai Odaiyar v Official Receiver, Tanjore, 99 Ind Cas 683	590
Appaswami v Marutham, 9 Mad 103	23
Appi Reddi v Appi Reddi 45 Mad 189 41 M L J 606	589
1921 M W N 816 14 L W 639	375
Archer, Re, (1904) 20 T L R 390	672
Archibald Gilchrist Pece, Re 26 C W N 653	491, 664, 667, 672
Arden Exp 14 Q B D 121	484
Ariff, G H C v Fatima 16 C W N 394	627
Arjun Das v Marchia Telini, 1936 A I R (C) 444	257, 358 467
Arman Sardar v Sitkhira Jt Stock Co Ld, 18 C L J 564	626
Armani v Castrique 13 M & W 447	468, 734
Armitage, Ex parte (1881) 17 Ch D 13	63
Armstrong Re, (1888) 21 Q B D 264	95
Arnavyl In Re, 21 Bom 297	381
Arnold Gantzer, In Re, 42 C W N 350	164
	356
	M L W 513
	517
Arundel v Official Receiver, Tanjore, 22 M L W 134 (1925) M W N 561 49 M L J 562 91 Ind Cas 522 (1925) A I R (M) 1089	99, 565, 567, 575
Aruna Chellam v Maung Po Thin 9 Ind Cas 461	236
Aruna Giri Mudaliar v Kandaswami Mudaliar 83 Ind Cas 955	74, 247 249, 387, 449, 450, 723
Arundel v Official Receiver, (1926) M W N	387
	41 C W N 804
	695 1933 A I R (L)
Asa Nand v Jugul Kishore 1933 A I R (L) 1008	187
Ashghari Begum v Muhammad Yusoof, 61 Ind Cas 534	449, 628
Ashidbai v Abdulla, 31 B 271	289
Ashrafuddin v Bepin Behari 30 Cal 407	532
Ashutosh Ganguly v E L Watson 53, Cal 929 44 C L J 350 98 Ind Cas 116 (1927) A I R (C) 149	355
	711

Aslaji Dhiraji Bro v Sunni Lal 9 Mys LJ 222	18, 124, 466
Assaram Moti Ram In re 126 IC 477 1930 AIR (S) 244	654
Assomal, Application of In Re, 4 SLR 222 9 Ind Cas 724	396
Assudamal, In Re 101 IC 848 1927 AIR (S) 194	505
Atur Ahmad v Syid Hasan 57 All 900	547
Ata Mohammad v Official Receiver Sargodha 1 LR 16 Lah 1013 156 IC 1018 1935 AIR (L) 1068	50, 544
Atmaram v Dayaram, 1929 AIR (S) 94 115 IC 330	48, 54, 555
Attar Chand v Muhammad Mobin 13 Lah 396 1932 AIR Lah 121	190
Avanashi v Muthulkaruppam, 34 MLJ 319 1918 MWN 345 44 Ind Cas 885	628, 688
Ayyasami Chetty v The Official Receiver, Coimbatore, 61 MLJ 719 1932 AIR (M) 63 135 IC 750	71, 75
Azizuddin Ferozudin v Niamat Ali, 31 PLR 944 129 IC 213 1930 AIR (L) 970	519, 724
Aziz un nissa Bibi v O M Chiene 42 All 593	307

B

Baboo Jivan Hansraj, In re, v Irrawadi Flotilla Co, 11 Rang 116	317
Babu Lal Sihu v Krishna Prasad, 4 Pat 128 85 Ind Cas 543 (1925) AIR (P) 438	358, 480
Bachu Mallikarjuna Rao v Official Receiver, Kistna, 1 LR 1938 Mad 1063 1938 AIR (M) 449	513
Badcock Re (1886) 3 Morr 138	422
Badham In Re Exp, Palmer (1893) 10 Morr 252	597
Badri Das v Chetty, 45 Ind Cas 918	480
Badri Narain v Sheo Koer 17 IA 1 17 Cal 512 (PC)	74, 453
Bagi Ram v Chanan Mal, 10 LLJ 180 IC 603 (1928) AIR (L) 453	561
Bagley Re (1911) 1 KB 317	91
Bahadur Khan v Official Receiver, 1936 AIR (Pesh) 109	313
Bai Bano v Maganlal, 34 Bom LR 1217	55
Bai Nath v Gajadhar Prasad, 1935 O WN 374 154 IC 908 1935 AIR (O) 406	16, 19, 105, 730
Bajjnath Rameshwar Lal v Atul Prasad, 163 IC 154 1937 AIR (Pat) 134	570, 585
Baj Ram v Chanan Mal 10 LLJ 180 108 IC 603 1928 AIR (L) 453	392
Baily v Johnson, LR 7 Ex 263	371, 384, 448
Bajrath v Daulath 1930 AIR (Nag) 215 128 IC 404 20 G, 269	
Bakaram Bapoji v Manghya Adkus, 1 LR (1937) N 461 166 IC 956 1937 AIR (Nag) 17	436, 453

THE PROVINCIAL INSOLVENCY ACT

Page

Anilbala Chaudhuri v Dhirendra Nath Saha 32 C L J	162
314 Anna Latesia De Silva v Govind Balvant Parasher 22 Bom L R 987 58 Ind Cas 411	197, 326, 605 613
Anna Laticia v E V Davis (1924) A I R (All) 40	736
Annamalai Chetty v Official Assi., nee Madras (1925) A I R (M) 243	736
Annamalay Chettiar v R K Binerjee 14 R 254 163 I C 217 1936 A I R (R) 234 (F B)	385, 388, 393
Anupama Debi v Gurudas Chatterjee 57 Cal 1274 131 I C 590 1931 A I R (Cal) 264	86
Apothorai Odayar v Official Receiver Tanjore, 99 Ind Cas 683	590 23
M - ham o m d 103 Mad 189 41 M L J 606 39	589 375
C W N 653	491, 664, 667, 672 484
Ariff G H C v Fatima 16 C W N 394	627
Arjun Das v Marchia Telini 1936 A I R (C) 444	257, 358, 467
Arman Sardar v Sakhira Jt Stock Co Ld, 18 C L J 564	626
Armani v Castrique 13 M & W 447	468, 734
Armitage Ex parte (1881) 17 Ch D 13	63
Armstrong Re (1888) 21 Q B D 264	95
Arnavyl In Re, 21 Bom 297	381
Arnold Gantzer In Re 42 C W N 350	164 356
M L W 513	517
Tanjore, 22 A L J 562 91	99, 565, 567, 575 236
Aruna Chellam v Maung Po Thin 9 Ind Cas 461	236
Aruna Giri Mudaliar v Kandaswami Mudaliar, 83 Ind Cas 955	74 247 249 387, 449 450 723
Official Receiver, (1926) M W N	387
41 C W N 804	230
695 1933 A I R (L)	187
997	449, 628
Asa Nand v Jugal Krishore 1933 A I R (L) 1008	289
53 Cal 929 44 C L J	532
407	355
53 Cal 929 44 C L J	711
I R (C) 149	711

As of 1960-61, 1961-62, 1962-63, 1963-64, 1964-65, 1965-66, 1966-67, 1967-68, 1968-69, 1969-70, 1970-71, 1971-72, 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, 1989-90, 1990-91, 1991-92, 1992-93, 1993-94, 1994-95, 1995-96, 1996-97, 1997-98, 1998-99, 1999-00, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, 2022-23, 2023-24, 2024-25, 2025-26, 2026-27, 2027-28, 2028-29, 2029-30, 2030-31, 2031-32, 2032-33, 2033-34, 2034-35, 2035-36, 2036-37, 2037-38, 2038-39, 2039-40, 2040-41, 2041-42, 2042-43, 2043-44, 2044-45, 2045-46, 2046-47, 2047-48, 2048-49, 2049-50, 2050-51, 2051-52, 2052-53, 2053-54, 2054-55, 2055-56, 2056-57, 2057-58, 2058-59, 2059-60, 2060-61, 2061-62, 2062-63, 2063-64, 2064-65, 2065-66, 2066-67, 2067-68, 2068-69, 2069-70, 2070-71, 2071-72, 2072-73, 2073-74, 2074-75, 2075-76, 2076-77, 2077-78, 2078-79, 2079-80, 2080-81, 2081-82, 2082-83, 2083-84, 2084-85, 2085-86, 2086-87, 2087-88, 2088-89, 2089-90, 2090-91, 2091-92, 2092-93, 2093-94, 2094-95, 2095-96, 2096-97, 2097-98, 2098-99, 2099-00, 2100-01, 2101-02, 2102-03, 2103-04, 2104-05, 2105-06, 2106-07, 2107-08, 2108-09, 2109-10, 2110-11, 2111-12, 2112-13, 2113-14, 2114-15, 2115-16, 2116-17, 2117-18, 2118-19, 2119-20, 2120-21, 2121-22, 2122-23, 2123-24, 2124-25, 2125-26, 2126-27, 2127-28, 2128-29, 2129-30, 2130-31, 2131-32, 2132-33, 2133-34, 2134-35, 2135-36, 2136-37, 2137-38, 2138-39, 2139-40, 2140-41, 2141-42, 2142-43, 2143-44, 2144-45, 2145-46, 2146-47, 2147-48, 2148-49, 2149-50, 2150-51, 2151-52, 2152-53, 2153-54, 2154-55, 2155-56, 2156-57, 2157-58, 2158-59, 2159-60, 2160-61, 2161-62, 2162-63, 2163-64, 2164-65, 2165-66, 2166-67, 2167-68, 2168-69, 2169-70, 2170-71, 2171-72, 2172-73, 2173-74, 2174-75, 2175-76, 2176-77, 2177-78, 2178-79, 2179-80, 2180-81, 2181-82, 2182-83, 2183-84, 2184-85, 2185-86, 2186-87, 2187-88, 2188-89, 2189-90, 2190-91, 2191-92, 2192-93, 2193-94, 2194-95, 2195-96, 2196-97, 2197-98, 2198-99, 2199-00, 2200-01, 2201-02, 2202-03, 2203-04, 2204-05, 2205-06, 2206-07, 2207-08, 2208-09, 2209-10, 2210-11, 2211-12, 2212-13, 2213-14, 2214-15, 2215-16, 2216-17, 2217-18, 2218-19, 2219-20, 2220-21, 2221-22, 2222-23, 2223-24, 2224-25, 2225-26, 2226-27, 2227-28, 2228-29, 2229-30, 2230-31, 2231-32, 2232-33, 2233-34, 2234-35, 2235-36, 2236-37, 2237-38, 2238-39, 2239-40, 2240-41, 2241-42, 2242-43, 2243-44, 2244-45, 2245-46, 2246-47, 2247-48, 2248-49, 2249-50, 2250-51, 2251-52, 2252-53, 2253-54, 2254-55, 2255-56, 2256-57, 2257-58, 2258-59, 2259-60, 2260-61, 2261-62, 2262-63, 2263-64, 2264-65, 2265-66, 2266-67, 2267-68, 2268-69, 2269-70, 2270-71, 2271-72, 2272-73, 2273-74, 2274-75, 2275-76, 2276-77, 2277-78, 2278-79, 2279-80, 2280-81, 2281-82, 2282-83, 2283-84, 2284-85, 2285-86, 2286-87, 2287-88, 2288-89, 2289-90, 2290-91, 2291-92, 2292-93, 2293-94, 2294-95, 2295-96, 2296-97, 2297-98, 2298-99, 2299-00, 2300-01, 2301-02, 2302-03, 2303-04, 2304-05, 2305-06, 2306-07, 2307-08, 2308-09, 2309-10, 2310-11, 2311-12, 2312-13, 2313-14, 2314-15, 2315-16, 2316-17, 2317-18, 2318-19, 2319-20, 2320-21, 2321-22, 2322-23, 2323-24, 2324-25, 2325-26, 2326-27, 2327-28, 2328-29, 2329-30, 2330-31, 2331-32, 2332-33, 2333-34, 2334-35, 2335-36, 2336-37, 2337-38, 2338-39, 2339-40, 2340-41, 2341-42, 2342-43, 2343-44, 2344-45, 2345-46, 2346-47, 2347-48, 2348-49, 2349-50, 2350-51, 2351-52, 2352-53, 2353-54, 2354-55, 2355-56, 2356-57, 2357-58, 2358-59, 2359-60, 2360-61, 2361-62, 2362-63, 2363-64, 2364-65, 2365-66, 2366-67, 2367-68, 2368-69, 2369-70, 2370-71, 2371-72, 2372-73, 2373-74, 2374-75, 2375-76, 2376-77, 2377-78, 2378-79, 2379-80, 2380-81, 2381-82, 2382-83, 2383-84, 2384-85, 2385-86, 2386-87, 2387-88, 2388-89, 2389-90, 2390-91, 2391-92, 2392-93, 2393-94, 2394-95, 2395-96, 2396-97, 2397-98, 2398-99, 2399-00, 2400-01, 2401-02, 2402-03, 2403-04, 2404-05, 2405-06, 2406-07, 2407-08, 2408-09, 2409-10, 2410-11, 2411-12, 2412-13, 2413-
--

13

[illegible]

Anilabala Chaudhuri v Dhirendra Nath Saha, 32 C L J 314	162
Anna Latesia De Silva v Govind Balwant Parasher, 22 Bom L R 987 58 Ind Cas 411	197, 326, 605
Anna Laticia v E V David (1924) A I R (All) 40	613
Annamalai Chetty v Official Assignee Madras (1925) A I R (M) 243	736
Annamalayi Chettiar v R K Binerjee, 14 R 254 163 I C 217 1936 A I R (R) 234 (F B)	385, 388, 393
Anupama Debi v Gurudas Chatterjee, 57 Cal 1274 131 I C 590 1931 A I R (Cal) 264	86
Apothorai Odayar v Official Receiver Tanjore, 99 Ind Cas 683	590
Appaswami v Maniham, 9 Mad 103	23
Appi Reddi v Appi Reddi, 45 Mad 189 41 M L J 606 1921 M W N 816 14 L W 639	589
Archer, Re, (1904) 20 T L R 390	375
Archibald Gilchrist Peace, Re, 26 C W N 653	491, 664, 667, 672
Arden, Exp, 14 Q B D 121	484
Ariff, G H C v Fatima 16 C W N 394	627
Arjun Das v Marchia Telini, 1936 A I R (C) 444	257, 358, 467
Arman Sardar v Satkhira Jr Stock Co Ld, 18 C L J 564	626
Armani v Castrique 13 M & W 447	468, 734
Armstrong, Exparte, (1881) 17 Ch D 13	63
Armstrong, Re, (1888) 21 Q B D 264	95
Arnavyl In Re, 21 Bom 297	381
Arnold Gantzer, In Re, 42 C W N 350	164
Arundell v Arundell, 21 Mad 219	356
	M L W 513
	517
	Tanjore, 22
	A L J 562 91
	99, 565, 567, 575
Aruna Chellam v Maung Po Thun 9 Ind Cas 461	236
Aruna Giri Mudaliar v Kandaswami Mudaliar, 83 Ind Cas 955	74, 247, 249, 387, 449, 450, 723
Aruna Giri Mudaliar v Official Receiver, (1926) M W N 950 98 I C 1060	387
Asadul Haque v Kulia Krishna Bank 41 C W N 804	230
Asa Nand v Bishan Sing, 147 I C 695 1933 A I R (L) 997	187
Asa Nand v Jugul Kishore, 1933 A I R (L) 1008	449, 628
Ashghari Begum v Muhammad Yusoof, 61 Ind Cas 534	289
Ashudhai v Abdulla, 31 B 271	532
	355
	7
	Cal 929 44 C L J
	(C) 149
	711

TABLE OF CASES

li

	Page
Aslaji Dhiraji Bro v Sunni Lal, 9 Mys L J 222	18, 124, 466
Assaram Moti Ram In re, 126 I C 477 1930 A I R (S) 244	654
Assomal, Application of In Re, 4 S L R 222 9 Ind Cas 724	396
Assudamal, In Re 101 I C 848 1927 A I R (S) 194	505
Atair Ahmad v Syid Hasan 57 All 900	547
Ata Mohammad v Official Receiver, Sargodha 1 L R 16 Lah 1013 156 I C 1018 1935 A I R (L) 1068	50, 544
Atmaram v Dayaram, 1929 A I R (S) 94 115 I C 330 48, 54, 555	
Attar Chand v Muhammad Mobin, 13 Lah 396 1932 A I R Lah 121	190
Avanashi v Muthulkaruppam, 34 M L J 319 1918 M W N 345 44 Ind Cas 885	628, 688
Ayyasami Chetty v The Official Receiver, Coimbatore, 61 M L J 719 1932 A I R (M) 63 135 I C 750	71, 75
Azizuddin Ferozdin v Niamat Ali, 31 P L R 944 129 I C 213 1930 A I R (L) 970	519, 724
A.iz un nissa Bibi v O M Chiene, 42 All 593	307

B

Baboo Jivan Hanstraj In re, v Irrawadi Flotilla Co, 11 Rang 116	317
Babu Lal Sahu v Krishna Prasad 4 Pat 128 85 Ind Cas 543 (1925) A I R (P) 438	358 480
Bachu Mallikarjuna Rao v Official Receiver, Kistna, 1 L R 1938 Mad 1063 1938 A I R (M) 449	513
Badcock Re (1886) 3 Morr 138	422
Badham In Re Exp, Palmer (1893) 10 Morr 252	597
Badri Das v Chetty, 45 Ind Cas 918	480
Badri Narain v Sheo Koer 171 A 1 17 Cal 512 (P C)	74, 453
Bagi Ram v Chanan Mal, 10 L L J 180 1 C 603 (1928) A I R (L) 453	561
Bagley Re, (1911) 1 K B 317	91
Bahadur Khan v Official Receiver, 1936 A I R (Pesh) 109	313
Bai Bani v Mangalal, 34 Bom L R 1217	55
Bai Nath v Gajadhar Prasad 1935 O W N 374 154 I C 908 1935 A I R (O) 406	16, 19, 105, 730
Bajinath Rameshwar Lal v Atul Prasad, 163 I C 154 - 1937 A I R (Pat) 134	570, 585
Baij Ram v Chanan Mal, 10 L L J 180 108 I C 603 1928 A I R (L) 453	392
Baily v Johnson, L R 7 Ex 263	371, 384, 448
Bajirao v Dhultrao 1930 A I R (Nag) 215 128 I C 404 20, 95, 269	
Bakaram Bapont v Manghya Adkus, 1 L R (1937) N 461 166 1 C 956 1937 A I R (Nag) 17	436, 453

Anilabala Chaudhuri & Dhirendra Nath Saha, 32 C L J	162
314	
Anna Latesia De Silva & Govind Balwant Pirasher, 22 Bom	197, 326, 605
LR 987 58 Ind Cas 411	613
Anna Laticia & E V David (1924) A I R (All) 40	
Annamalai Chetty & Official Assignee Madras (1925) A I R	736
(M) 243	
Annamalai Chettiar & R K Binerjee 14 R 254 163 I C.	385, 388, 393
217 1936 A I R (R) 234 (F B)	
Anupama Devi & Gurudas Chatterjee 57 Cal 1274 131	86
I C 590 1931 A I R (Cal) 264	
Apothorai Odayar & Official Receiver Tanjore, 99 Ind Cas	590
683	23
Appaswami & Maniham, 9 Mad 103	
Appi Reddi & Appi Reddi 45 Mad 189 41 M L J 606	589
1921 M W N 816 14 L W 639	375
Archer, Re, (1904) 20 T L R 390	
Archibald Gilchrist Peace Re 26 C W N 653 491, 664, 667, 672	484
Arden, Exp, 14 Q B D 121	627
Ariff, G H C & Fatima 16 C W N 394	257, 358, 467
Arjun Das & Marchia Telini 1936 A I R (C) 444	626
Arman Sardar v Satkhira Jt Stock Co Ltd, 18 C L J 564	468, 734
Armani & Cristique, 13 M & W 447	63
Armstrong, Exparte (1881) 17 Ch D 13	95
Armstrong, Re, (1888) 21 Q B D 264	381
Arnavyl In Re, 21 Bom 297	164
Arnold Gantzer, In Re, 42 C W N 350	356
Arunachala & Ayyavu, 7 Mad 318	
Arunachalam Chettiar & Naganna Naicker 23 M L W 513	517
94 Ind Cas 126 (1926) A I R (M) 606	
Arunachalam Chettiar & Official Receiver, Tanjore, 22	99, 565, 567, 575
M L W 134 (1925) M W N 561 49 M L J 562 91	
Ind Cas 522 (1925) A I R (M) 1089	236
Aruna Chellam & Maung Po Thin, 9 Ind Cas 461	
Aruna Giri Mudaliar & Kandaswami Mudaliar, 83 Ind Cas	74, 247, 249, 387, 449 450, 723
955	
Receiver, (1926) M W N	387
41 C W N 804	230
Asa Nand & Bishan Sing 147 I C 695 1933 A I R (L)	187
997	
Asa Nand & Jugal Kishore, 1933 A I R (L) 1008	449, 628
Ind Cas 534	289
	532
	355
	929 . 44 C L J
	149
	711

TABLE OF CASES

li

Page

Aslaji Dhiraji Bro v Sunni Lal	9 Mys LJ 222	18, 124, 466
Assaram Moti Ram In re,	126 1C 477 1930 AIR (S)	654
Assomal Application of, In Re,	4 SLR 222 9 Ind Cas	396
Assudamal In Re	101 1C 848 1927 AIR (S) 194	505
Atar Ahmad v Syid Hasan	57 All 900	547
Ata Mohammad v Official Receiver Sargodha,	1 LR 16 Lah	50, 544
Atmaram v Dayaram	1929 AIR (S) 94 115 1C 330 48	54, 555
Attar Chand v Muhammad Mobin	13 Lah 396 1932	190
Atanashi v Muthulkaruppan	34 MLJ 319 1918 MWN	628, 688
Ayyasami Chetty v The Official Receiver Coimbatore,	61 MLJ 719 1932 AIR (M) 63 135 1C 750	71, 75
Azizuddin Fero din v Niamat Ali	31 PLR 944 129 1C	519, 724
Aziz un nissa Bibi v O M Chiene	42 All 593	307

B

Baboo Jivan Hansraj In re v Irrawadi Flotilla Co,	11 Rang 116	317
Babu Lal Sahu v Krishna Prasad	4 Pat 128 85 Ind Cas	358 480
Bachu Mallikarjuna Rao v Official Receiver, Kistna,	1 LR 1938 Mid 1063 1938 AIR (M) 449	513
Bidcock Re (1886)	3 Morr 138	422
Bidham In Re Exp Palmer (1893)	10 Morr 252	597
Badri Das v Chetty	45 Ind Cas 918	480
Badri Narain v Sheo Koer	17 1A 1 17 Cal 512 (PC)	74, 453
Bagi Ram v Chanan Mal	10 LLJ 180 1C 603 (1928)	561
Bagley Re (1911)	1 KB 317	91
Bahadur Khan v Official Receiver,	1936 AIR (Pesh) 109	313
Bai Bant v Mignilal	34 Bom LR 1217	55
Baij Nath v Gajadhar Prasad	1935 O WN 374 154 1C 908	16 19 10, 730
Baijnath Rameshwar Lal v Atul Prosad,	163 1C 154 1937	570 580
Baij Ram v Chanan Mal	10 LLJ 180 108 1C 603 1928	392
Baily v Johnson,	LR 7 Ex 263	371 384 448
Bajirao v Dulatrio	1930 AIR (Nag) 215 128 1C 404 20 90, 2	
Bakaram Bapoji v Mangal Adkus	1 LR (1937) N 461 106	
	1C 956 1937 AIR (Nag) 17	43

	Page
Baker v Lloyds Bank Ltd (1920) 2 K B 322	474
Bakht Singh v The Municipal Committee, Sargodha, 1 L R. (1938) L 336	68
Balai Chand Datta, <i>In the matter of</i> , 20 Cal 874	217
Balaji v Ramchandra, 19 Bom 660	634
Balakrishna Menon v Minakhal Umma, 52 Mad 263 114 1 C 285 1929 A I R (M) 105	638, 741
Balasami Reddi v Official Receiver, Nellore, (1939) 1 M L J 205	501
Bala Venkataram Chetty v Angathayammal, 38 L W 896 1933 A I R (Mad) 471	53
Balavenkatasethurama Chettiar v Official Receiver, Tanjore, 49 Mad 849 51 M L J 269 97 Ind Cas 825 (1926) A I R (M) 994	217
Balchand v. Tekchand 22 S L R 345 113 I C 319	506
Baldeodas v Sukhdeodas, 19 All 125 21 A W N 97 19 A L J 699	239
Bali v Nundlal, 33 I C 773	622
Baliram v Supadasa 121 I C 55 1931 A I R (Nag) 109	371, 753
Balkrishna v Calcutta Soap Works 40 Bom L R 956	633
Balkrishna v Digambar Das, 161 I C 689	556, 586
Balla Mal v Mr Fatima Bibi, 15 Lah 698 1934 A I R (L) 468	456
Ballavchand Serowgee, <i>In Re</i> , 27 C W N 739	160, 173, 241, 375
Balmokand v Ayya Sing 18 P W R 1912 26 P L R 1912 13 Ind Cas 63	579
Balubhai Mohanlal v Kalyanji Nichhabhai, 1 L R (1939) B 1	532, 549
Baluswami Naidu v. Official Receiver, Madras, 1936 M W N 806 165 I C 207 1936 A I R (M) 915	455
Bamford v Baron, 2 T R 594	579
Banakar Basappa v Hansaya Gulaband Firm 1 L R 59 M 1049	734
Banarasi Das v Baldeo Das, 82 Ind Cas 742 (1925) A I R (O) 222	107
Banarasi Das v Banarasi Das, 9 A L J 233 14 Ind Cas 416	232
Banarasi Das v Mani Chand, 34 P L R 43 141 I C 62 1933 A I R (L) 113	108
Banderilly Jaffer v Peer Mohamed, 146 I C 124 1933 A I R (R) 75	750
Banerjee P K v Mangal Prasad, 1932 A L J 53 1932 A I R (All) 243	532, 551
Banerjee R K, v Karuthal Achi, 164 I C 893 1936 A I R (R) 413	564, 734
Bank of Chetland v Ko San Ok, 11 R 372	312
Bank of Chettinad Ltd, v Ko Tin 14 R 529	358, 667
Bank of Upper India v The Administrator General of Bengal, 45 Cal 653 22 C W N 793	482, 654

Bank of Upper India Ltd v Rani Kant Abid, 1935 A L J 785 1935 A W R 945 61 C L J 274 40 C W N 33 37 Bom L R 874 68 M L J 744 155 I C 426 1935 A I R (P C) 104	279
Bankay Lal v Durga Prasad, 53 All 868 (F B) 1931 A I R All 312	269
Bankim Ch Maity v Dinesh Chandra Ray, 40 C W N 731	553
Bankruptcy Notice, <i>In Re</i> , (1924) 2 Ch D 76	367
Banks v Scott, 5 Mad 493	678
Banner Exp, (1874) 9 Ch 379	509
Banomal Dutta v Lalit Mohan Ghosal, 47 I C 152	285
Bansidhar v Kharagjit, 37 All 65 12 A L J 1273 26 I C 926 38, 69, 610, 644	261
Bansidhar Khettry, <i>In the matter of</i> , 2 Cal 359	261
Bansilal v Kashinath, 29 N L R 303 145 I C 695 1933 A I R (N) 229	478, 504
Bansilal v Official Receiver, 12 L L J 316	579
Bansilal Agarwal v Ranglal Agarwal, (1923) A I R (Nag) 97 550 588, 623	58
Bansi Ram v Anandi Ram Mohan, 155 I C 734 1935 A I R (Pat) 273	58
Bappu Reddier v Official Assignee, Tinnevely, (1919) M W N 576 37 M L J 246	582
Bapuji v Tansa 120 I C 218 1930 A I R (N) 17	322
Baranashi Kuer v Bhabadeb Chatterjee, 34 C L J 167 368, 480, 749	422
Barker Re Ex parte Constable and Jones, (1890) 25 Q B D 285	265
Barker v Goodwin, 11 Ves 78	141
Barr, Re, (1869) 1 Q B 616	40, 43, 59, 685
Barr Begum v Babu Sheo Narain, (1923) A I R (All) 293	476
Barrel, Ex parte, 34 L J 41	11, 35, 468
Bartley v Hodges, (1861) 30 L J Q B 352 4 L T 445 1 East 6	49
Basant Bai v Ram Rao, 141 I C 667 15 N L J 85 1934 A I R (N) 47	49
Basant Bai v Nani Mal, 23 A L J 792 89 Ind Cas 357 (1926) A I R (A) 29 445 550 553 584 589, 707	202
Basant Lal v Cheddi Singh, 39 Cal 1040 16 C W N 664	499
Basarmal v Khemchand 11 Ind Cas 433	628
Basant v Anjaneylu, 50 Mad 135 (F B)	49, 63, 546
Basharat Ali v Ram Rattan, 1938 A I R (L) 73	500, 507
Basheshar Nath v Baga Mal, 120 I C 175 (1929) A I R (L) 805	195
Bashyam Reddi v Somasundaram, 32 Ind Cas 897	550
Basiruddin v Mokim Bibi 22 C W N 709	610
Basodi v Lal Muhammad 13 N L R 210	486
Bath, Ex parte, Re, Phillips, (1882) 22 Ch D 450	

	Page
Baker v Lloyds Bank Ltd (1920) 2 K B 322	474
Bakht Singh v The Municipal Committee Sargolha, 1 L R (1938) L 336	68
Balai Chand Datta In the matter of 20 Cal 874	217
Balaji v Ramchandra 19 Bom 660	634
Balakrishna Menon v Manakhal Umma 52 Mad 263 114 1 C 285 1929 A I R (M) 105	638, 741
Balasami Reddi v Official Receiver Nellore (1939) 1 M L J 205	501
Bala Venkataram Chetty v Angathayammal, 38 L W 896 1933 A I R (Mad) 471	53
Balavenkatasethuram Chettiar v Official Receiver, Tanjore, 49 Mad 849 51 M L J 269 97 Ind Cas 825 (1926) A I R (M) 994	217
Balchand v. Tekchand 22 S L R 345 113 I C 319	506
Baldeodas v Sukhdeodas, 19 All 125 21 A W N 97 19 A L J 699	239
Bali v Nundlal 33 I C 773	622
Baliram v Supadasa 121 I C 55 1931 A I R (Nag) 109	371, 753
Balkrishna v Calcutta Soap Works 40 Bom L R 956	633
Balkrishna v Digambar Das, 161 I C 689	556, 586
Balla Mal v Mr Fatima Bibi 15 Lah 698 1934 A I R (L) 468	456
Ballavchand Serowgee In Re 27 C W N 739 160 173, 241, 375	
Balmokand v Ayya Sing 18 P W R 1912 26 P L R 1912 13 Ind Cas 68	579
Balubhai Mohanlal v Kalyanji Nichhabhai, 1 L R (1939) B 1	532, 549
Baluswami Narisu v Official Receiver, Madras 1936 M W N 806 165 I C 207 1936 A I R (M) 915	455
Bamford v Baron, 2 T R 594	579
Banakar Basappa v Hansaja Gulaband Firm 1 L R 59 M 1049	734
Banarasi Das v Baldeo Das, 82 Ind Cas 742 (1925) A I R (O) 222	107
Banarasi Das v Banarasi Das, 9 A L J 233 14 Ind Cas 416	232
Banarasi Das v Man Chand, 34 P L R 43 141 I C 62 1933 A I R (L) 113	108
Banderly Jaffer v Peer Mohamed 146 I C 124 1933 A I R (R) 75	750
Banerjee P K v Mangal Prasad, 1932 A L J 53 1932 A I R (All) 243	532, 551
Banerjee R K v Karuthal Achi 164 I C 893 1936 A I R (R) 413	564, 734
Bank of Chetland v Ko San Ok, 11 R 372	312
Bank of Chettinad Ltd, v Ko Tin 14 R 529	358, 667
Bank of Upper India v The Administrator General of Bengal 45 Cal 653 22 C W N 793	482, 654

Bank of Upper India Ltd v Rani Kaniz Abid, 1935 A L J 785 1935 A W R 945 61 C L J 274 40 C W N 33 37 Bom L R 874 68 M L J 744 155 I C 426 1935 A I R (P C) 104	279
Bankay Lal v Durga Prasad, 53 All 868 (F B) 1931 A I R All 312	269
Bankim Ch Maity v Dinesh Chandra Ray, 40 C W N 731	553
Bankruptcy Notice, <i>In Re</i> , (1924) 2 Ch D 76	367
Banks v Scott, 5 Mad 493	678
Banner Exp, (1874) 9 Ch 379	509
Banomali Dutta v Lalit Mohan Ghosal, 47 I C 152	285
Bansidhar v Kharagpt, 37 All 65 12 A L J 1273 26 I C 926 38 69, 610, 644	261
Bansidhar Khettry, <i>In the matter of</i> , 2 Cal 359	261
Bansilal v Kashinath, 29 N L R 303 145 I C 695 1933 A I R (N) 229	478, 504
Bansilal v Official Receiver, 12 L L J 316	579
Bansilal Agarwal v Ranglal Agarwal, (1923) A I R (Nag) 97 550, 588, 623	58
Bansi Ram v Anandi Ram Mohan, 155 I C 734 1935 A I R (Pat) 273	58
Bappu Reddier v Official Assignee, Tinnevely, (1919) M W N 576 37 M L J 246	582
Bapuji v Tansa 120 I C 218 1930 A I R (N) 17	322
Baranashi Kuer v Bhabadeb Chatterjee, 34 C L J 167 368, 480, 749	422
Barker Re Ex parte Constable and Jones, (1890) 25 Q B D 285	265
Barker v Goodair, 11 Ves 78	141
Barr, Re, (1869) 1 Q B 616	40, 43, 59, 685
Barra Begum v Babu Sheo Narain, (1923) A I R (All) 293	476
Barrel, Ex parte, 34 L J 41	11, 35, 468
Bartley v Hodges, (1861) 30 L J Q B 352 4 L T 445 1 East 6	49
Basant Bai v Ram Rao, 141 I C 667 15 N L J 85 1934 A I R (N) 47	49
Basanti Bai v Nani Mal, 23 A L J 792 89 Ind Cas 357 (1926) A I R (A) 29 445, 550 553, 584, 589, 707	202
Basanti Lal v Cheddi Singh, 39 Cal 1040 16 C W N 664	499
Basarmal v Khemchand 11 Ind Cas 433	628
Basari v Anjaneylu, 50 Mad 135 (F B)	49, 63, 546
Basharat Ali v Ram Rattan, 1938 A I R (L) 73	500, 507
Basheshar Nath v Bagra Mal, 120 I C 175 (1929) A I R (L) 805	195
Bath, Ex parte, Re, Phillips, (1882) 22 Ch D 450	550
	610
	486

Baker v Lloyds Bank Ltd (1920) 2 K B 322	474
Bakht Singh v The Municipal Committee Sargodha, 1 L R (1938) L 336	68
Balai Chand Datta In the matter of 20 Cal 874	217
Balaji v Ramchandra 19 Bom 660	634
Balakrishna Menon v Manikhal Umma 52 Mad 263 114 1 C 285 1929 A I R (M) 105	638, 741
Balasami Reddi v Official Receiver Nellore (1939) 1 M L J 205	501
Bala Venkataram Cherry v Angathayammal, 33 L W 896 1933 A I R (Mad) 471	53
Balavenkatasethuram Chettiar v Official Receiver, Tanjore, 49 Mad 849 51 M L J 269 97 Ind Cas 825 (1926) A I R (M) 994	217
Balchand v. Tekchand 22 S L R 345 113 I C 319	506
Baldeodas v Sukhdeodas, 19 All 125 21 A W N 97 19 A L J 699	239
Bali v Nundlal, 33 I C 773	622
Baliram v Supadasa 121 I C 55 1931 A I R (Nag) 109	371, 753
Balkrishna v Calcutta Soap Works 40 Bom L R 956	633
Balkrishna v Digambar Das, 161 I C 689	556, 586
Balla Mal v Mt Fatima Bibi, 15 Lah 698 1934 A I R (L) 468	456
Ballavchand Serowgee, In Re, 27 C W N 739 160 173, 241, 375	
Balmokand v Ayya Sing 18 P W R 1912 26 P L R 1912 13 Ind Cas 68	579
Balubhai Mohanlal v Kalyanji Nichhabhai, 1 L R (1939) B 1	532, 549
Baluswami Naidu v Official Receiver, Madras 1936 M W N 806 165 I C 207 1936 A I R (M) 915	455
Bamford v Baron 2 T R 594	579
Banakar Basappa v Hansaja Gulaband Firm 1 L R 59 M 1049	734
Banarasi Das v Baldeo Das 82 Ind Cas 742 (1925) A I R. (O) 222	107
Banarasi Das v Banarasi Das 9 A L J 233 14 Ind Cas 416	232
Banarasi Das v Man Chand 34 P L R 43 141 I C 62 1933 A I R (L) 113	108
Bandeally Jaffer v Peer Mohamed, 146 I C 124 1933 A I R (R) 75	750
Banerjee P K v Mangal Prasad 1932 A L J 53 1932 A I R (All) 243	532, 551
Banerjee R K. v Kivruthal Achi 164 I C 893 1936 A I R (R) 413	564, 734
Bank of Chetland v Ko Sin Ok, 11 R 372	312
Bank of Chettinad Ltd v Ko Tin 14 R 529	358, 667
Bank of Upper India v The Administrator General of Bengal 45 Cal 653 22 C W N 793	482, 654

TABLE OF CASES

iii

Page

Bank of Upper India Ltd v Rani Kanai Abid, 1935 A L J 785 1935 A W R 945 61 C L J 274 40 C W N 33 37 Bom L R 874 68 M L J 744 155 I C 426 1935 A I R (P C) 104	279
Bankay Lal v Durga Prasad, 53 All 868 (F B) 1931 A I R All 312	269
Bankim Ch Maity v Dinesh Chandra Ray, 40 C W N 731	553
Bankruptcy Notice In Re, (1924) 2 Ch D 76	367
Banks v Scott, 5 Mad 493	678
Banner Exp, (1874) 9 Ch 379	509
Banomali Dutta v Lalit Mohan Ghosal 47 I C 152	285
Bansidhar v Khuragut, 37 All 65 12 A L J 1273 26 I C 926 38 69, 610, 644	261
Bansidhar Khettry, In the matter of, 2 Cal 359	261
Bansilal v Kashinath 29 N L R 303 145 I C 695 1933 A I R (N) 229	478, 504
Bansilal v Official Receiver, 12 L L J 316	579
Bansilal Agarwal v Ranglal Agarwal, (1923) A I R (Nag) 97 550, 588, 623	58
Bansi Ram v Anandi Ram Mohan, 155 I C 734 1935 A I R (Pat) 273	58
Bappu Reddier v Official Assignee Tinnevely, (1919) M W N 576 37 M L J 246	582
Bapuji v Tansa 120 I C 218 1930 A I R (N) 17	322
Baranashi Kuer v Bhabadeb Chatterjee 34 C L J 167 368, 480, 749	422
Barker Re Ex parte Constable and Jones, (1890) 25 Q B D 285	265
Barker v Goodwin, 11 Ves 78	141
Barr, Re, (1869) 1 Q B 616	40, 43, 59, 685
Barra Begum v Babu Sheo Narain, (1923) A I R (All) 293	476
Barrel, Ex parte, 34 L J 41	11, 35, 468
Bartley v Hodges, (1861) 30 L J Q B 352 4 L T 445 1 East 6	49
Basanti Bai v Ram Rao, 141 I C 667 15 N L J 85 1934 A I R (N) 47	445, 550 553, 584, 589, 707
Basanti Bai v Nanhi Mal, 23 A L J 792 89 Ind Cas 357 (1926) A I R (A) 29	202
Basanti Lal v Cheddi Singh, 39 Cal 1040 16 C W N 664	499
Basarmal v Khemchand 11 Ind Cas 433	628
Basara v Anjaneyulu, 50 Mad 135 (F B)	49, 63, 546
Bisharat Ali v Ram Rattan, 1938 A I R (L) 73	500, 50
Bisheshwar Nath v Bagri Mal, 120 I C 175 (1929) A I R (L) 805	897
Bashyram Reddi v Somasundaram 32 Ind Cas 897	709
Basiruddin v Mokim Bibi 22 C W N 709	210
Basodi v Lal Muhammad, 13 N L R 210	450
Bath, Ex parte, Re, Phillips (1882) 22 Ch D 450	

	Page
Battams, <i>Ex parte</i> , (100) 2 Q B 698	145
Bauker v Burdekin, (1834) 11 M & W 128	90
Bhambhani v M Chien 44 All 316 20 A L J 155	267
	468
	233
	4 Cal 402
	37 Mad 107
	620
Beard v W & C 11 M L T 391	625
Beauchamp, <i>Ex parte</i> , (1894) 1 Q B 1 42 W R 110	123, 133
Bebro, Re, (1900) 2 Q B 316	178
Bechni, Mt v Sheikh Sadique 9 Pat 839 129 I C 129	541, 590
Beekham v Drake, 2 H L C 579 (1849) 2 D L C 579 11 M & W 315	632
Behari Lal v Sat Narain, 3 Lahore 329	258, 267, 268
Beharilal Sikdar v Harsookdas Chakmali, 25 C W N 137	137
61 Ind Cas 904	177 353 366, 377, 405, 494
Behari Sahu v Juthermal, 1 P L W 227 38 Ind Cas 822	240
Beli Ram v Mangal Das 117 I C 237 1928) A I R (L) 452	160
Benares Bank Ltd v Hari Narain 59 I A 300 36 C W N 826	266
Benares Bank Ltd v S C H Meyer, 43 C W N 483 (P C.)	410
Bengal Banking Corporation v Mackeritch 10 Cal 315	23
Beni Madhav v Kumud Kumar 30 Cal 123 6 C W N 799	244
Beni Madhab Khetry v Abdul Razak 37 C W N 390 1933 A I R (Cal) 673	60
Bent Prasad v Phula Mal, 1933 A L J 1051 146 I C 819	347, 348
1933 A I R (All) 591	496
Benoist, In Re, (1909) 2 K B 784	749
Benson, In Re, Bower (1914) 2 Ch 68	655
Benwell, Exp., (1884) 14 Q B D 301	173, 195, 240, 241, 375, 459
Berts, In Re, (1901) 2 K B 39	414 139 I C 574
Bhadramma v Parvateesam, 63 M L J 414 139 I C 574	1932 M W N 1105
1932 A I R (M) 731 36 L W 655	384 393, 455, 538, 693
Bhagat Ram Bindrabai v Puran Chand, 33 P L R 1058	140 I C 528 1933 A I R (L) 43
530, 543, 551, 563	
Bhag Mal v Parshottam, 1935 A I R (L) 919	424
Bhagirath v Mt Jamun, 8 P L T 184 101 Ind Cas 445	
(1927) A I R (P) 188	229, 232
Bhag Mal v Lala Kishan Lal, 1937 A I R (L) 441	552
Bhagwan Das In Re, 4 Bom 489	729
Bhagwan Das v Chum Lal, 121 I C 303 1930 A I R (L) 996	71, 236
Bhagwan Das v Chutan Lal, 43 All 427 19 A L J 240 62	
Ind Cas 732	571, 594
Bhagwan Das v Haji Abdul Ahmed, 16 Bom 263	74

Bhagwan Das & Lakshmi Chand, 1935 A L J 673	1935
A W R 672	20, 248, 287, 336
Bhagwanji & Raja Sampanji 9 Mys L J 1	122
Bhagwan Singh & Chedi Lal, 99 Ind Cas 277	376
Bhagwant & Munim Khan, 6 N L R 146 8 Ind Cas 1115	329, 555
Bhagwat Kishore & Sanwal Das, 19 A L J 701 61 Ind Cas 802	700, 724
Bhagwat Koer & Dhanokdhari, 47 Cal 466 (P C)	96
Bhairo Pershad & S P C Das, 17 A L J 787 51 Ind Cas 113 1 U P L R 18	683, 684
Bhanjan Ram & Official Receiver, Muraffargarh, 27 P L R 513 99 Ind Cas 708 (1926) A I R (L) 621	534
Bhavan Mulji & Kasavji 2 Bom 542	299
Bhimaji Bhikutmal & Chunilal Javerchand, 57 Bom 623 34 Bom L R 653 1932 A I R (Bom) 344	297, 335
Bhogchand Dagadusa & Secretary of State, 51 Bom 725 (P C)	605
Bhola Nath & Chuni Lal, 1932 A I R (All) 41	313
Bhola Prasad & Ramkumar Marwari, 11 Pat 399 1932 A I R (Pat) 231	266
Bholai Karim & D D Desai, 6 Bur L T 14 100 Ind Cas 1004	229
Bhuban Mohan Bose, In the matter of, 15 W R 571	202
Bhur Nath & Biraj Mohini, 28 C L J 536 49 Ind Cas 87	526
Bibee Tokaisheerob & David Mullick, 6 M I A 510	264
Bibhutji Bhusan Khan & Birendra Nath Roy, 39 C W N 1167 158 I C 704 1935 A I R (C) 558	39
Bidharadin & Jagannath, 9 A L J 699	239, 240
Bihari Lal & Abdul Khaliq, 119 I C 496 1930 A I R (L) 235	355
Bijai Inder Singh & Charan Singh, 24 A L J 755 98 I C 525 (1926) A I R (A) 640	293
Bilas Ray Serawgee, In Re, 56 Cal 865 33 C W N 681	645
Bills & Smith, (1865) 34 L J Q B 68	573
Binda Prasad & Ram Chandra 19 A L J 277	616.
Birraj Sargamall, Re, 39 C W N 1135	13
Bird & Philpott, (1900) 1 Ch 822	676, 678
Bir Singh & Firm Chanchal Singh, 133 I C 626 1932 A I R (L) 28	733
Bir Singh & Humphry, 120 I C 791	71
Biseswar Chaudhuri & Kanhai Singh, 11 Pat 9 13 P L T 298 1932 A I R (Pat) 129	47
Bishambarnath & Rukha 81 Ind Cas (O) 647	24, 478, 6
Bisham Chand & Kisanlal, 1939 N L J 96 1939 A I R (N) 103	341, 420, 431, 45
Bishan Singh & Gurmukh Ram, 34 P L R 41	51

	Page
Bishop v Church, 3 Atk 691	472
Bishwanath Sao v Official Receiver 16 Pat 60 167 I C 765 1937 A I R (Pat) 185 (F B)	20, 270, 627
Blackburn, Ex parte, (1871) L R 12 Eq 358 19 W R 973	581
Blackman, Re Ex parte, Branfil (1892) 9 Morr 157	192
Blackpool Motor Co, Ltd In Re, (1901) 1 Ch 77 361, 367, 468, 564	
Blain, Ex parte, (1879) 12 Ch D 522	89, 112, 122
De G M & G 757	88
Ex D 784	441
	374
Board of Trade, Ex parte, Re Moulton (1890) 8 Morr 1	673
Board of Trade v Block, 13 A C 570	255
Boddam, Exp, 2 D F & J 625	667
Bolisetti Momayya v Kolla Kotayya, 44 Mad 810 40 M L J 570 1921 M W N 330 29 M L T 288 14 L W 428 63 Ind Cas 916	121, 125, 180, 579
Bolisetti Momayya v Official Receiver Guntur, 1926 M W N 124 23 M L W 10 92 Ind Cas 726 (1926) A I R (M) 338	579
Bombay Company Ltd v The Official Assignee of Madras, 44 Mad 381	407
Bombay Co. Mills Co. Ltd In Re 12 D - 214	25
	328
	195, 241
	403
	509
	364, 740
	2, 497
	440
	276
	546 586
	102
	394
	630, 634
	498
	21
	120
Bright, Re (1903) 1 K B 735	374
Brij Kessor Lal v Official Assignee, Madras, 43 Mad 71 37 M L J 244	377, 405
Brij Indar Kuar v Thakur Jai Indar Bahadur Singh, 36 C W N. 882 (P C)	606
Brijmohan v Mahabir, 63 Cal 194 40 C W N 808 166 I C 781	56, 294
Brij Mohan, In the matter of, v Bungshidhar, 2 C W N 335	90
Brij Mohan Dobey, In the matter of, 2 C W N 306	112

TABLE OF CASES

lvii

Page

Brij Mohan v Sarju, 8 O W N 843	134	I C	607	1931	
A I R (Oudh) 356					436
Brindley, Re, (1906) 1 K B 377					91
Brinsmead v Harrison, (1871) 6 Ch Prac 584				41 L J C P	328
190					185
Bristow, Re, L R 3 Ch 247					24
Bristow v Whitmore (1859) 4 De G & J 325					121
Brocklebank Exp, 6 Ch D 358					396
Brojendra Chandra Das v Satish Chandra Das, 37 C W N					180
189					126, 153,
Brojendra Nandan Saha v Nikunja Behari Das, 39 C W N					187
104 60 C L J 248				1935 A I R (C) 174	63
Bromley v Goodeve 1 Atk 75					121
Brown Experte, (1879) 11 Ch D 148				40 L T 402	299
Brown, Experte, (1832) 1 Derc & Ch 118					100
Brown, In Re, 12 Cal 629					470
Brown v Fergusson, 16 Mad 499					334
Brown and Wingrove Re Experte Ador, (1891) 2 Q B 574					439
Brownscombe v Fair (1887) 58 L T 85					101, 442
Brundrit, Experte, Re Caldwell (1867) 3 Ch App 26					304
Bryant Re 3 M & A 722 (1895) 1 Q B 420					661
Buddhu Lal v Ram Sahai 9 O W N 523				1932 A I R	731
(Oudh) 244					41, 732
Budgett Re (1894) 2 Ch 557					8
Budha Mal v Official Receiver, Lahore, 1930 A I R (L) 122					525
Budhsen v Ashrafi Lal 1937 A L J 1071				1938 A I R	146 746
(All) 28					22
Budhu Koer v Hafi 18 C L J 274					706
Bulmer v Hunter (1869) 8 Eq 46					376
Bulomal Variomai v Sumarkhan, 112 I C 646 (1908)					403
A I R (S) 17					100, 531, 586, 595
Burlinson v Hall 12 Q B D 347					151
Burmah Dairy Co v D D Desai 13 R 525					24
Burnett Re 1 Mins 89					
Burr Re (1892) 2 Q B 467					
Butcher v Stead 7 Eng & Ir App 849 (1875) 7 H L					
839					
Button Re, (1905) 1 K B 602					
Buxton v Bangham (1835) 6 C & P 674					

C

Cahen, In Re (1879) 10 Ch D 183					124
Curney v Back, (1906) 2 K B 746					657
Callender Sykes & Co v Colonial Secretary of Lagos and Davies (1891) A C 460					11, 17
Campbell, In Re, (1884) 14 Q B D. 32					

	Page
Campbell <i>Ex parte</i> (1885) 15 Q B D 213	401 404
Campbell F F & Co v Mithomal Dwarkadas 9 S L R 65	529
Campbell <i>In Re Seal Ex parte</i> (1911) 2 K B 992	495
Canthom <i>In the matter of</i> 33 Mad 53	368
Carleton v Leighton (1805) 3 Mor 667	278
Carter and Kenderdenis Contratt <i>In Re</i> (1897) 1 Ch 776	541
Cartwright <i>Exp</i> (1881) 44 LT 883	596
Chagmull v Jainarain 15 C L J 239 16 C W N lxxx	727
Chainrai v Dolaram 25 S L R 371 1932 A I R (S) 3	577
Chainrai Valiram v The Sunday Times Ltd 1932 A I R (Sind) 33 140 I C 233 26 S L R 21	339
Chairman District Board Monghyr v Sheo Dutt Singh 5 Pat 476 98 Ind Cas 364 (1926) A I R (P) 438	269
Chakravarti G C v E White 1 L R 63 C 535 40 C W N 336	332 333 501 718 23
Chalamanna v Subbamma 7 Mad 23	23
Challa Abbireddi v Challa Venkatareddi 51 M L J 60 23 M L W 644 (1926) M W N 256 94 I C 351 (1927) A I R (M) 175	75 457
Champa Musst v Official Receiver Karachi 15 Lah 9 1933 A I R (Lah) 901	25 266 293 361
Chanchalu Silva Reddi v Official Receiver Bellary 1936 M W N 1040 44 L W 651 71 M L J 730 166 I C 80 1937 A I R (M) 13	115
Chand J v Aba 5 Bom 132	655
Chandan Lal v Khem Raj 15 A L J 538 40 Ind Cas 156	400
Chand Kaur Mt v Official Receiver 38 P L R 729 163 I C 383 1936 A I R (L) 499	221
Chandmull Sardamull v Satya Ch Dutt 42 C W N 34 292 296 330 459 529	27 61 77
Chandra Booda Ch L A N Ch C W N 818 (F B) 274 626 Roy 22 C W N (C) 57	27 61 77
Chandranath v Nagendranath 107 I C 467 (1928) A I R (C) 263	733
Chandulal Laxminarayan v Bhikamchand Premchand 1 L R 1936 Nag 41 163 I C 127 1936 A I R (N) 117	748
Ch D 319	547
A I R (L) 690	94
rru <i>In Re</i> 2 Mad 13	504
rru Chandra v Hem Chandra 47 Ind Cas. 72	678
rru Chandra Muhuri v Ramesh Chandra Sil 1 L R (1937) 1 Cal 628 171 I C 280 1937 A I R (C) 158	278
thirgali Ratichin v Purvamparambati 57 Mad 808	683
	371 753
	755

Chatrapat Singh Dugar v. Kharag Singh Luchmiram, 40 Cal 655 : 44 Cal. 535 : 17 C.W.N. 752 : 21 C.W.N. 497 : 25 C. L.J. 215 82. 153, 224, 238, 240, 241, 693, 736.	
Chatterjee & Co., Messrs. D. N. v. Rajkumar Mandal, 37 C.W.N. 135 146 I.C. 597 : 1933 A.I.R. (Cal.) 651	500
Chaturbhuj v. Hiralal, 80 Ind. Cas. 858 : (1925) A.I.R. (Cal.) 335	34, 727
Chauthmal Bhagirath v. Khem Karan Das, 1928 A.I.R. (P.) 116	70
Chavadi Ramasami Pillai v. Venkatesware Aiyar, 42 Mad. 13 : 35 M.L.J. 531 : 48 Ind. Cas. 952	143, 738
Cheda Lal v. Lachman Prasad, 39 All. 267	628
Chella Abbireddi v. Chella Venkatarreddi, 51 M.L.J. 60 : 23 M.L.W. 644 : 1926 M.W.N. 256 : 94 I.C. 351 : 1927 A.I.R. (M) 175	75, 457
Chellaram v. Official Receiver, 75 Ind. Cas. 497 : (1923) A.I.R. (Sind) 20	267
Chenchayya v. Bapayya, 62 M.L.J. 177 : 32 L.W. 66 : 1932 A.I.R. (Mad.) 233	247, 543, 557
Chanchuramanna Reddi v. Arunchalam, I.L.R. 58 M. 794 : 1935 M.W.N. 685 : 42 L.W. 330 : 158 I.C. 1 : 1935 A.I.R. (M) 857	144
Chengalvaraya v. Official Assignee, Madras, 33 Mad. 467 : 7 M.L.T. 207	472
Chetan Das Mohan Das v. Ralli Brothers, 83 Ind. Cas. 135 : (1925) A.I.R. (S.) 153	140, 165, 472
Chet Ram Ram Rachhpal v. Atma Ram, 34 P.L.R. 960	558, 731
Chetti v. Ba Tin, 13 Bur.L.T. 117. 61 Ind. Cas. 640	366
Chettiar v. Maung Myat Tha, 6 Bur.L.J. 5 : 100 Ind. Cas. 921 : (1927) A.I.R. (R.) 136	251, 451
Chettiar Firm, K. P. A. P. v. U. Maung Maung, 1934 A.I.R. (R.) 208	531, 580
Chetty, S. R. M. C. T. v. Ko Aung Gyi, 15 I.C. 276	434
Chettyar, L. C. T. R.M. S. v. A. S. Chettyar Firm, 7 Rang. 785 : 1929 A.I.R. (R.) 291	185
Chettyar, R. M. K. R. M. v. Ko Po Thit, 8 Rang. 506 : 128 I.C. 841 : 1931 A.I.R. (Rang.) 27	251
Chetty Firm, A. K. R. M. C. T. v. Maung Aung Buint, 1923 A.I.R. (Rang.) 21	141, 219
Chetty Firm, N. N. S. v. The Bailiff, 4 Bur.L.J. 56 : 89 I.C. 61 : (1925) A.I.R. (R.) 224	537
Chettyar Firm v. Ma Ngwe Yon, 1933 A.I.R. (R.) 216	550
Chettyar Firm v. S. Dutt, I.L.R. 14 R. 280 : 1937 A.I.R. (R.) 223	34
Chettyar Firm, A. K. R. M. M. C. T. v. Maung Ba Chit, 128 I.C. 589 : 1930 A.I.R. (R.) 315	534, 568

THE PROVINCIAL INSOLVENCY ACT

Page

Chettyar Firm A K R M M C T & S E Munnee, 6 Rang 533 117 I C 570 1928 A I R (Rang) 326	294, 752
Chettyar Firm, A K R M S & Dawpwa 161 I C 342 1936 A I R (R) 2	427
Chettyar Firm L P R & R K Banerjee, 9 Rang 71 134 I C 744 1931 A I R (R) 136	583
Chettyar Firm, M K M & Maung Thaung, 13 Rang 37 1935 A I R (R) 92	296 323
Chettyar Firm, M S M M & P Mudaliar, 11 Rang 96	111
Chettyar Firm, P M & A K A C T A L Chettyar Firm, 13 R 534 1935 A I R (R) 317	517
Chettyar Firm P A A & T R M Chettyar Firm, 12 Rang 602	138, 363, 663
Chettyar Firm, R M & U Hla Bu 5 R 623 106 I C 200	607
Chettyar Firm, R M & U Hla Bu 5 R 623 106 I C 200	409
Chettyar Firm, R M & U Hla Bu 5 R 623 106 I C 200	285
Chettyar Firm, R M & U Hla Bu 5 R 623 106 I C 200	638
Chettyar Firm, R M & U Hla Bu 5 R 623 106 I C 200	580 38 P L R
Chidambara Ayyar & Sivaramakrishna Ayyar, 1935 M W N 834	137
Chidambaram v Nagappa 38 Mad 15 24 M L J 73	561
Chidambaram Chettiar v Daivanat Achi 1935 M W N 1159	759
Chidambaram Chettiar v S - - - - - Mad 6	233, 585
Chidambaram Chettiar v S - - - - - Mad 6	100, 531
Chidambaram Chettiar v S - - - - - Mad 6	17 Mad 227
Chidambaram Chettiar v S - - - - - Mad 6	714 100 528
Chidambaram Pillai & Subramania Ayyar, 1932 A I R (Mad) 513 140 I C 674 39 L W 219	544 558, 730
China Venkatappayya v Punnayya, 1932 M W N 153 (F B)	372
China Venkataraju & Lakshmanaswami, 34 L W 143 1931 M W N 937 134 I C 169 1931 A I R (M) 729	376, 489, 664 677
Chinna Subraya v Kudaswami Reddi, 1 Mad 59	478
Chinna Veeriah & Gurivi Reddi 39 L W 347	290
Chinna & Kumar, 36 Ind Cas 906	445, 541
Chinnappa & Kolakula 51 Mad 839 54 M L J 344 109 I C 581 (1928) A I R (M) 26	447, 454
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	275
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	4, 454
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	25 Ind Cas 686 726 732
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	49 Mad, 762 1926
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	23 M L W 94 92
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	3
Chinrai Valiram & The Sunday Times, Ltd 1932 A I R (Sind) 33	44, 53, 65, 611

Chobey Shrinopal Chitambar & Dhanlal Ghosharam, 35 Bom 383	752
Chockalingam Chettiar & Muthia Chettiar, 1935-2 M L J 300 1935 A I R (M) 884	150
Chote Lal & Kedar Nath 46 All 565 84 Ind Cas 259 (1924) A I R (A) 703 84 I C 259	307, 308, 309, 598
Choudhry Goundan & Kathaperumal Pillai 50 M L J 602 (1926) A I R (M) 801 96 I C 944	537, 722 724
Choung Taik & Ma Thien Nu, 8 Rang 665 131 I C 504 1931 A I R (R) 74	635
Chouthmal Bhagirath & Jokhiram 13 Pat L T 775 141 I C 836 1933 A I R (P) 84	385 390, 456
Chowdhri Gaur Narain & Sheo Lal Singh, 46 Cal 566 23 C W N 521	15
Chowdhury Sharfuz Zaman & Deputy Commissioner, Barabanki 79 Ind Cas 888	527
Chowdhury Sureshwar Misir & Must Moheshram Misra 41 C L J 433 (P C)	96
Chowth Mull & The Calcutta Wheat, etc, 51 Cal 1010 84 I C 922	509
Chugmull & Jangra 16 C W N 80 n 15 C L J 238	727
Chundra Narain Singh & Kishen Chand Golichar, 9 Cal 855	478
Chunilal & Biharlal 21 P W R 1916 38 Ind Cas 995	8
Chunilal Oswal In the matter of, 29 Cal 503	355, 646
Chunilal Bhawanidas & Vithal Balaji Kasar, 28 N L R 317 1933 A I R (N) 28	338, 511
Clarke Ex parte, 1 Deac & Ch 544 4 Ves 677	115
Clay Re Ex parte the trustee, 3 Mans, 31	573
Clough v Samuel (1905) A C 442	107
C M S A No 142 of 1930, 65 M L J 35 (Notes)	664
Coates Ex parte, Re Skelton, (1877) 5 Ch D 979	101 102
Cobbold Re, 36 Cal 512,	667
Cobham & Dalton, L R (1875) 10 Ch 655	402
Cochrane, Ex parte, (1875) 20 Eq 282 23 W R 726	680
Cockerell v Dickens, (1840) 3 Moo P C 98	12 36 202
Cockerell, R H & Ors v Theodore Dickens, 2 M I A 353	498
Cohen, In Re, Ex parte The Trustee, (1924) 2 Ch D 514	552
Cohen & Mitchell (1890) 25 Q B D 262	307, 308 309 310
Coker, Ex parte, L R (1875) 10 Ch 652	321 402
Collector of Akyab v Paw Tun, 5 R 806 (1928) A I R (R) 81 109 I C 145	210 343
Colonial Bank & Whitney, (1885) 30 Ch D 261	298 303
Colonial Bank v Whitney, (1885) A C 426	307
Cook, Exp., 2 P Wms 500	-
Cooke v Charles, A Vogelar (1901) App Cas 102 89 90 11	-
Coombes, Ex parte, (1877) 5 Ch App 979	-
Cooper v Pritchard, (1883) 11 Q B D 351	-

	Page
Corlett v Radcliffe, 14 Moo P C C	121 528
Corser v Cartwright L R 7 Eng & Irish App	731 25
Couldery v Bartrum, 19 Ch D	394 484
Courtis, Ex parte, Re, Courtis, (1893) 9 T L R	387 102
Cowasji Polkerji, In Re, 13 Bom	114 254, 695
Cowie, Re, 6 Cal	70 439
Cracknall v Janson, (1877) 6 Ch D	735 151, 481
Cranston, In Re, Ex parte, Cranston, (1892) 9 Morrel's Bank- ruptcy Rep	160 93
Crawford, Re, (1887) 6 Ch D	29 525
Crawshay v Collins, 15 Ves	229 264
Crispe v Peritt, Willes	467 18, 123
Crispin Ex parte (1873) 8 Ch App	374 94, 122
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 203
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 107
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 403
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 265
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 11 R R 98
Cronmire, Re Ex parte, Cronmire, (1894) 2 Q B	246 wither, 51 Mad 833 53
Cunhan v Bank of Madras, 19 Mad	234 292, 335
Currie v Misa, L R 10 Exch	162 24
Currimbhai Abdulhussain v Ahmedalli, 143 I C	698 35 532
Bom L R 12 1933 A I R (Bom) 91	395, 603
Cycle Maker's Co operative Supply Co v Sinns, (1903) 1 K B 477	630
D	
Dadapa v Bishnudas, 12 Bom	424 100
Dagnal, Re, (1896) 2 Q B	407 124
Dainty, Re Ex parte Holt, 2 Q B D	116 109
Dambar Singh v Munwar, 15 A L J	877 610
Damodar v Atmaram, 8 Bom L R	344 29
Damodar Das v Official Receiver, 117 I C 145 (1930) A I R (S) 127	506, 660
Damodar Das v Sheikh Hamid Rahaman, 98 Ind Cas 74 (1926) A I R (O) 621	364
Dan Rylands, Ex parte, Re Collier, (1891) 64 L T. 742 (1891) 8 Mor 80	120, 149, 175
Darraha, S R v Fazal Ahmad, 93 Ind Cas 903 (1926) A I R (L) 360	192, 201, 208, 756
Daryal Singh v Kunj Lal, 75 Ind Cas	995 579, 588
Dasarathi Sinha v Mahamulya, 47 C	961 309
Dasru Mahar v Official Receiver, 97 Ind Cas 900 (1927) A I R (N) 16	308
Dataram v Deoki Nandan, 58 Ind Cas	6 682, 689
Daulat v Panduram, 55 I C	67 530

Dault Chind v Jugul Kishore, 32 P L R 254 130 I C 333 1931 A I R (L) 3	44
Dault Ram v Deoki 75 I C 861 (1924) A I R (L) 686	99, 569
Dault Ram Chhng Mal v Sundar Mal-Ram Chind, 32 P L R 180 133 I C 282 1931 A I R (Lah) 298	520
David Sassoon & Co., Ltd., In the matter of, 95 Ind Cas 453 (1926) A I R (S) 246	108, 110
David Sassoon & Co., In the matter of, 100 Ind Cas 389	114
Davies In Re (1921) 3 K B 628	596
Dawood Mohideen Rowther v Shabudin Shih, 1 L R 1937 (M) 841 1937 M W N 1063 46 L W 520 (1937) 2 M L J 760 1937 A I R (M) 667	293, 332
Dayaram Menghray v Sakhi Bai 130 I C 559 1930 A I R (Sind) 65	75 181, 500
Dearle, Ex parte, (1854) 14 Q B D 184	149
Debendra Sikdar v Pursottam Das 55 Ind Cas 186 113 119, 661, 756	503
Debi Pershad v O M Chetne 16 Ind Cas 84 9 A L J 797	424, 446
Debi Prasad v Allen Grant, 39 Ind Cas 919	727
Debi Prasad v Jumnai Das, 23 All 56	34
Debi Prasad v Staneely Ray, 6 A L J 483 2 Ind Cas 223	19, 105
Debi Prasad Singha v Krishna Kumar Sarkar, 41 Cal W N 800	56, 66
Deorao v Vithal, 87 Ind Cas 1000 (1925) A I R (N) 363	680
Deosthan Narsinghi v V D Bhake, 178 I C 110 1938 A I R (N) 320	560, 563
Desameseti Venkanna v Official Receiver, East Godavari 65 M L J 57 1938 M W N 114 157 I C 539 1935 A I R (M) 250	295
Des Raj v Duntchand, 60 Ind Cas 588	567
Desraj v Sagarmauli, 38 All 37 13 A L J 1064 31 Ind Cas 716	577
De Tastet v Carroll, 1 Stark 88	33
Devadass Premchand v Soleti Gopalappa 45 M L J 689 1923 M W N 754 18 L W 685 75 Ind Cas 876 (1924) A I R (M) 398	689
Devaswami, M v Munakshisundara 16 M L T 246	320
Deverges v Sandeman Clark & Co., (1902) 1 Ch D 579	50
Devi Das v Lala Manohar Lal 1937 A I R (L) 323	425
Devi Dayal v Sarmukh Singh 117 I C 662 (1929) A I R (L) 231	557, 586
Devi Dial v Sunder Das 51 Ind Cas 720 65 P R 1919	259
Devi Prasad v J A N Lewis 16 A L J 107	311
Devulipalli Sobhandri Sastrulu v Dorbala Nagayya Sastry, 1 L R 1938 (M) 578 F B	495
Dewcurn Jewraj In Re, 12 Bom 342	368
Dewdney, Ex parte, (1808) 15 Ves 479	

	Page
Dhanraj Singh, <i>In Re</i> , 20 Cal 771	113
Dharamdas Thawardas v Hukumchand Mirimal, 1932 A I R (S) 62	306, 330, 597
Dholan Das, <i>In the application of</i> , 56 Ind Cas 158	103, 140, 361
Dhurvas, J Subbarayar v J K Muniswami Iyer, (1926) A I R (M) 1133 98 I C 516 1926 M W N 797	276, 636
Dialsha v Miranbakhsh, 23 P L R 1917 39 Ind Cas 745	232
Dickin, <i>Ex parte</i> , (1878) 8 Ch D 377 38 L T 860	64
Dickinson, <i>In Re</i> , Exp Carrington & Co., 22 Q B D 187	29, 493
Dickson v Evans, (1794) 3 R R 119	472
Digendra Chandra Basak v Ramani Mohon Goswami, 22 C W N 958, 48 Ind Cas 333	36, 701
Dikin, <i>Ex parte</i> , 8 Ch D 377	686
Din Dayal v Jugdeep Narain, 4 I A 247 3 Cal 193 (P C)	264
Din Doyal v Gursaran Lal, 42 All 336 18 A L J 287, 59 I C 67	499, 510
Din Mohammad v Tarichand, 116 I C 192 1930 A I R (L) 39	43, 507
Dinajpur Trading and Banking Company v Provash Chandra Sen 56 C L J 440 142 I C 484 1933 A I R (C) 151	42, 115 132, 660, 725, 735
Dina Nath v Ghulam Akbar, 34 P L R 647 143 I C 286	528, 532
Dina Nath v Labhu Ram, 33 P L R 255 1932 A I R (L) 321	560, 584, 587, 730
Dinesh Chandra Roy Chowdhury v Munshi Jahanali, 39 C W N 424	282, 510, 512
Dinonath v Hogg, 2 Hay, 295	613
District Official Receiver, Tinnevely v Nallaperumal Pillai, 1929 M W N 327 119 I C 703, 1929 A I R (M) 471	568, 571
1929 M W N 327 119 I C 703, 1929 A I R (M) 471	156
1927 A I R (L) 38	50
(Lah) 101	457
11 Ch D 56	
LR 16 L 392 36 P L R	
185 1927 A I R (M) 471	303, 311
Doddi Abdul Nabi Saib v Kalappa Rajappa Patel, 44 L W 284 71 M L J 371 1936 M W N 1229 165 I C 83	
1936 A I R (M) 800	
Dola Ram v Parma Nand, I R 1932 (Lah) 659	434, 437
Donaghue, C M F, <i>In the matter of</i> , 19 Bom 232	372
Donepudi Subramanyam v Nune Narasimham, 119 I C 46	259
(1929) A I R (M) 323	
Doraiswami Chettiar v Abdul Subhan Sahib, 62 M L J 289, 294, 297	
35 L W 248 1932 A I R (Mad) 237	234
Doraiswami Pillai v Arumuga Naicker, 42 L W 834 69	153, 239, 246
M L J 799 1935 M W N 1328	
Doraisami v Vaithilinga, 40 Mad 31 (F B) 1917 M W N 353 32 M L J 422	467

	Page
Dossagopal v Bhanji 26 Bom 171	183
Dost Muhammad Khan v Munick, 29 All 537	652
Downman, Ex parte, (1863) 32 L.J. 49	440
Dowson, In Re 4 Mor 310	426
D Palay v T P Sen, 16 Pat LT 167 (F B) 1935 A I R (Pat) 211	20
Drabamoy v Davies, 14 Cal 323	634
Draupadi Bai v Govind Singh 65 Ind Cas 334	262, 523, 537
Dronadula v Ponakuratti 45 M L J 105 1923 M W N 306	
82 Ind Cas 805 (1923) A I R (M) 641	48, 538, 542, 549
Dropadi v Hiralal, 34 All 496 (F B) 10 A L J 3	5, 72, 738, 745, 748
Duce and Duce, (1889) 6 Morr 290	462
Dulal Chandra v Hiralal Mondal 42 C W N 965	463
Dulichand v Kalyan Singh 12 Lah 260	605
Duncan In Re, (1892) 1 Q B 879	638
Duni Chand v Jita Mal, 35 P L R 408 149 I C 127 1934 A I R (L) 535	501
Duni Chand v Jitaram 34 P L R 135 141 I C 260 1933 A I R (L) 181	414
Duni Chand v Muhammad Hossain, 40 Ind Cas 770 22 P R 1917 14 P W R 1917	685
Duraiyya Solagyan v Venkatarama Naicker, 60 Ind Cas 123 2 L W 535	541
Durga Das v Kundan Lal, 26 P L R 812 96 Ind Cas 4 (1926) A I R (L) 307	550
Durgaram v Harkishandas, 23 A L J 536 88 Ind Cas 440 (1925) A I R (All) 564	103
Durjai Singh v Kunj Lal, 75 Ind Cas 995 (1924) A L R (L) 553	542
Dutt Choudhuri, P N v J H Blades (1928) A I R (C) 843 48 C L J 550 115 I C 585	435
Dutton v Morrison (1810) 17 Ves 194	90, 94, 98
Dwarka Mohan v Lukhimony 14 Cal 384	264
Dwarkadass, In Re, 40 Bom 235 17 Bom L R 925	292
Dwarkadass Javher v David Sasson & Co, Ltd, 121 I C 865	110, 114
Dwarka Nath Mitter, In Re, 3 Cal 58	299
Dwarka Prasad v Sunder, 1935 A L J 484 155 I C 1037 1935 A I R (All) 546	40, 612
Dwijendra v Surendra, 32 C W N 525	614

E

E A B, Re, (1902) 1 K B 457	404
E V David v The Judge, Small Cause Court, Cawnpore 1931 A L J 670 133 I C 607 1931 A I R (All) 723	606, ,

East India Cigarette Mfg Co Ltd v Ananda Mohan Basak, 24 C W N 401	737
Easwara Aiyar v K Govindarajulu 39 Mad 689 31 IC 192	290, 346
Ebrahim Ahmed In Re, 32 Bom LR 1076 128 IC 24. 1930 AIR (B) 516	475
Ebrahim Kt " " " " " " 420	653
Edgcombe,	403
Edward v	339
Edwards v Hooper 11 M and W 363	473
Elrabeth May Toomey v Bhupendranath, 7 Pat 520	659
Elkuns In Re, 216 U S 125	322
Elliot, Ex parte, (1837) 2 Dea 179	743
Elliot, M W v Kopprupu, 26 L W 248 53 M L J 742 105 IC 138	368
Ellis, Re, 4 Mor 283	534, 735
Ellokasee Dasi v Durganaram 5 Cal 59	149
Elmslie v Corrie, (1879) 4 Q B D 295	277
Emerson, Ex parte, 41 L J (Bcy) 20 20 W R 110	465
" " " " (1891) 12 Ch D 35	299
(1880) 17 Ch D 122	632
Bom LR 731 1934 Cr	462
Empress v Ketabdi 7 Cal 107	711
Entazuddi v Ramkrishna, 24 C W N 1072	442
Ernest Clarence O'Brien In Re, 60 Cal 926 37 C W N 1050 1933 AIR (Cal) 701	628
Errikulappa v The Official Assignee of Madras, 39 Mad 903	317
Erskine Re, Ex parte, Erskine (1893) 10 T L R 32	505
Ethirajulu Chettiar v Official Receiver West Tanjore, 56 Mad 453 141 IC 817 1933 M W N 43	163
Eusoo Abdul Razak v Messrs Royal Stationary House, 1939 AIR (R) 58	200, 520
Evelin, Re, Ex parte General Public Works and Assets Co, (1894) 2 Q B 302	305, 428
	320

F

Fakir Chand v Motichand, 7 Bom 438	
Fanshawe, Re, (1905) 1 K B 170	187, 189, 267
Farnham, Re, (1895) 2 Ch 799	483
" " " " " " " " 134	18, 123, 556
	250
(Q) 124	305
Singh, 1938 AIR	
Fazalidin v Nathu Mal, 1934 AIR (L) 109	449
	428, 436

Fida Hussain v Collector of Shahjahanpur, 17 O C 267 251 C 708 1914 A I R (O) 222	208
Fiddian Re. Exr re, Fiddian (1892) 9 Morr 65	101
Field, Exr re, Re, Marlow, (1879) 13 Ch D 100n	88
Fridley, Exr (1881) 17 Ch D 334	661
Fink v Maharaj 25 Cal 642 26 Cal 772	502, 633
Firm Adarni v Firm Basind 89 I C 330 1926 A I R (S) 77	258
Firm Bajnath Rameshwar Lall v Atul Prasad Kumar, 168 1 C 140 1937 A I R (P) 134	100 219, 523, 529
Firm Bhuduemull Chand Prasad v Firm Haji Mohammad, etc 173 I C 988 1938 A I R (Pat) 65	491
Firm D N Chatterjee & Co v Rajkumar Mandal, 37 C W N 135	500
Firm Ghansyam Das Hanuman Prasad v Jainwain, 1934 All L R 389 1934 A I R (All) 444	518 618
Firm, Joysingh v Normal Dis 7 L L J 553 26 P L R 837 92 Ind Cas 235 (1926) A I R (L) 24	722
Firm Kanhya Lal v Seth Radha 112 P L R (1913) 92 P W R (1913) 18 I C 205	487
Firm, K P S P P L v C A P C Firm 7 Rang 126 117 1 C 582 (1929) A I R (R) 168	431, 562, 607
Firm Labhu Mal Banarasi Das v Mt Bibi 40 P L R 1057 1939 A I R (L) 39	675
Firm, Manak Chand Ralia Ram Junt v Lakhnu Das, 148 1 C 832 1934 A I R (Lah) 507	13, 94
Firm Meghraj v Firm of Birbhandar, 76 I C 250 (1924) A I R (Sind) 122	357
Firm Mela Mal Shib Dary v Thakar Das Sud 1934 A I R (Lah) 819	596
Firm Mela Ram Dipchand v Ghulam Dastgir 114 I C 709 1929 A I R (L) 159	571
Firm Moti Ram Prem Chand v Firm Kewal Ram 28 P L R 468 105 I C 506 9 L L J 550 (1928) A I R (L) 202	225
Firm Nanak Ram Matilal v Jugul Kishore Marwari 1935 A I R (P) 177	76
Firm Pannalall v Firm of Hira Nand, 8 Lah 593	295, 296 464
Firm Partap Singh v Firm Bhai Mewar, 107 I C 608 (1928) A I R (L) 258	290 346
Firm Prayag Shaha Saheb Ram v Dwijapada Roy, 55 C L J 94 1932 A I R (Cal) 623	429, 435
Firm R M M v Hla Bu 5 Rang 623	562
Firm S V A R S v Maung Pau 101 I C 589	393 450
Firm Tekchand v Official Assignee, 134 I C 1178 (1931) A I R (S) 164	507
Firm of Utma Mullick Vishen Das, In the matter of, 107 I C 442 (1928) A I R (S) 114	

East India Cigarette Mfg Co, Ltd v Ananda Mohan Basak, 24 C W N 401	737
Easwara Aiyar v K Govindarajulu 39 Mad 689 31 IC. 192	290, 346
Ebrahim Ahmed, In Re, 32 Bom LR 1076 128 IC 24 : 1930 A I R (B) 516	475
Ebrahim Khan v Rangaswami Naicker, 28 Mad 420	653
Edgcombe, Re Ex parte, Edgcombe, (1902) 2 K B 403	339
Edward v Ramdin, 14 C W N 170	473
Edwards v Hooper, 11 M and W 363	659
Elizabeth May Toomey v Bhupendranath, 7 Pat 520	322
Elkuns, In Re, 216 U S 125	743
Elliot, Ex parte, (1837) 2 Dea 179	368
Elliot, M W v Kopprupu, 26 L W 248 53 M L J 742 105 1 C 138	534, 735
Ellis, Re, 4 Mor 283	149
Ellokasee Dasi v Durpanaram, 5 Cal 59	277
Elmslie v Cortie, (1879) 4 Q B D 295	465
Emerson, Ex parte, 41 L J (Bey) 20 20 W R 110	299
Emmanuel, Ex parte, (1881) 17 Ch D 35	632
Emma Silver Mining Co v Grant, (1880) 17 Ch D 122	462
Emperor v Phirozshah Manekji 36 Bom LR 731 1934 Cr Cases (Bom) 1132	711
Empress v Ketabdi, 4 Cal 764	442
Entazuddi v Ramkrishna, 24 C W N 1072	628
Ernest Clarence O'Brien, In Re, 60 Cal 926 37 C W N 1050 1933 A I R (Cal) 701	317
Errikulappa v The Official Assignee of Madras, 39 Mad 903	505
Erskine, Re, Ex parte, Erskine, (1893) 10 T L R 32	163
Ethirajulu Chettiar v Official Receiver, West Tanjore, 56 Mad 453 141 IC 817 1933 M W N 43	200, 520
Euseof Abdul Razak v Messrs Royal Stationary House, 1939 A I R (R) 58	305, 428
Evelin, Re, Ex parte, General Public Works and Assets Co., (1894) 2 Q B 302	320

F

F. I. - C. - J. M. v. . . . m 438	187, 189, 267
.	483
.	18, 123, 556
.	250
.	305
(O) 122, Mananath Bux Singh, 1938 A I R	
Fazaludin v Nathu Mal, 1934 A I R (L) 109	449
	428, 436

Fida Hussain v Collector of Shahjahanpur, 17 O C 267 : 25 I C 708 1914 A I R (O) 222	298
Fidhan, Re Laxmi Fidhan (1892) 9 Morr 65	101
Field, Laporte & Co, Marlow, (1879) 13 Ch D 106 n	88
Findley, Exp (1881) 17 Ch D 334	661
Fink v Maharaj 25 Cal 642 26 Cal 772	502, 633
Firm Adampur v Firm Barid 89 I C 330 1926 A I R (S) 77	255
Firm Brijnath Rameshwar Lal v Atul Prasad Kumar, 168 I C 140 1937 A I R (P) 134	100 219 523, 529
Firm Bhuduemull Chand Prasad v Firm Haji Mohammad, etc 173 I C 988 1938 A I R (Pat) 65	491
Firm, D N Chatterjee & Co v Rajkumar Mandal, 37 C W N 135	500
Firm Ghansyam Das Hanuman Prasad v Jainarain, 1934 All L R 389 1934 A I R (All) 444	518, 618
Firm, Jyotsingh v Nirmal Das, 7 L L J 553 26 P L R 837 92 Ind Cas 235 (1926) A I R (L) 24	722
Firm Kanhyal Lal v Seth Radha 112 P L R (1913) 92 P W R (1913) 18 I C 205	487
Firm, K P S P P L v C A P C Firm 7 Rang 126 117 I C 582 (1929) A I R (R) 168	431, 562, 607
Firm Labhu Mal Banarasi Das v Mt Bibi 40 P L R 1057 1939 A I R (L) 39	675
Firm, Manak Chand Ralia Ram Jain v Lakhmi Das, 148 I C 832 1934 A I R (Lah) 507	13, 94
Firm Meghraj v Firm of Birbhandas, 76 I C 250 (1924) A I R (Sind) 122	357
Firm Mela Mal Shub Dyal v Thakar Das Sud, 1934 A I R (Lah) 819	596
Firm Mela Ram Dipchand v Ghulam Dastgir, 114 I C 709 1929 A I R (L) 159	571
Firm Moti Ram Prem Chand v Firm Kewal Ram 28 P L R 468 105 I C 506 9 L L J 550 (1928) A I R (L) 202	225
Firm Nanak Ram Matilal v Jugal Kishore Marwari, 1935 A I R (P) 177	76
Firm Pannalal v Firm of Hira Nand 8 Lah 593	295, 296 464
Firm Partap Singh v Firm Bhai Mewa, 107 I C 608 (1928) A I R (L) 258	290, 346
Firm Prayag Shaha Saheb Ram v Dwijapada Roy, 55 C L J 94 1932 A I R (Cal) 623	429, 435
Firm R M M v Hla Bu, 5 Rang 623	562
Firm S V A R S v Maung Pau 101 I C 589	393, 450
Firm Tekchand v Official Assignee, 134 I C 1178 (1931) A I R (S) 164	502
Firm of Utma Mullick Vishen Das, In the matter of 442 (1928) A I R (S) 114	712

Fisher, <i>Ex parte In Re Ash</i> (1872) L R 7 Ch App	636	93
Fisher v Boucher (1830) 10 B & C	705	103
Fitzgerald <i>In Re</i> 1916 H B R	157	255
Fleming Shah & Co, <i>In Re</i> , 23 I C	565	405
Fleming Shah & Co <i>In the Application of Messrs</i>	35 Ind	178
Cas 539		402, 404
Flew, <i>Re</i> (1905) 1 K B	278	410
Flint & Barnard, 22 Q B D	90	
Flower v The Mayor of Lyme Regis (1921) 1 K B	488	
Fool Kumari & Khurod Chandra 31 C W N	502	388, 409, 454
Cas 115 (1927) A I R (C)	474	102 Ind
Ford, <i>In Re</i> , (1900) 1 Q B	264	40, 46, 67, 731
Ford, <i>Re</i> , (1900) 2 Q B	211	498
Foster, <i>Ex parte</i> (1810) 7 Ves	414	509
Fowler & Padget, 7 T R	509	103
Fox v Hanbury Cowp	445	101
Frederick Peacock & Madan Gopal, 6 C W N	576 (F B)	659
Cal 428		28, 504
French, <i>Ex parte</i> , 52 L J Ch	48	340
Fresency & Wells (1867) 26 L J C P	129	298
Frost, <i>Re</i> , (1899) 2 Q B	50	672

G

G C Moses v A C Oakeshotr 30 C W N	518	95 I C
522 1926 A I R (C)	794	422, 428, 443
Gadi Bhikaji Dhanagar v Govindrao Bapuji, 169 I C	186	
1937 A I R (N)	127	236
Gadiji Mudapa v Parameshwara Bhat, 85 Ind Cas	303	
(1925) A I R (M)	242	177
Galbraith v Grim Shaw (1910) A C	508	11
Gallara N C		355 82, 736
Galstraun, J		303 502
Gandabhai		294
127 I C 190 1930 A I R (Bom)	217	568
		1937 A I R (L) 757
		8 Mys L J 331
		1939 A I R (All) 166
		53 (1929) A I R (L)
636		208, 735
Ganeshdas Panalal <i>In Re</i> , 32 Bom	198	695
Ganesh Lal & Sanchi Ram, 12 Pat	107	141 I C 223 1933
A I R (Pat)	43	230
Ganeshi Lal & Dwarkaram 27 P L R	734, 98 Ind Cas	900
(1927) A I R (L)	27	225
Ganeshnarain & Raja Pratap, 1 L R	1938 Bom	301
		19

TABLE OF CASES

Ixi

Page

Gangabishnu Singha v Khan and Khan & Co, 55 Cal 334 134 I C 534 1931 A I R (Cal) 505	693
Ganga Charan Shah v Toyebuddin Ahmed, 23 C W N 461	498, 506
Gangadas Seal v Percival, 97 Ind Cas 792 (1927) A I R (C) 32	232
Gangadhar v Kanai, 1 L R 50 (All) 606	367
Gangadhar v Kanhai, 26 A L J 425 109 I C 421 1928 A I R (A) 306	468
Gangadhar v Sridhar, 61, Ind Cas 589	40, 81, 729
Ganga Din Gur Pershad Firm v Jigmohan Singh, 1936 O W N 52 161 I C 266 1936 A I R (O) 236	227, 360, 464
Ganganath v Kunwar Zahim Singh, 1931 A L J 1089 135 I C 250 1932 A I R (All) 147	185
Ganga Pershad v Feda Ali, 48 Ind Cas 913	368
Ganga Persad In the matter of, 89 Ind Cas 959 (1926) A I R (O) 186	252
Ganga Prosad v Madhuri Sran, 25 A L J 331 100 Ind Cas 550 (1927) A I R (A) 352	438, 693, 697, 708
Ganga Ram v Amar Nath, 1937 A I R (L) 304	428
Gangaram v Official Receiver, Delhi 33 P L R 5 1932 A I R (L) 248	733, 735
Ganga Sahai v Mukarram Ali Khan, 24 A L J 441 97 Ind Cas 556 (1926) A I R (A) 361	398, 406 407, 488, 489, 496, 497, 664, 683
Gangashai v Shyam Sunder Lal, 7 O W N 475 1930 A I R (O) 266	362
Gangjee Premjee & Co v O L K K N Firm Colombo, 55 Mad 766 62 M L J 152 35 L W 544 1932 A I R (M) 352	147 149 746
Ganguli A T v E L Watson 53 C 929 44 C L J 350 98 I C 116 1927 A I R (C) 149	7 711
Ganoda v Buttokristo, 30 Cal 1040 10 C W N 857	461
Ganpat v Harigir, 1929 A I R (N) 11	250
Gantu Appa Reddi v Gantu China Appa Reddi 45 Mad 189 1921 M W N 816	247
Gardener, Ex parte, (1821) 1 Ves & B 45	102
Gaskell, Re, (1904) 2 K B 478	418
Gaura v Nawab Mohammad 64 Ind Cas 523	554
Geake v Ross 44 L J C P 315	488
Gee, G H v Shib Narain, 118 I C 332 (1929) A I R (Cal) 184	
Geisel, Ex parte (1882) 22 Ch D 436	
Genese, Re, (1886) 18 Q B D 168	
Ghanasham v Yoowarf 17 N L J 163 151 I C 500 1934 A I R (N) 231	

TABLE OF CASES

iv-1

	Page
Gobind Prasad Girdhar v. Kishan Lal, (1924) A I R (Pat) 166	154
Gobordhan Seal, In Re, 20 C W N 554	598
Gocharan Singha v. Rimbhallah, 17 P L T 671 163 I C 611 1936 A I R. (P) 357	613
Goculdas Jumnadas v. Sadasukter 52 M 57 114 I C 352 28 M L W 369 (1928) A I R (M) 1091	80
Godbole, G W, v. Maroti Bahera Bhaskar 1 L R 1937 (N) 408 169 I C 683 1937 A I R (N) 197	145
Gogineni Ankaya v. O R, Masulipatam, 1937 M W N 262 45 L W 771 171 I C 220 1937 A I R (M) 589 196, 198	
Gokul Singh v. Krishnan Lal, 35 P L R 114 1934 A I R (L) 198	436, 730
Gokul Chunder v. Radha Gobinda 44 C L J 108 97 Ind Cas 1124 (1926) A I R (C) 1210	358
Gokul Singh v. Shiv Ram 83 Ind Cas 558 (1925) A I R (L) 366	189
Golding In Re Experte Harper 27 Q B D 87	16
Gomti Prasad v. Central Nazir, Rai Barilic, 1936 O W N 960	45
Goolbai Petit In Re, Bank of India v. Phirozshah 57 Bom 665 35 Bom L R 546 145 I C 648 1933 A I R (B) 309	645
Good Exp., (1880) 14 Ch D 82	666
Gopal v Bank of Madras 16 Mad 397	100, 531
Gopal v Ramkrishna, 62 Ind Cas 289	550
Gopalaiyar v. Theruvengadan, 38 I C 481	509
Gopala Krishna Ayyar v. Official Receiver, South Malabar, 1930 M W N 837 1930 A I R (Mad) 998 128 I C 879	16 119, 475
Gopalakrishnayya v. Venkataswamy 1937 M W N 1160	670, 918
Gopal Balkrishna v. Bajirao 1 L R (1937) N 78 167 I C 833 1937 A I R (Nag) 117	576, 585
Gopal Das v. Official Receiver, Sialkot 132 I C 526 1931 A I R (L) 647	731
Gopaldas Aurora, Re, 30 C W N 173	106
Gopal Gunaji v. Balaji 122 I C 374 1930 A I R (N) 196	483
Gopal Karnani v. Suklal Karnani 31 C W N 22	337
Gopalkrishnayya v. Gopalan 27 M L W 430 (1928) A I R (M) 479	269, 271
Gopal Prosad v. Bhaneshwar, 108 I C 433	226
Gopal Ram v. Magni Ram, 7 Pat 375 (FB) 107 I C 830	247, 250 448, 449, 450 458, 733, 735
Gopal Rao v. Hiralal, 83 Ind Cas 246 (1925) A I R (N) 225	550, 551
Gopalu Pillai v. Kothandarama, 57 Mad 1082 1934 A I R (M) 529	408, 414, 415

Ghani Muhammad v Lala Dinanath Puri, 108 IC	602	
1928 AIR (L) 556		54, 67, 732
Ghansamdas v Bishundeen 5 SLR 259	15 Ind Cas	830 166
G. H. S. & Co., 93 Ind Cas	448	114
Manager Encumbered Estates		
IR (S) 123		212, 215, 216
474		741
Ghulam Dastgir v Mohan Lal	34 PLR 1063	53
Ghulam Haider v Durga Das	99 Ind Cas 7	225, 227
Ghulam Haider v Mangal Sen	98 Ind Cas 425 (1926)	
AIR (L) 235		139, 155, 294
Ghulam Husain v Rameshwar Das, 99 Ind Cas	524 (1927)	
AIR (L) 108		155, 225
Ghulam Muhammad v Panna Ram, 72 Ind Cas	433 (1924)	
AIR (L) 374		246, 329, 535
Ghulam Rasul v Kidar Nath, 150 IC 305	36 PLR 5	67, 731
1934 AIR (L) 807		214
Ghulam Sarwar v Guru Piara	1934 AIR (L) 113	
Ghulam Sharf v Lachhman Das, 148 IC 329	1934 AIR	726
(L) 36		376
Gill Re (1888) 5 Morr	272	262
Gill v Barron, LR 2 PC	157	2, 2, 340
Gillmore v Bulacktilal	19 PR 1900 (FB)	
Girdhari Lal v Jhaman Lal	25 ALJ 197 98 Ind Cas	650
1046 (1927) AIR (A) 203		
Girdhari Lal v Jugal Kishore	1932 AIR (Lah) 264 136	186
IC 733		550
Girdhari Lal v Saratkissen	138 PWR (1928) 667	451
Girija v Sheoraj	111 IC 903	310
Girikant Shrivastav Pandia v Vadilal, ILR 60 Bom	141	23
Girish v Anundo	15 Cal 66	
Girish Chandra Ghose v Kishori Mohan Das,	23 CWN	193
319		72 223,
Girwadhar v Joy Narain, 32 All 646 - {ALJ}	835	231, 236, 238
Gladstone Wyllie v Umesh Chatterjee, 25 WR	96	223
Goater, Ex parte	30 LT 620	101
Gobindhan Das v Jagat Narain	94 Ind Cas 506 (1926)	
AIR (Pat) 291		609
Gobinda v Abdul Kadir, 1923 AIR (N) 150		317
Gobinda v Gopal	9 NLR 182	52 622, 632
Gobind Das v Karan Singh, 40 All 197	43 Ind Cas	
672 16 ALJ 32		514, 622
Gobindlal Mahata, Re	39 CWN 275	17, 124, 133
Gobindo v Official Receiver	103 IC 381 1927 AIR	
(Mad) 897		539

TABLE OF CASES

188111

	Page
Grey & Ugramohan, 28 Cal 790	613
Grey, C & Lamond 17 C W N 578	626, 631, 632
Griffin, Ex parte, (1879) 12 Ch D 450	173
Gubbay Miller, In Re, 6 Cal 633 7 B L R 29	299
Gujar Shah & Barkat Ali Shah, 1 Lah 213 56 Ind Cas 744	700
Gulam Mustaffa Mullick & Madanlal, 34 C W N 1051 58 Cal 624	157, 722
Gulam & Piarally, 97 I C 797	636
Gulap Sing Ram Sing & Hukmatrai 1939 A I R (S) 45	734
Gulati & Hardy, 158 I C 371 1935 A I R (L) 148	216
Gummidelli Anantapadmanabhaswami & The Official Receiver of Secunderabad 56 Mad 405 (P C) 37 C W N 553	12, 602
Gunnis, G P, & Co & Mahomed Ayyub, 37 Mad 555 19 I C 19	149, 176
Gunsbourg In Re (1920) 2 K B 426	328, 545
Guntapalli & Marlapoti 41 Mad 440 42 I C 525	628
Guntura Pullayya & The Official Receiver of Kistna, 1932 M W N 821	543, 551
Gurbakash Singh & Sardar Singh, 16 L. 173 1935 A I R (L) 268	628, 629
Gurdit Singh & Chuni Lal 1932 A I R (Lah) 66	280
Gurmukh Dass Ranjamal & Hussomal Tharunmal, 1932 A I R (S) 71	752
Gurmukh Singh & Ram Ditta Mal, 112 I C 132	108, 109
Gustasp & Bhagvandas 55 Bom 649 134 I C 1161 1931 A I R (B) 554	365
Gyanendra Nath & Parash Nath 26 C W N 73	148

H

Habbib t Dutcher, 216 U S 102	742
Habib-ur Rahaman t Nurul Hasan Khan, 1937 O W N	
923 170 1 C 540 1937 A 1 R (O) 450	723
Hafez t Damodar, 18 Cal 242	502
Hagemeister H t U, Po Cho 12 Rang 625	530, 551
Hajee Al t t 6 Rang 352 111 1 C	
908	74
Haji Ab t atnulla Sahib, 1937	
M W N 279 170 1 C 851 1937 A 1 R (M) 727	467
Haji Anwar Khan v Mohammad Khan, 51 All 550 (F.B.)	
27 A L J 155 113 1 C 819 1929 A 1 R (All) 105 (F.B.)	46, 49, 554
Haji Jackeria t Selha, 12 Bom L R 27	683
Haji Umar v Jwala Prasad, 79 Ind Cas 662 1924 A 1 R	
(N) 300	295, 334

Gopewar & Jibanchandra, 41 Cal 1125	18 C W N 804	19	8
CLJ 549			
Gopikabai & Chapsi Purshottam, 59 B 161	36 Bom L R		
1236 1935 A I R (Bom) 80		41, 142, 220	
Gopinath & Guru Prashad, 15 Ind Cas 860		322, 482, 484	
Gopinath Chaudhuri & Binodilal Rai Chaudhuri 31 Cal			203
162			
Gopiram Bhotika & Bitaj Mohan (1929) A I R (C) 576		421, 435	
Gopuchina Jogayya & Manepalli Bapanayya, (1939) 1 M L J			621
88			
Gordon Re Exparte Official Receiver, (1889) 6 Morr 115			321
Gordon, Re, (1897) 2 Q B 516			509
Gori Shankar & Official Receiver, Delhi, 13 Lah 464	33		
Punj L R 314 1932 A I R (Lah) 151			269
Goswami Giridhari & Govardhanlalji, 18 Bom 294 (P C)			673
Goswami Shri & Shri Govardhan 14 Bom 541			162
Gouranga Behari Basak & Manindra Nath Das Gupta, 58			
CLJ 222 37 C W N 475 145 1 C 826 1933 A I R			
(C) 625		29, 478, 510	
Gour Charan Ganga Charan Shah & Toyebuddin Ahamed,			
23 C W N 461		498, 506	
Gouri Datt & Shanker Lal 14 All 358			290
Gouri Shanker & De Cruze 92 Ind Cas 673 3 O W N			
378 1927 A I R (O) 22			316
Government Pleader & D Narain, 52 Bom 559			715
Governor of Bengal & Motilal Ghosh, 41 Cal 173 18 CLJ			
452 17 C W N 1253			614
Govind & Sonba, 121 1 C 663		408, 543	
Govind Das Pity & Jardine Skinner & Co., 27 C W N 908			
80 1 C 849 1924 A I R (Cal) 176			417
Govind Ram Lala & Kunj Behari Lal, 46 All 398 (F B) 22			
A L J 217 83 1 C 403 (1924) A I R (All) 341		2, 283	
Govinda & Abdul Kadir, (1923) A I R (N) 150		276, 482, 607	
Govinda Chandra & Hari Churn, 94 Ind Cas 332 (1926)			
A I R (C) 826			688
Govindasami Pillai & Ramaveerapandian Servai 1926 M			
W N 739 24 L W 387 97 Ind Cas 765 (1926)			
A I R (M) 1145			337
G... ..	7 L W 486		356
			260
			124
			259
Great Eastern Railway Company & Turner, (1872) L R 8 Ch			
149			302
Greaves C, Re, W H Greaves, Exparte Official Receiver,			
(1904) 2 K B 493			180, 181
Greender Chander & Mackintosh, 4 Cal 897			26

	Page.
Grey v Ugramohan, 28 Cal 790	613
Grey, C v Lamond 17 C W N 578	626, 631, 632
Griffin, Ex parte, (1879) 12 Ch D 480	173
Gubbay Miller, In Re, 6 Cal 633 7 B L R 29	299
Gujar Shah v Barkat Ali Shah, 1 Lah 213 56 Ind Cas 744	700
Gulam Mustaffa Mullick v Madanlal, 34 C W N 1051 58 Cal 624	157, 722
Gulam v Piarally, 97 I C 797	636
Gulap Sing Ram Sing v Hukmatrai, 1939 A I R (S) 45	734
Gulati v Hardy, 158 I C 371 1935 A I R (L) 148	216
Gummidelli Anantapadmanabhaswami v The Official Receiver of Secunderabad, 56 Mad 405 (P C) 37 C W N 553	12, 602
Gunnis, G P, & Co v Mahomed Ayyub, 37 Mad 555 19 I C 19	149, 176
Gunsbourg In Re (1920) 2 K B 426	328, 545
Guntapalli v Marlapoti 41 Mad 440 42 I C 525	628
Guntura Pullayya v The Official Receiver of Kistna, 1932 M W N 821	543, 551
Gurbakash Singh v Sardar Singh, 16 L 173 1935 A I R (L) 268	628, 629
Gurdit Singh v Chuni Lal, 1932 A I R (Lah) 66	280
Gurmukh Dass Ranjamal v Hussomal Tharunmal, 1932 A I R (S) 71	752
Gurmukh Singh v Ram Ditta Mal, 112 I C 132	108, 109
Gustasp v Bhagvandas 55 Bom 649 134 I C 1161 1931 A I R (B) 554	365
Gyanendra Nath v Paresh Nath, 26 C W N 73	148

H

Habbit v Dutcher, 216 U S 102	742
Habib-ur Rahaman v Nurul Hasan Khan, 1937 O W N 923 170 I C 540 1937 A I R (O) 450	723
Hafez v Damodar, 18 Cal 242	502
Hagemester H v U Po Cho, 12 Rang 625	530, 551
Hajee Ally Mohamed v M M Bham, 6 Rang 352 111 I C 908 (1928) A I R (R) 241	74
Haji Abdul Kuthus Sahib v Inavatnulla Sahib, 1937 M W N 279 170 I C 851 1937 A I R (M) 727	467
Haji Anwar Khan v Mohammad Khan 51 All 550 (F B) 27 A L J 155 113 I C 819 1929 A I R (All) 105 (F B)	46, 49, 554
Haji Jackeria v Selha, 12 Bom L R 27	627
Haji Umar v Jwala Prasad, 79 Ind Cas 662 1924 A I R (N) 300	295,

Gopewar v Jibanchandra	41 Cal 1125	18 C W N 804	19	8
CLJ 549				
Gopikabai v Chapasi Purshottam,	59 B 161	36 Bom L R		
1236	1935 A I R (Bom) 80		41, 142, 220	
Gopinath v Guru Prashad,	15 Ind Cas 860		322 482, 484	
Gopinath Chaudhuri v Binodilal Rai Chaudhuri	31 Cal			203
162				
Gopiram Bhotika v Biraj Mohan	(1929) A I R (C) 576			421, 435
Gopuchina Jogayya v Manepalli Bapanayya,	(1939) 1 M L J			621
88				
Gordon Re Ex parte Official Receiver	(1889) 6 Morr 115			321
Gordon, Re	(1897) 2 Q B 516			509
Gori Shankar v Official Receiver, Delhi,	13 Lah 464	33		
Punj L R 314	1932 A I R (Lah) 151			269
Goswami Giridhari v Govardhanlalji	18 Bom 294	(P C)		673
Goswami Shri v Shri Govardhan,	14 Bom 541			162
Gouranga Behari Basak v Manindra Nath Das Gupta	58			
CLJ 222	37 C W N 475	145 I C 826	1933 A I R	
(C) 625			29 478	510
Gour Charan Ganga Charan Shah v Toyebuddin Ahamed,				
23 C W N 461				498, 506
Gouri Datt v Shanker Lal	14 All 358			290
Gouri Shanker v De Cruze	92 Ind Cas 673	3 O W N		
378	1927 A I R (O) 22			316
Government Pleader v D Narain,	52 Bom 559			715
Governor of Bengal v Motilal Ghosh	41 Cal 173	18 C L J		
452	17 C W N 1253			614
Govind v Sonba	121 I C 663			408, 543
Govind Das Pity v Jardine Skinner & Co,	27 C W N 908			
80 I C 849	1924 A I R (Cal) 176			417
Govind Ram Lala v Kunj Behari Lal	46 All 398	(F B) 22		
ALJ 217	83 I C 403	(1924) A I R (All) 341		2, 283
Govinda v Abdul Kadir,	(1923) A I R (N) 150		276, 482	607
Govinda Chandra v Hari Churn,	94 Ind Cas 332	(1926)		
A I R (C) 826				688
Govindasami Pillai v Ramaveerapandian Servai	1926 M			
W N 739	24 L W 387	97 Ind Cas 765	(1926)	
A I R (M) 1145				337
		9 L W 486		356
				260
				124
				259
Great Eastern Railway Company v Turner,	(1872) L R 8 Ch			
149				302
Greaves C. Re, W H Greaves, Ex parte Official Receiver,	(1904) 2 K B 493			
Greender Chander v Mackintosh,	4 Cal 897			180, 181
				26

	Page
Grey v Ugrimohan, 28 Cal	790 613
Grey, C v Lamond, 17 C W N	578 626, 631, 632
Griffin, Ex parte, (1879) 12 Ch D	450 173
Gubbay Miller, In Re, 6 Cal	633 7 B L R 29 299
Gujar Shah v Barkat Ali Shah, 1 Lah	213 56 Ind Cas 700
744	
Gulam Mustaffa Mullick v Madanlal, 34 C W N	1051 58 157, 722
Cal 624	
Gulam v Piarally, 97 I C	797 636
Gulap Sing Ram Sing v Hukmatrai, 1939 A I R (S)	45 734
Gulati v Hardy, 158 I C	371 1935 A I R (L) 148 216
Gummidelli Anantapadmanabhaswami v The Official Receiver of Secunderabad, 56 Mad	405 (P C) 37 C W N 553 12, 602
Gunnis, G P. & Co v Mahomed Ayyub, 37 Mad	555 19 149, 176
I C 19	
Gunsbourg In Re (1920) 2 K B	426 328, 545
Guntapalli v Marlapoti, 41 Mad	440 42 I C 525 628
Guntura Pullayya v The Official Receiver of Kistna, 1932 M W N	821 543, 551
Gurbakash Singh v Sardar Singh 16 L	173 1935 A I R (L) 628, 629
268	
Gurdit Singh v Chuni Lal, 1932 A I R (Lah)	66 280
Gurmukh Dass Ranjamal v Hussomal Tharunmal, 1932 A I R (S)	71 752
Gurmukh Singh v Ram Ditta Mal, 112 I C	132 108, 109
Gustasp v Bhagvandas, 55 Bom	649 134 I C 1161 1931 365
A I R (B) 554	
Gyanendra Nath v Patesh Nath 26 C W N	73 148

H

Habbit v Dutcher, 216 U S	102 742
Habib-ur Rahaman v Nurul Hasan Khan, 1937 O W N	923 170 I C 540 1937 A I R (O) 450 723
Hafez v Damodar, 18 Cal	242 502
Hagemeister H v U Po Cho, 12 Rang	625 530, 551
Hajee Ally Mohamed v M M Bham, 6 Rang	352 111 I C 74
908 (1928) A I R (R) 241	
Haji Abdul Kuthus Sahib	" " " " 467
M W N 279 170 I C	851
Haji Anwar Khan v Moham	27 A L J 155 113 I C 819
	46, 49, 55
Haji Jackeria v Selha, 12 Bom L R.	27
Haji Umar v Jwala Prasad, 79 Ind Cas	662 1924 A I R (N) 300 295,

Hakim Lal Lala & Mushahar Sahu, 34 Cal 999	11 C W N	561, 562
889 6 C L J 410		
Hakim Syed Muhammad Taki & Fateh Bahadur Singh, 9		285
Pat 372		
Halfhide & Halfhide, 50 Cal 867		216, 339, 464
Halima, Musummut & Mathura Das 10 S L R 179	40 1 C	686
122		
Hall, Ex parte, (1882) 19 Ch D 580		575
Hall, Ex parte, Re Whitting (1870) 10 Ch D 615		305
Hall, In Re, (1907) 1 K B 875		667
Hallet's Estate In Re Knatchbull & Hallet (1879) 13 Ch D		27, 656
696		
Hamid P M & P K Mohamed Sheriff I L R 13 R 623		343, 347
Hamida Rahaman & Jamila Khatun 34 C L J 123		610
H. 222 & H. 223 (1881) 20 C B D 723		527, 533
		375
	1939 A I R (M)	361
Hansheshur & Rakhal, 18 C W N 366	18 C L J 359	615, 680, 683, 688, 725
		143
Hanson, Re, Ex parte Frester, (1887) 4 Morr 98		
Hans Raj Khanna & Ramditta Mal, 143 1 C 755	1933	659
A I R (L) 639		
Hanuman Prasad & Harakh Narain 42 All 142	58 Ind	313
Cas 551		
Haramohun & Mohandas, 39 C L J 433	(1924) A I R	601, 622
(Cal) 849		
Haran Chandra & Joychand 57 Cal 122	1929 A I R (C)	28, 504, 505, 519, 521
524		
Harapriya Debya & Shama Charan Sen, 16 Cal 592		322 355, 357, 465, 482, 492
Harbans Lal & Bute Khan, 34 P L R, 987	1933 A I R	86
(Lah) 725		
Harchand Rai & Khairuddin, 38 P L R 1160	1936 A I R	706, 709
(L) 871		
Hardyan Dass, Firm & Jagannath, 15 Pat L T 461	152	109, 574
1 C 655 1934 A I R 10 15 222		
Hardt	R 1888	190
Hari	414 24 A L J 495	94
In	170	45, 49, 554
Hari	327	502
Hari Charan Ghosh Sadhukhan & Dinesh Chandra Roy		
Chowdhury, C R No 1363 of 1934		697
Haridas & Lallubhas, 55 Bom 110	32 Bom L R 1362	129
1 C 153 1931 A I R (B) 50		7, 20 269, 676
Haridas Acharjia & Baroda Kishore Acharjia, 27 Cal 38		
4 C W N 87		17

TABLE OF CASES

Lxxv

Page

Haridas Kundu v J C McGregor, 18 Cal 477	634
Harihar v Moheshwar, 18 C W N 692	707
Harihar Binerji v Ramchoshu Rai 23 C W N 77 29 C L J 117	193
Hari Lal Mullick, In the matter of, 33 Cal 1269 10 C W N 884	490
Haripada v Anath De, 22 C W N 758 44 I C 211	29
Hari Pada Maitra v Emperor 169 I C 101 1937 A I R (C) 234	699
Hari Ram, Maharaja v Sri Krishna Ram, 49 All 201 52 A L J 152 100 Ind Cas 320 (1927) A I R (A) 418	290, 345, 450
Hari Rao v Official Assignee Madras 1926 M W N 364	690
Harish Chandra v The East Indian Coal Co Ltd, 16 C W N 733	157
Har Kishan Das v Purshotamanand 151 I C 952 1934 A I R (A) 793	637
Har Kishan Lal v Peoples Bank of Northern India, 14 Lah 117 86, 110, 143, 174, 196	
Harkishan Lal v Official Liquidator, Peoples' Bank of Northern India 1 L R 17 L 582 160 I C 972 1936 A I R (Lah) 608	80
Harkishore v Masum Ali Khan, 6 O W N 1093 (1930) A I R (O) 53	341, 740
Harmuk Roy Munnoo Lall v Radha Mohan, 54 I C 931	267
Harmusji Ardeshir, In Re 17 Bom L R 313	434 441
Harnam v Ganpat 73 I C 367	59, 685
Harnam Chander v Rupchand 54 All, 532 1932 A L J 361 1932 A I R (All) 382	295, 723
Harnam Das v Faiyazi Begum, 20 A L J 172	314
Harnam Singh v Gopal Das 109 I C 370	226, 578
Haro Prita v Shama Charan 16 Cal 592	322, 355, 357, 465
Har Pershad v Dargahi Lal, 1932 A I R (O) 61	698, 720
Har Proceed v Ram S. v. 82 Ind C. 340	473
Harris	96
Harrod	545
Harry Pope v Official Assignee, Rangoon, 60 I A 362 12 R 105	563
Hart Re (1912) 2 K B 6	545, 547
Hart v Taraprasunno Mukherjee, 11 Cal 718	105
Harya v Mulchand, 64 P R 1907 89 P W R 1908	356
Hasan Din v Kripa Ram, (1928) A I R (L) 374 109 I C 86	127, 172
Hashim Khan v Koya Moideen Kaka, 145 I C 835 1933 A I R (R) 268	275, 5,
Hasluk v Clark, (1899) 1 Q B 699	
Hasmat Bibi v Bhagwan Das, 36 All 65	72, 202,

Hakim Lal Lala & Mushahar Sahu, 34 Cal 999	11 C W N	
889 6 C L J 410		561, 562
Hakim Syed Muhammad Taki & Fateh Bahadur Singh, 9		
Pat 372		285
Halfhide & Halfhide, 50 Cal 867		216, 339, 464
Halima, Musummut & Mathura Das 10 S L R 179	40 I C	
122		686
Hall, Exparte, (1882) 19 Ch D 580		575
Hall, Exparte, Re Whitting (1870) 10 Ch D. 615		305
Hall In Re, (1907) 1 K B 875		667
Hallet's Estate In Re Knatchbull & Hallet (1879) 13 Ch D		
696		27, 656
Hamd P M & D K Mahomed & S L R 623	13 R	343, 347
F	123	610
F		527, 533
F		375
Hanibabeebt Ammal & Syed Munurdeen 1939 A I R (M)		
183		361
Hansheshur & Rakhal, 18 C W N 366	18 C L J 359	
		615, 680, 683, 688, 725
Hanson, Re Exparte Frester, (1887) 4 Morr 98		143
Hans Raj Khanna & Ramdutta Mal 143 I C 755	1933	
A I R (L) 639		659
Hanuman Prasad & Harakh Narain 42 All 142	58 Ind	
Cas 551		313
Haramohun & Mohandas, 39 C L J 433	(1924) A I R	
(Cal) 849		601, 622
Haran Chandra & Joychand 57 Cal 122	1929 A I R (C)	
524		28 504, 505, 519, 521
Harapriya Debya & Shama Charan Sen 16 Cal 592		
		322, 355, 357, 465, 482, 492
Harbans Lal & Bute Khan, 34 P L R 987	1933 A I R	
(Lah) 725		86
Harchand Rai & Khairuddin, 38 P L R 1160	1936 A I R	
(L) 871		706, 709
Hardayan Dass, Firm & Jagarnath, 15 Pat L T 461	152	
1 C 655 1934 A I R (Pat) 526		109, 574
Hardhar		38
Hari Ch		190
Ind C		A I J 495 94
Hari Ch		45, 49, 554
Hari Ch		502
Chandra Roy		
		697
		10 32 Bom L R 1362 129
		7, 20, 269, 676
Kishore Acharja 27 Cal 38		
4 C W N 87		

TABLE OF CASES

Lxxx

Page

Haridas Kundu v J C McGregor, 18 Cal 477	634
Harihar v Moheshwar 18 C W N 692	707
Harihar Binert v Ramchoshi Rai 23 C W N 77 29 C L J 117	193
Hari Lal Mullick In the matter of 33 Cal 1269 10 C W N 854	490
Haripada v Anath De 22 C W N 758 44 I C 211	29
Hari Pada Maistri v Emperor 169 I C 101 1937 A I R (C) 234	699
Hari Ram, Maharaja v Sri Krishna Ram, 49 All 201 52 A L J 152 100 Ind Cas 320 (1927) A I R (A) 418	290, 345, 450
Hari Rao v Official Assignee Madras 1926 M W N 364	690
Harish Chandra v The East Indian Coal Co Ltd, 16 C W N 733	157
Har Kishan Das v Purshotamanand 151 I C 952 1934 A I R (A) 793	637
Har Kishan Lal v Peoples Bank of Northern India, 14 Lah 117 86, 110, 143, 174, 196	
Harkishan Lal v Official Liquidator, Peoples' Bank of Northern India 1 L R 17 L 582 160 I C 972 1936 A I R (Lah) 603	80
Harkishore v Masum Ali Khan 6 O W N 1093 (1930) A I R (O) 53	341, 740
Harmuk Roy Munnoo Lal v Radha Mohan, 54 I C 931	267
Harmusji Ardeshir, In Re 17 Bom L R 313	434, 441
Harnam v Ganpat 73 I C 367	59, 685
Harnam Chander v Rupchand 54 All, 532 1932 A L J 361 1932 A I R (All) 352	295, 723
Harnam Das v Faisazi Begum, 20 A L J 172	314
Harnam Singh v Gopal Das, 109 I C 370	226, 578
Haro Pria v Shama Charan, 16 Cal 592	322, 355, 357, 465
Har Pershad v Dargahi Lal, 1932 A I R (O) 61	698, 720
Har Prasad v Ram Swarup, 82 Ind. Cas 340	473
Harris v Rickett, (1859) 28 L J Q B 197	96
Harrods Ltd v Stanton, (1923) 1 K B 516	545
Harry Pope v Official Assignee, Rangoon, 60 L A. 362 12 R. 105	563
Hart, Re, (1912) 2 K. B. 6	545, 547
Hart v Taraprasunno Mukherjee, 11 Cal. 718	105
Harya v Mulchand, 64 P. R. 1907 89 P W R. 1903	356
Hasan Din v Kripa Ram (1928) A I R (L) 374 109 L C. 86	127, 172
Hashim Khan v Koya Moudien Kala, 145 L C. 835 1933 A I R. (R) 268	275, 374
Hasluk v Clark, (1899) 1 Q B. 699	325
Hasmat Bibi v Bhagwan Das, 36 All 65	72, 203, 204

	Page
Hassanbhoy v Cowasji, 7 Bom 1	614
Haveli Ram v The Zemindar Bank, 117 I C 373	346
Haveli Shah v Mt Hussaina Jan, 1938 A I R (L) 217	468
Haveli Shah v Mt Zorah Jan, 32 P L R 698 133 I C 876 1932 A I R (L) 84	479, 680
Hawke, Re, (1885) 16 Q B D 503	63
Hawkins, Re, Ex parte Hawkins (1894) I Q B 25	215
Hawkins v Duche, 37 T L R 748	340
Hayat Muhammad v Bhawan Das, 26 P L R 397 90 Ind Cas 1037 (1926) A I R (L) 146	542, 543
Hayword, Ex parte, (1870) L R 6 Ch App 546	17
Heap, Re Ex parte Bord of Trade, 4 Morr 314	422, 439
Heather & Son v Walsh (1876) 1 CP D 1	418, 465
	120, 135, 163
	Mulji 25 S L R 422 1932
A I R (Sind) 39	69 124, 132, 466, 660, 757
Hem Chandra v Uma, 103 I C 695 1927 A I R (C) 659	687
Hemming, Ex parte, (1879) 13 Ch D 163	462
Hemraj v Krishanlal 10 L 106 (FB) 29 P L R 446 (FB) 111 I C 8 (1928) A I R (L) 361	330, 535
Hemraj v Ramkrishna, (1917) 2 P L J 101	247, 542, 550, 578, 586, 590
Henely & Co, In Re, (1878) L R 9 Ch D 469	651
Henry Langtry, In Re, (1894) I Manson 169	457
Henry Robert Smith, Re, Application by, 9 S L R 132 32 Ind Cas 575	444
Herbert v Sayer, (1843) 5 Q B 965	309
Hester, In Re, Ex parte Hester, (1889) 22 Q B D 632	6 372, 377
Hibbins and Deal Re (1860) 1 Q B 325	352
	581
	120
	Marwari, 46 C 962 24
C W N 200	315
Hinga Lal v Jawahir Prashad, 114 I C 126	281
Hira Lal Mandal v Sanker Lal Mandal I L R (1936) 2 Cal 250	278
Hiralal Mandal, Re, Ex parte Sm Lilabati Dassee, 40 C W N 1031	565, 574, 591
Hiralal Ramsukh v Mangibai Chimanji, I L R (1938) Bom 743	81
Hiralal Shrinarain, In Re, 97 Ind Cas 446 (1927) A I R (S) 18	109, 123
Hira Lal v Tulsi Ram, 80 Ind Cas 946 (1925) A I R (N) 77	215, 287, 289, 345, 352, 368
Hira Nand Mulchand v Official Receiver, 100 I C 791	668, 671
Hirst, Ex parte, Re Wherly, (1879) 11 Ch D 278	320
Hit Narayan Singh v Brij Nandan Singh, 10 Pat 422 1931 A I R (Pat) 357	290, 346, 751

	Page
Hla Gyaw U v K Tun Kyaw, 1937 A I R (R) 369	50, 57
Hodgkin, Ex parte, In Re Softley, (1875) 20 Eq 746	572
Holderness v Shackless 8 B & C 612	658
Holland, In Re, (1920) 2 Ch 360	596
Hollinshead, Re, 6 Mor 66	87
Holroyd v Writchead 3 Camp 530	101
Holthausen, Ex parte, In Re Schibler, (1875) 9 Ch 722	11
Honda Ram v Chiman Lal, 100 Ind Cas 112	289, 756
Hook v The Administrator General of Bengal, 48 I A 187	58, 557
48 Cal 499	434, 441
Hormusji Ardeshtir, In Re, 17 Bom L R 313	299
Horn v Baker, (1808) 2 Smith's Leading Cases, 11th Ed 232	113
Horukhand Golicha, In Re, 5 Cal 605 6 C L R 282	161
Howard Bros, In Re, 11 B L R 254	267
Howatson v Durrant, 27 Cal 351 4 C W N 610	91
Howley, Re, 4 Mans 41	539, 553
Hriday Krishna Adya v Osmanali Mandal, 58 Cal 1352	305
1932 A I R (Cal) 151 136 I C 143	618
Hubert v Sayer, (1844) 5 Q B 965	425
Hudson v J P Morgan, 13 C W N 654 9 C L J 563	87
U v v Estelle U v v v In Re 22 Q B D 277	38, 59, 64, 685
All 353	141
9 Ind Cas 666 (1927)	634
Hunseswar v Rakhal, 18 C W N 366	326, 603, 615
Hunt, In Re, 1 B H C R 251	634
Hunter, H, v Rani Kaniz Abid, 1935 O W N 610 42 L W	
146 1939 M W N 669 68 M L J 644 40 C W N 33	
61 C I J 274 37 Bom L R 874 1935 A L J 785 155	
I C 426 1933 A I R (P C) 104	484
Hurmukh Roy v Radha Mohon, 54 Ind Cas 931	267
Husaini v Muhammad Zamir Abedi, 74 Ind Cas 802 1924	
A I R (O) 294	529, 628, 683
Hutton, Re, (1872) 7 Ch App 723	397

I

Ichasankar v Banamal Gulzarimal, 144 I C 678 1933 A I R	
(S) 185	64
Ijaz Hussain v Lachman Das, 75 Ind Cas 790 (1921) A I R	
(O) 351	366
Imambundi v Mutsuddi, 45 I A 73 45 Cal 878 (P C)	6
Imamdin v Rupa Jhangt Atma Ram, 1930 A I R (Lah) 21	
(Notes)	229, 246
Imbiohi v. Achampat, 33 M L J 58 . 39 I C 867	23

	Page
117 I C 373	614
938 A I R (L) 217	346
PLR 698 133 I C 876	468
	479, 680
	63
94) 1 Q B 25	215
	340
Hayat Muhammad & Bhawani Das, 26 P L R 397 90 Ind	
Cas 1037 (1926) A I R (L) 146	542, 543
Hayword, Ex parte, (1870) L R 6 Ch App 546	17
Heap, Re, Ex parte Bord of Trade 4 Morr 314	422, 439
Heather & Son v Webb (1876) 2 C P D 1	418, 465
Hecquard Re, (1889) 24 Q B D 71	120, 135, 163
Heerji Jivraj v Firm of Valabram Mulji, 25 S L R 422 1932	
A I R (L) 20	69, 124, 132, 466, 660, 757
	695 1927 A I R (C) 659
	687
D 163	462
(F B) 29 P L R 446 (F B)	
	330, 535
Hemraj v Ramkrishna, (1917) 2 P L J 101	
	247, 542, 550, 578, 586, 590
Henely & Co, In Re, (1878) L R 9 Ch D 469	651
Henry Langtry, In Re, (1894) 1 Manson 169	457
Henry Robert Smith Re, Application by, 9 S L R 132 32	
Ind Cas 575	444
Herbert v Sayer, (1843) 5 Q B 965	309
Hester, In Re, Ex parte Hester, (1889) 22 Q B D 632	6, 372, 377
	352
1 Q B 325	581
95	120
un Marwari, 46 C 962 24	
	315
Hinga Lal v Jawahir Prashad 114 I C 126	281
Hira Lal Mandal & Sanker Lal Mandal, 1 L R (1938) 2 Cal	
250	278
Hiralal Mandal, Re, Ex parte Sm Lilabati Dassee, 40 C W N	
1031	565, 574, 591
Hiralal Ramsukh & Mangubat Chumanji, 1 L R (1938) Bom 743	81
Hiralal Shivnarain In Re, 97 Ind Cas 446 (1927) A I R	
(S) 18	109, 123
Hira Lal & Tuls Ram, 80 Ind Cas 946 (1925) A I R (N)	
77	215, 287, 289, 345, 352, 368
Hira Nand Mulchand & Official Receiver, 100 I C 791	668, 671
Hirst, Ex parte, Re Wherly, (1879) 11 Ch D 278	320
Hit Narayan Singh & Brij Nandan Singh, 10 Pat 422 1931	
A I R (Pat) 357	290, 346, 751

	Page
Imperial Bank of India v Avinasi Chettiar, 53 Mad 826 128 I C 518 1930 A I R (Mad) 874	142
Inamullah Khan v Lala Sambhu Dayal 1931 A I R (All) 159	227
Indian Bank Ltd Madras v Seth Bansiram 39 L W 624 1934 A I R (M) 411	637
Indian Specie Bank v Nagin Das Hurjiwan Das 18 Bom L R 689 35 Ind Cas 628	140
Indubala Dassi Sm v Bakkeswar Banerjee, I L R (1937) 2 Cal 675 41 C W N 1079 66 C L J 315 1937 A I R (C) 517	270, 726 89
Ingliss v Grant, 5 T R 530	
Irshad Hussain v Gopi Nath 41 All 378 17 A L J 374 49 Ind Cas 590	60, 492, 685 743
Isaac Shrager, In Re 33 Cal 1062	
Isamoodin v Ajmoodin 38 Bom L R 225	31, 525
Ishar Das v Must Fatima Bibi 15 Lah 698 1934 A I R (Lah) 468	72, 187
Ishar Das v The Official Receiver 1930 A I R (Lah) 135	525
Ishar Das v The Official Receiver 21 Bom 681	510
	Cas 824 525, 589, 724
	630 701 723
	Ch App 271 96

J

Jackeria Haji v Selha 12 Bom L R 27	683
Jackson, Ex parte, (1842) 3 Mont D & D 1	672
Jackson Ex parte, 20 W R 1023	361
Jada Ram v Faizullah Khan 1934 A I R (Peshawar) 30	536
Jadu Nath Halder v Manindra Nath Chandra 27 C W N 816	16 564
Jafri Begum v Amir Muhammad, 42 Cal 72 (P C)	26
Jagabhai Lall v 37	267
Jagannadha v	543 587
Jagannath v 17 A L J 565	224, 238
Jagannath v	541
Jagannath v	220
Jagannath v	315
. 41 C L J 290 29	
. A I R (C) 785	324
. (N) 73	459
Jagannath Sahu v Beni Prasad, 12 Pat 866 1934 A I R (Pat) 97	
Jagat Chandra Roy v Issur Chandra Roy, 20 Cal 693	230
Jagat Tarini v Nabogopal, 34 Cal 305 5 C L J 270	264 633

Jagdish Narain v Mt Ramsakal Kuer, 8 Pat 478	114	1 C
465 9 Pat L J 969 (1929) A I R (Pat) 97	309, 310,	317
Jagendra Nath Kundu v Yojneshwar Mondal, 1 L R 63 Crl		
176 39 C W N 1289 62 C L J 79 158 1 C 436 1935		
A I R (C) 612		292
Jagjwan Keshowji In the matter of, 152 1 C 878 1934		
A I R (S) 158		646
Jagmohan Narain v Girish Babu, 42 All 515 18 A L J		
611 58 Ind Cas 557	123, 134,	374
Jagmohan Singh v Deputy Commissioner, Fyzabad 80 Ind		
Cas 54		435
Jagrup Sahoo v Ramanand, 39 All 633 15 A L J 738 40		
1 C 373	610,	644
Jahanwar Sultan v Safdar Ali 142 1 C 97 1933 A I R		
(Pesh) 46		555
Jai Kishan Das v Chiragh Din, 1935 A I R (Lah) 60	45, 72	
Jainab Bibi v Hyder Ally, 43 Mad 609		541
Jaising Bir Singh v Official Receiver, 11 Rang 287 145 1 C		
320	391, 451, 454, 456,	561
Jalaun District Co operative Bank v Official Receiver,		
Jhansi, 1935 A I R (All) 279 1935 A L J 170	304,	314
Jamaldin v Bishambhar Dial 109 1 C 578 1929 A I R (L)		
72	106, 129,	143
James, Ex parte, 8 Morr 19		428
James In Re, (1884) 12 Q B D 332		124
James Finlay & Co v Amanmal 118 1 C 198 1930 A I R		
(S) 2	701,	724
James Young & Ors v Bank of Bengal 1 M I A 87		475
Jam Khan v Debi Dutt 11 P W R 1915 152 P L R 1915		
29 Ind Cas 888		373
Jamnadas Vishandas In Re, 1935 A I R (S) 57	484, 666,	668
Jamshedji v Pestonji 34 Bom L R 980	293, 362 366,	466
Jamuna Devi Mt v Official Receiver, Campbellpore, 38		
P L R 67 163 1 C 956 1936 A I R (L) 593		527
Janaki v Ramaswami 56 1 C 267		506
Jan Bahadur v Bailiff, 5 R 384 104 1 C 816 (1927) A I R		
(Rang) 263		357
Jangti Lal v Jaddu Ram, (1919) C W N Pat (F B) 105 4		
Pat L J 24		536
Janki Das v Mangi Lall, 16 P L T 140 1935 A I R (Pat)		
126		700
Janki Prasad v Gridharilal, 16 O C 68 19 1 C 704	123, 134	
Janki Ram v Official Receiver, Coimbatore, 78 Ind Cas 16		
(1925) A I R (M) 329	582, 595	/
Jasodabai Mt, v Firm, Shrikishan Radhakishan, 1939 A I R		
(N) 10	202, 600,	611

Jatindra N Saha v Katihar Oil Mills Ltd, 39 C W N 1292	
155 IC 392 1935 AIR (C) 644	420, 738
J C Galstaun v Umesh Chandra Banerjee, 25 CLJ 303	502
Jeer v Rangaswami 36 Mad 402	193, 209, 231, 238
Jethaji Peraji v Krishnayulu, 52 Mad 648 57 M L J 116	
74 250, 251 389 452, 454, 456, 459	
Jethalal v Lallubhat, 32 Bom LR 702 127 IC 335	662
Jevanji Mamooji v Ghulam Hussain 12 SLR 20 47 IC	
771	288 350 418, 431, 562
Jewan Ram v Ratan Chand 26 C W N 285 70 Ind Cas	
498	276
Jewraj Kharewalla v Lalbhai Kalyanbhai, 30 C W N 834 96	
LC 131 (1926) AIR (C) 1011	73, 213
Jewraj Khariwal v Doyal Chand, 55 Cal 783 47 CLJ	
250 111 IC 372 (1928) AIR (C) 211	705, 706
Jhabba Lal v Shib Charan Das 39 All 152	683, 720
Jhan Bahadur v The Bailiff District Court Toungoo, 5 Rang	
384 104 IC 816 1927 AIR (Rang) 263	6
Jhanda Singh v Receiver Insolvent's Estate Amritsar 158	
IC 94 1936 AIR (L) 412	194, 236, 340
Jinwar Gangasa Chawre v W B Damle, 161 IC 441	
1936 AIR (N) 28	594
Jita Mal v Madan Lal 1931 ALJ 999 133 IC 907 1932	
AIR (All) 4	701
Jitendra Nath v Fateh Singh 26 C W N 921 72 IC 320	61
Jitmal Ram Gopal v Nathu Ram, 1932 ALJ 407 1932	
ALR (All) 285 138 IC 267	345, 721
Jitmand v Ram Chand 29 Bom 405	498
Jivandas Jhawar, In the matter of, 40 Cal 78 18 IC 908	597, 743
Jiwan Ram v Official Receiver, Ambala, 1935 AIR (L)	
708	558
J N Mundara v Nemsai Rajpal, 1935 AIR (N) 246	52
Jogendranath v Debendranath 26 Cal 127	322
Jogendra Nath Kundu v Jogneswar Mondal, 1 LR 63 C	
178 39 C W N 1289 158 IC 574 1935 AIR (C)	
612	511, 522
Jogendra Nath Saha v Rai Kishori Dasi, 59 Cal 1279 55	
CLJ 356 36 C W N 698	209, 229, 246
John Brown & Co, Re, (1906) 22 T L R 291	441
	560
	24
	97
	278
	531
	12 L L J 113 128
	508

Jokhim Sing v Deputy Commissioner of Fyzabad, 23 Ind Cas 924	329, 535
Jokhim Surajmal, Firm v Chouthmal Bhagwath, 9 Pat 945 130 I C 38 1931 A I R (Pat) 70	199, 384, 387, 507, 510
Jones v Evans (1891) 18 Ch D 109	139
	424
Balwant Joshi, 27 Bom L R A I R (B) 472	607
t, 9 Rang 478	340
Lal, 61 Cal 605 59 C L J 399	
151 I C 1026 1934 A I R (C) 764	709, 713
Joseph Perry v Official Assignee, Calcutta 24 C W N 425	
31 C L J 209 56 Ind Cas 778	707
Joy v Campbell (1804) Sch & Lef 328	299
Joy Chandra Das v Muhammad Amir 22 C W N 702	38
Judah v Secretary of State, 12 Cal 445	461
Jugal Kishore v Bankim Chandra, 41 All 481 17 A L J 480 51 Ind Cas 192	477, 479, 483, 490
Jugal Kishore v Gur Narain, 33 All 738 8 A L J 833	738
Jugal Kishore v Ishar Das 63 P R 1919 51 I C 695	735
Jugalpada v Ganes Chandra, 44 Ind Cas 168	548
Jukes, In Re Official Receiver, (1902) 2 K B 58	530, 595
Jumai v Muhammad Karim All 25 All 204 23 A W N 11	156, 157, 171, 213
Jumnadas v Vinayak, 10 Ind Cas 698	258, 271, 304
Jwala Nath v Parbati Bibi 14 Cal 691	155, 226, 239

K

Kadibhoy Ismailji Lotta, In Re, Messrs 11 Ind Cas 14	260, 298
Kaka v Nandoo 125 I C 638 1930 A I R (Lah) 644	224, 225
Kalachand Banerjee v Jagannath Marwari 54 I A 190 54 Cal 595 31 C W N 741 (1927) A I R (P C) 108	283, 305 309 322 324, 508 622, 633, 635
Kalagara Purnryya v Cherukuri Besava Kottayya, 61 M L J 518 1931 A I R (M) 788	18, 138
Kalamalai v South Indian Export Co 33 Mad 334 20 M L J 211	96
Kalianji v The Bank of Madras 39 Mad 693 31 I C 583	112
Kaliaperumal v Ramachandra, 53 M L J 142	325, 332
Kaliappa Nadalwar v Ramaswami Chettiar 71 M L J 656 44 L W 650 1936 M W N 1209 1936 A I R (M) 955	42
Kali Charan Khettry, In Re Ind Jur O L 16	187
Kali Charan Shaha v Hari Mohon Basak 24 C W N 461 31 C L J 206	124, 125, 131, 132, 180, 241, 756
Kali Kissen v Janki, 8 W R 250	649
Kalikumar v Gopikrishna, 15 C W N 990	106, 209, 226, 239

	Page
Kalinath & Ambica Prasad, 41 Ind Cas 399	560
Kalka Das v Gojju Sing 43 All 510 (FB)	16, 273, 283, 648
Kalleappa Chetty & Maung Kiwe, 5 LBR 189	91 C 950
	434, 435, 441
Kallukutt Parambath & Kuttrial 49 MLJ 595 (1926) A I R	
(M) 113	252
Kalluri Venkataraman & Official Receiver, 18 L W 610	
1923 M W N 780 76 Ind Cas 1006 (1924) A I R (M)	
358	530
Kalu Ram & Gitwar Singh 12 LLJ 96 1930 A I R (L)	
592	18, 126, 138, 233
Kalyansundaram Pillai v Vaithilinga Vannier 48 L W 881	
1938 M W N 1255	748
Kamal Lal & Chandrika Charan, 19 PLT 860 177 I C	
829 1939 A I R (P) 18	304
Kamatchi & Sundarram Aiyar, 26 Mad 492	683
Kamini Kumar & Hiralal, 23 C W N 769	530
Kamireddi Timmappa & Devasi Harpal, 56 MLJ 458 115	
I C 815 (1929) A I R (M) 157	370, 382, 399, 411, 413,
	414, 447, 454, 461, 669, 753
Kamla Bai & Chatra Prasad 1 L R (1938) All 84 1937	
A W R 1111 1937 A L J 1221	105
Kanai Lal Nandy & Tinkari De 57 CLJ 148 37 C W N	
535 145 I C 429 1933 A I R (C) 564	106 107, 129,
	144, 145, 147, 542, 578
Kanksahapathy Chettiar & Gomathi Munakshi Ammal,	
1935 M W N 586 156 I C 677 1935 A I R (M) 720	65
Kanaya Lal & Official Receiver, 110 I C 742	540
Kanhya Lal Mohon Lal of Amritsar Firm of & Seth Radha	
Kishen, 112 P L R 1913 92 P W R 1913 18 Ind Cas	
205	381
Kanhya Lal & Sadashiv Rao 150 I C 834 1934 A I R (Nag)	
171	145
Kaniz Fatima, Mt & Naram Singh, 24 A L J 897 98 Ind	
Cas 1001 (1927) A I R (A) 66	56, 538
Kanniappa Mudaly & Raju Chettiar, 47 Mad 605 47 MLJ	
16 (1924) M W N 520 79 Ind Cas 850 (1924) A I R	
(M) 761	483
Kanshi Ram & Hari Ram, 171 I C 610 1937 A I R (L) 87	
Kanshi Ram & Official Receiver, 39 P L R 344 1937 A I R	311, 463
(L) 752	
Kanshi Ram & Harnam, 129 I C 218 1930 A I R (Lah)	420
602	
Kanto Mohon & J C Galstun, 51 CLJ 283 126 I C 754	220
1830 A I R (C) 547	354, 489, 495

Karam v Jhanda	131 I C 112	1931 A I R (Lah)	112
Karim Baksh v Gaja Dhari	148 I C 48	1934 A L R (Lah)	112, 143, 166
63			155, 227, 239
Karim Baksh v Khesa	36 P L R 493	1935 A I R (L)	316
Karim Baksh v Misri Lal	7 All 295		325
Karim Mia alias Muhammad Abdul Rashid	In the matter of,		696
53 C L J 44	132 I C 640	1931 A I R (Cal)	392
Karniappa v Raju Chettiar	47 Mad 605	47 M L J 16	79
1 C 850	(1924) A I R (M)	761	318, 321
Karsandas v Maganlal	26 Bom 476		90
Kartar Devi v Surasati	9 P R 1908		361
Karuthan Chettiar v Raman Chetty	45 M L J 804	1923	
M W N 838	79 Ind Cas 340		701
Karuthan Chettiar v Raman Chetty	1923 M W N 746	45	
M L J. 844	80 Ind Cas 376	(1924) A I R (M)	400
Karuthan Chettiar v Raman Chetty	24 M L W 486	97	746
Ind Cas 590	(1926) A I R (M)	1159	373, 701
Kashi Bai v Chunnilal	31 Bom L R 1199	1930 A I R (B)	11
			322, 323, 327
Kashi Nath v Kanhya Lal	37 All 452		506
Kashi Nath v Official Receiver	1931 A L J 26	1931 A I R	
(All) 142			583
Kashi Prasad v Miller	1 L R 7 All 752		603
Kasi Iyer v Official Receiver, Tanjore	1925 M W N 767		
(1926) A I R (M)	228		168
Kasi Iyer v The Official Receiver Tanjore	1929 A I R (M)		
821		99, 570, 574, 582	
Kasturchand v Dhanpat Singh	23 Cal 26 (P C)		102, 113
Kathayan Chettiar v Govindswami Chettiar	35 M L W		
449	1932 A I R (M)	416	464
Kattapalli Bapayya v Official Receiver	57 M L J 816	30	
M L W 948	(1929) M W N 910	(1930) A I R (M)	
112			378
Kaufman Sagal v Domb, Ex parte, The Trustee	(1923) 2 Ch		
D 89			299
Kavali Sankara Rao v Turlapati Ramakrishnayya	46 M L J		
185	78 Ind Cas 294	(1924) A I R (M)	461
Kazi Abdul Sattar v Dinajpore Trading & Banking Co., Ltd.	42 C W N 1153		443, 738
Kearsley, Ex parte, (1887)	12 Q B D 168		404
Keays, Ex parte, Re (1891)	9 Morr 18		440
Kedarnath v Dwarkadas	109 I C 648	1928 A I R (L)	
848			128, 381
Keene, In Re, (1922)	2 Ch. D 475		231, 259
Keene v Thomas (1905)	1 K B 136		24
Keisel, Ex parte, (1882)	22 Ch D 436		374

	Page
King Emperor v Alexander, 25 Mad 627 12 M L J 393	649
King, Ex parte, (1876) 3 Ch D. 461 20 Eq 273	173
King Ex parte, Re, King (1976) 2 Ch D. 256	96
King, the v Edward Fitzgerald Duke of Leicester, (1924) 1 K B 311	711
King v Henderson, (1898) A C 720	237, 243
Kirpa Ram v Sanwala Ram, 1935 A I R (L) 55	145
Kishan Chand v Sohan Lal, 2 Lahore 95 59 Ind Cas 710	296
Kishan Lal v Ganga Ram, 13 All 28	22
Kishanlal Sheokarın Marwari v Dinaji Zamaji Marathe, 1938 A I R (N) 50	42
Kishan Swarup v Mukandi Lal, 1934 A L J 857 1934 A W R 557 1934 A I R (All) 252	511
Kishore Khanna Maharaj v The Netherlands Trading Society, 33 C W N 401	109
Kissen Gopal v Suklal, 31 C W N 22	337
K v - - - - - (1877) 7 Ch Prac, 473	121
	550
	615
	Mad 494
	v Sankaralinga Mudaliar, 40
	236 14 L W 508 62 Ind
	Cas 495
	47, 555, 610, 611
Koilash v Nallasivam, 106 I C 487	705
Komara Sami v Govind, 11 Mad 136	192
Ko Maung Gyi v P L M Chettyar Firm, (1929) A I R (R) 338	179, 202
Konda Pillai v Diduvant Ramchandra 13 L W 616 (1921) M W N 535 62 Ind Cas 854	275
Ko po Yin v Daw Hnin Thet, 1934 A I R (Rang) 242	94
	169 33 M L J 566
	738
	Chettyar Firm, 170 I C 942
	120, 150
Kothandarama v Murugesam, 27 Mad 7 13 M L J 372	385 397
Koya Mohidin v Hashim Khan 158 I C 333 1935 A I R (R) 276	373
K P S P P L Firm v C A P C Firm, 7 Rang 126 117 I C 582 (1929) A I R (R) 168	431
Kripa Ram v Mangal Sen, 19 A L J 696 3 U P R (All) 18 65 I C 93 (1922) A I R (All) 337	165
Krishan Lal v Mt Mirzan Bibi, 35 P L R 74 1934 A I R (L) 271	584
Krishna Chandra v Jitindra Nath, 48 C L J 574 114 I C 415 (1920) A I R (C) 159	491, 753, 754
Krishna Chandra Bhoumik v Pabna Dhanabhandar Co Ltd, 62 C 298 60 C L J 281 39 C W N 106	471, 472, 474,

	Page
Krishna Das Roy & Charusila 35 C W N 567	175
Krishna Iyer v Messrs Pierce Leslie & Co 1936 M W N 539 43 L W 587 160 I C 478 1936 A I R (M) 64	139
Krishna Iyer v Official Receiver, Trichinopoly 75 I C 445 (1925) A I R (M) 381	53, 69, 540, 541
K. S. K. Chandra Prasad In Re 35 C W N 566	383
Cal 650 105 I C 90	416
signee, Madras 55 Mad 1932 M W N 8 1932	28
Krishnan Nair v Itinon Nair 24 Mad 367	202
Krishnaswami v Official Assignee of Madras, 26 Mad 673	504
Kristo Komul v Sures Chandra, 8 Cal 556 12 C L R 253	305, 309
Kristomohun v Bamacharan 7 Cal 733	322
Kullappa Reddiar v Veerappa Chettiar, 1938 A I R (N) 285	532, 556
Kullu v Agha Salim 2 O W N 659 89 Ind Cas 923 (1925) A I R (O) 668	362
Kumarappa Chettiar v Chidambaram Chettiar 48 L W 239 1938 M W N 844 1938 2 M L J 385 1938 A I R (M) 898	144, 373
Kumaraswami Nadar v Venkataswami 46 M L J 242 78 Ind Cas 857 (1924) A I R (M) 830	758
Kumud Nath v Jatindranath 38 Cal 394 13 C L J 221	164
Kundan Lal v Khem Chand 44 All 620	690
Kundan Lal v Nathu 55 All 636 1932 A L J 1340 146 I C 765 1933 A I R (All) 600	465
Kundan Lal v Sadi Ram 55 P R 1917 132 P W R 1917 41 I C 809	610
K. S. K. Chandra Prasad In Re 117	588
803	452
868 45 M L J	307
41	741
Kupuswami v Marimuthu 47 M L J 487 1924 M W N 807 82 Ind Cas 438 (1925) A I R (M) 52	487
Kutner, In Re (1921) 3 K B 93	267
7, 425, 437, 446	

L

Labhu Ram v Puran Chand 130 P R 1919	570
Lachhi v Badri Parshad 36 P L R 205 1934 A I R (L) 1006	54, 197, 199
Lachman v Mahantaram 29 P L R 606 1929 A I R (L) 66	648

Lachman Das v. Jai Singh, 79 I C 548 (1922) A I R (L) 399	189
Lachman Das v. Lakshmi Narain 54 All 444 1932 A L J 226 1932 A I R (All) 283	638, 742
Lachman Kachhi v. Secy. of State, 1934 A L J 864	635
Lachmichand Jhawar v. Bepin Behary, 32 C W N 716 85, 104, 112, 127, 385,	
Lakshmi Narain v. Makund Singh 26 All 617	315
Ladha Mal v. Taji, 40 P L R 151	675
Ladha Ram v. Lurind 34 P L R 682 144 I C 276 1933 A I R (Lah) 319	111
Ladha Ram v. Prabh Dial 32 P L R 476 132 I C 525 1931 A I R (L) 672 419 424, 432, 435, 448	
Ladu Ram v. Mahabir Pershad 39 All 171 37 I C 996	695
Laduram v. Nundlal 47 Cal 555 31 C L J 150 55 I C 747	630, 641
Laduram v. Sakharam 27 N L R 374 1932 A I R (Nag) 22	251
Lakhi v. Molar, 86 I C 115 (1925) A I R (L) 416	250, 451
Lakhipriya v. Rat Kessori 20 C W N 554	526, 543
Lakhiram v. Punamchand, 45 Bom 550 22 Bom L R 1173	468
Lakshmi Chand v. Kesho Ram 1 L R 16 L 735 158 I C 226 1935 A I R (L) 375	145
Lakshmanan v. Mutria 11 Mad 1	355
Lakshmanarasimha v. Jagannatha Rao 18 M L T 147 30 I C 256	26
Lakshmanan Chettiar v. Srinivas Jyengar 1 L R (1937) M 203 1936 M W N 1043 44 L W 657 71 M L J 707	386
Lakshmi Bai v. Rukmaji Rao 59 M 767 67 M L J 45 40 L W 199 151 I C 284 1934 A I R (M) 465 492 753, 754	
Lakshminarain Aiyar v. C R Subramania Aiyar, 45 M L J 129 1923 M W N 328 73 Ind Cas 74 (1923) A I R (M) 585 164, 225, 228, 239	
Lakshmiram v. Punam Chand, 22 Bom L R 1173	430
Lala Govindram v. Kunj Behari 46 All 398 (FB) 22 A L J 217 83 Ind Cas 403 (1924) A I R (All) 341	2, 283
Lala Hakim Lal v. Mooshahar Sahoo, 34 Cal 999 11 C W N 880 6 C L J 410	100
Lal Bahadur v. Paspal Prosad 74 Ind Cas 301 (1923) A I R (Oudh) 154	267
Lalchand v. M C Boid & Co 38 C W N 914	17, 124
Lalchand Choudhri v. Bogha Ram 40 P L R 841 1938 A I R (L) 819	106 1
Lalchand Gobindram v. Tejbhandas Jagannath (1929) A I R (S) 41	630,

Lucas, J M v Official Assignee, Bengal, 24 C W N 418	529, 694, 697, 698, 708
Luchminarain Dube v Kripan Lall, 10 A L J 703 47 Ind	245
Luxmi Industrial Bank v Dinesh Chandra, 55 Cal 1053 32	
C W N 427 1928 A I R (C) 609	22, 44, 75, 320
Lyon Lord & Co v Virbhadrans, 76 Ind Cas 380 (1924)	
A I R (S) 69 95 I C 705	517, 520, 600, 617
Lyons, Exp, (1821) L R 7 Ch 494	38

M

Macfadyen, P In Re, (1908) 1 K B 675	666
Machenjeeri Ahmed v Govindaprabhu, 51 Mad 862 55	
ML J 661 114 I C 227	750
Macleod v Kikabhoy, 25 Bom 659	299
Madan Mohan Sarkar v Emperor I L R (1938) 2 C 478	
42 C W N 787 1939 A I R (C) 264	708
Maddever, Re, (1884) 27 Ch D 523	528
Maddipoti v Gandrappu 24 ML J 106 1918 M W N 479	
47 Ind Cas 308 8 L W 136	609, 625
Madharam Naiyar v The District Official Receiver, Tinne	
velley, 51 ML J 228 97 Ind Cas 918 (1927) A I R	
(M) 58	543
Madharao v Nago, 1923 A I R (Nag) 80	36
Madho Pershad v Walton 18 C W N 1050	69, 163, 167
Madho Prasad v Madho Prasad, 55 All 241 1933 A L J	
117 145 I C 668 1933 A I R (All) 230	249, 453, 730
Madho Ram v The Official Assignee, 27 C W N 611	565, 575, 582
Madho Ram Budh Singh v Raj Kishan, 1932 A I R (Lah)	
471	517, 618
Madho Ram Budh Singh v Receiver of Firm Radha Kishan	
& Sons 14 Lah 63	518, 618
Madhu Sardar v Kshitish Chandra 42 Cal 289	196 499, 617
Madhu Sudan v Parbati Sundari, 19 C W N 760 35 Ind	
Cas 643	510, 735
Mahabir Prosad Poddar v Ramtahal Mandar, 1 L R 16 P	
724 172 I C 24 1937 A I R (Pat) 665	85, 116, 123, 126, 129
	132, 133, 134 734
Mahabir Prasad v Shivnandan Sahay, 15 Pat L T 502	269
Mahadeb v Kuppaswami, 15 Mad 233	607
Mahadeo v Jainarain, 62 I C 850	272
Mahamed Shah, In Re, 13 Cal 66	382
Mahammad Ibrahim v Ram Chandra, 48 All 272 24	
A L J 244 92 I C 514 1926 A I R (A) 289	489
Mahange Lal v Firm Suraj Prosad Chandu Lal, 1938 A L J	
1151 1939 A I R (All) 114	468

Maharaj Kishore Khanna & The Netherlands Trading Society, 33 C W N 401	109
Maharaja Hari Ram v Sri Krishna Ram 49 All 201	419, 448
Maharaja Manindra & Chandt 24 C W N 582	673
Maharaja of Burdwan v Apurva Krishna Roy, 15 C W N 172	502
Maharana Kunwar v E V David 46 All 16 21 A L J 727 77 Ind Cas 57 (1924) A I R (All) 40	56, 604, 605, 683, 686
Mahasukh Jhavadras v Vallibhai Fatubhai 30 Bom L R 455 109 I C 152	287, 336, 516, 520
Mahendra Kumar Batsya Saha v Dmesh Chandra 60 Cal 696 37 C W N 392 57 C L J 381	200, 516, 519, 618
Mahesh Das v Bhag Singh 10 L L J 493 (1929) A I R (L) 49	222
Maheshwari Bros v Liquidators India Sugar Works, I L R (1938) All 896	279, 360
Mahomed v Official Receiver 132 I C 701 1931 A I R (L) 133	699, 721
Mahomed Adjun Nacoda v E M Chettiar Firm 9 Rang 7 128 I C 382 1930 A I R (Rang) 317	292, 295, 296
Mahomed Ali Akbar & Mt Fatima Bibi 32 P L R 298 133 I C 553 1931 A I R (L) 591	418, 429
Mahomed Galiff v Abdul Rahim, 89 Ind Cas 419 (1926) A I R (Nag) 156	634
Mahomed Husein v Radhi, 12 Bom 46	156
Mahomed Roshan Sheik v Ghulam Mohiuddin 118 I C 791 1929 A I R (B) 135	347
7	664
1935 A I J 487 1935 I R (All) 416 87 99, 118, 233	162
ogepore, 168 I C 389	
39 1930 A I R (Lah.)	682
100	47, 66, 542
Main Goman Singh v Gonesh Lal, 35 P R 1881	171
Majdan & Chatrumal, 110 I C 386	289
Ma Joo Tean & Collector of Rangoon 12 Rang 437	654
Makhan Lal Chatterjee, In the goods of, 15 C W N 350	135
Makhan Lal Govindram v Bhagwan Singh, 1 L R 17 P 201	
Makhan Lal & Gulzari Mal, 6 All 290	497, 721
Makhan Lal & Sreelal 34 All 382 9 A L J 371 14 Ind Cas 162	157, 550
Ma Khin Pu & Official Receiver, Mandalay, (1928) A I R (R) 166	33, 34 726, 732
	560, 564

TABLE OF CASES

xc1

Page

Ma Kyin Myaing v Muthaya Chettyar, (1930) A I R (R)	
147 127 I C 373	85, 87, 142, 221
Malchand v Gopal Chandra 21 C W N 298	161, 173, 240, 241, 375, 376
Mal Chand v Ram Jas 1939 A I R (L) 145	557
Malik Ram Lal v The Official Assignee of Calcutta 59 Cal	
1161 36 C W N 546 56 C L J 152	383
Mallapali Gopalam Nayar v Kopathil Gopalam 12 M L W	
202 (1925) M W N 612 91 Ind Cas 31 (1925) A I R (M) 915	342, 444
Maluk Chand v Mani Lal 28 Bom 364	397
Mamidi China Venkata Sivaya v Nilkanta Suryanarayana, 1938 M W N 841 1938 A I R (M) 906	2,512, 516
Manak Chand v Ibrahim 17 N L R 49 62 Ind Cas 307	204, 623
Manak Chand Ralia Ram v Lakhmi Das, 148 I C 832 1934 A I R (L) 507	13
Manaparama Padyachy v Armugum Padyachy, 1 L B R 229	232
Manchester and Liverpool District Banking Co Ltd, Ex parte, (1924) 2 Ch D 199	481
Manchester & Milford Ry Co., In Re, (1880) 14 Ch D 645	632
Manabhai v Dabodhai 27 Bom 604	727
"	742
"	580
Mangal Khatun v Janki Begum, 1934 A L J 64 3 A W R 191	526
Mangali Prasad v Zafar Husain 1937 O W N 33 166 I C 228 1937 A I R (O) 177	311
Mangat Rai v Lala Mohan Lal, 149 I C 935 1934 A I R (Lah) 33	662, 736
Manickchand Virchand In Re, 47 Bom 275	77 127, 382
Manicklal v Saratkumari, 22 Cal 648	615
Mani Iyer S P S v D K Syed Ebrahim, 12 Rang 428	276
Manik Rao v Nur Hassan, 88 I C 254 (1925) A I R (N) 376	304
Manindra Chandra Nandi v Lal Mohon Roy, 56 Cal 940	
49 C L J 212 1929 A I R (C) 358	91
Manindra Nath v Rasik Lal Pakhira, 97 Ind Cas 463 1927 A I R (C) 69	222, 227
Maniram v Sett Rupchand, 33 Cal 104 10 C W N 874	752
Manji v Giridhari Lal, 2 Lah 78 61 Ind. Cas 674	648
Manmohan Das v N C MacLeod 26 Bom 765	90
Mannasao Kalesar Banu v Rambharosa, 1934 A I R (N) 282	
Mannu Lal v Nelin Kumar, 41 All 200 16 A L J 938 48 I C 443	
Mannu Lal v P K Banerjee, 1 L R 1938 All 800	

TABLE OF CASES

xciii

Page

Maung Hme v U Po Seik, 3 Rang 201	86 Ind Cas	
324 (1925) A I R (R) 301		392
Maung Kyi Oh v Arun Chellum Chetti, 2 Rang 309		
84 Ind Cas 968	125	132
Maung Maung v A R R M A N Chettyar Firm, 126		
I C 656 (1930) A I R (Rang) 265		500
Maung Nyun Tin v Saw En Hoke, 158 I C 610	1935	
A I R (R) 281		102
Maung Pe v Maung Po, 6 Rang 193	110 I C 361	
(1928) A I R (R) 148		329, 535
Maung Po Mya v Maung Po Kiya, 30 Ind Cas 943		241
Maung Po Sai v The Bank of Chetnad, 13 R 717		
160 I C 109 1936 A I R (R) 26		39
Maung Po Toke v Maung Pa Gyi, 3 Rang 492	92 Ind	
Cas 142 (1926) A I R (R) 2	288, 291, 346, 444	
Maung Po Yeik v Power, 1934 A I R (R) 112		356, 615
Maung Sein Nyun v Dawson Bank Ltd 1931 A I R		
(Rang) 317		108
Maung Tha v Po Ka, 5 R 768	107 I C 172 1928 A I R	
(R) 60		629, 687
Maung Tun Aye, In the matter of, 165 I C 384	1936 A I R	
(R) 412	259 424 440	676
Maung Tun Tin, v K P A R Chettyar Firm, 1937, R L R		
264 1937 A I R (R) 472		709
Ma Yait v The Official Assignee 9 Rang 373		473
Mc Henry Re, (1888) 21 Q B D 580		416
Mc Murdo, Re (1902) 2 Ch 684		667
M Donald v Hanson 12 Ves 277		628
Mead In re L R 20 Eq 282		613
Mee Exp, L R (1866) 1 Ch 337		440
' ' ' ' of 35 Bom 47		346 347
' ' ' ' of Virbhandas 76 Ind Cas		357
Mercantile Bank v Official Assignee Madras, 39 Mad		
250 30 Ind Cas 942	107, 303,	595
Mercer v Vans Colina, (1900) 1 Q B 130 (notes)		259
Metropolitan Bank v Pooley, 10 A C 210		243
Ma as Exhorts R Cas - (1971) 2 Cl A	188	103
	Cas 743	236
		91
		22
		140
		475
		471
		573
		91
	55	565

	Page.
Mir Anser Ali v. Guru Charan, 16 All. 37	203
Mirabita in Dale, Exparte, (1875) 20 Eq. 772	403
Mirappa v. Raman Chettier, 43 Mad. 322 : 10 M.L.W. 59 :	
52 Ind. Cas. 519	536, 538
Mir Khan v. Sharfu, 74 I.C. 576	285
Mir Sha v. Rahim Bux, (1923) A.I.R. (All.) 33	576
Mirza v. Jhanda Ram, 12 L. 367 : 130 I.C. 419 : 1930 A.I.R.	
(L.) 1034	189, 314, 648
Mirza Ali v. Quaidri Khanam, 21 P.L.R. 1919 . 50 Ind. Cas.	
774	368
Misri Lal v. Kanhya Lal, 66 Ind. Cas. 863	59
Mitra, S. M. v. Corporation of the Royal Exchange, 126 I.C.	
650 : 1930 A.I.R. (R.) 259	634
Mogg, Exparte, 2 Gl. & J. 397	121
Mohamed Adjun Nacoda v. E. M. Chettiar Firm, 9 Rang. 7 :	
128 I.C. 382 : 1930 A.I.R. (Rang.) 317	292
Mohammad Alam v. Babulal Marwan, I.L.R. 15 Pat, 177 :	
16 Pat, L.T 833 : 1936 A.I.R. (P.) 18 F.B.	231
Mohammad Haji Issak v. Sk. Abdul, 40 Bom. 461 : 17 Bom.	
L.R. 989 : 31 I.C. 507	347
Mohammadi Begum, Mt., v. Ahsan Ahsan & Co., 171 I.C.	
992 : 1937 A.I.R. (L.) 96	659
Mohammad Ishaq Khan v. Kalloo, 1936 A.W.R. 485	292, 293, 335
63 Ind. Cas. 91	324
alpindi, 119 I.C.	
43 I.C. 262	132, 756
47 I.C. 577	289
All. 476 : 131 I.C. 35 :	636
1931 A.I.R. (All.) 331	560
Mohd. Safiq-ul-Huq v. Krishna Gobind, 23 C.W.N. 284 : 28	
C.L.J. 77 : 48 I.C. 428	376
Mohiruddin Mollah v. Gayan Nath, 1928 A.I.R. (C.) 221	29
Mohiruddin Sarkar v. The Secretary, Hadal Gramya Rindan	8
Samiti, 57 Ind. Cas. 977	
Mohit Kumar Mukherjee v. Surendra Nath Ghosh, 9 Pat.	153, 223
664	
Mohitosh Dutta v. Rai Satish Chandra Chowdhury Baha-	
dur, 35 C.W.N. 971	727
Moir, In Re., (1884) 25 Ch. D. 605	199, 516, 517, 603, 618, 731
Mokshagunam v. Ramakrishna, 42 M.L.J. 426 : 70 Ind. Cas.	
357	162
Momet, In Re., 21 Cal. 634	26, 318, 324, 478, 482, 635
J. 5	164, 438
Chou-	700
	67, 732

	Page
Moolaswami v Tatayya, 51 M L J 389	616
Mool Chand v Dip Chand 1935 A L J 274 153 I C 869	
1935 A I R (All) 272	426, 430
Mool Chand v Sarjoo Pershad, 12 C W N 273 7 C L J 268	192, 729
Moon Ex parte, (1882) 19 Q B D 669	416
Moonrumugamkondan Asari v Chockalingam Asari, 54 Mad 5 59 M L J 629 1930 A I R (Mad) 913	262, 302
Moore, Ex parte (1882) 14 Q B D 627	15
Moosaji Lotia, In Re, 5 S L R 249 15 I C 825	361
Morarji Jaiaram, In Re, 34 Bom L R 1175	76
Morgan, Re Ex parte, Turner, (1915) 2 Mans 508	111
Mortier, Re 76 L T 532	483
Moses G C v A C Oakeshott, 30 C W N 518 95 I C 522	422, 428, 443
Mooses Kerokoose v Benjamin Books, 8 M I A 339 4 W R. 61 1 Suth P C J 426	674
Moss Ex parte Re Toward, (1884) 14 Q B D 310	305
Motharam Dowlatram v Pahlajrai Gopaldis, 80 Ind Cas 141 (1925) A I R (S) 159	276, 386
Moti Lal v Ganpat Ram, 21 C W N 936 23 C L J 220 34 I C 792	373, 400
Moti Lal v Karrabuldin, 25 Cal 180 (P C)	28
Motilal Preamsukdas, In the matter of, Rang L R 166	13, 380
Moti Lal v Utamjagivandas, 13 Bom 434	531
Moti Mal v Doulat Ram, 92 I C 296 (1926) A I R (L) 231	569, 571
Moti Ram v Kewal Ram 9 L L J 550 28 P L R 468 105 I C 506 (1928) A I R (L) 202	225, 239, 723
Moti Ram v Official Receiver, 1934 A I R (Lah) 936	63
Motitam v Rodwell, 21 A L J 32 (1923) A I R (A) 159	43, 300, 321, 327, 482
Motu Mal v Ghanshamdas, 120 I C 84 (1929) A I R (S) 204	334, 337, 411, 461
Moturi Veerayya v Rai Bahadur P V Srinivasa Rao, I L R 58 M 908 1935 M W N 886 42 L W. 386 69 M L J 364 158 I C 1060 1935 A I R (M) 826 (F B)	309, 455
Moula Baksh v Tezmal 20 I C 395 11 A L J 545	100
Mrinalini Das Srimati v Harihar De, 59 Cal 1338 36 C W N 741 56 C L J 307	204
Muchiram v Ishan Chander, 21 Cal 568 (F B)	274
	23
	2 P W R 1917
	610
	44 All 617 20
	271,
Muhammad Habibullah v Mustaq Hossain, 39 All 95	526

Muhammad Haji Isakh v Abdul Rahman 41 Bom 312	18
Bom L R 198 33 Ind Cas 694	334
Muhammad Hussain v Elahi Baksh 10 A L J 182	17 Ind
Cas 92	239
Ram Chandra 48 All 272	24 A L J
R (A) 289	377, 488, 489
v Mandir Das, 34 All 511	556
Muhammad Sariff v Kuduomonan 57 I C 760	499
Muhammad Shair v Mahabir Prasad 15 A L J 572	40 Ind
Cas 445	172
Muhammad Umar v Official Receiver 119 I C 735	1929
AIR (L) 447	132, 756
Bachalor 29 Bom 428	532
I O C 304 43 I C 262	289
uruddin 21 Cal 85	613
Muhammad Asadulla v Sami Khan 89 Ind Cas 740 (1926)	
AIR (L) 87	398, 399
Muhammed Umar v Munsif Ram, 54 P R 1917	41 I C 802
Mukti Ram v Firm Ganga Ram 13 Pat 50	146 I C 252
1933 AIR (Pat) 619	506
Mulchand v Murarilal 36 All 8	11 A L J 979
21 I C 702	33 628 683
Mulchand v The Official Receiver Aligarh 52 All 385	
1930 A L J 316	124 I C 410
1930 AIR (All) 471	418, 423, 424
544 (1925) AIR (R) 735	749
Khan 1928 AIR (S) 177	107
I C 1055 (1927) AIR (L)	
225, 537	
N) 246	458
457	162
123	239
517	112
457, 728, 729	156
IR (L)	
423	725
Murad v Lala Hansraj 1 LR 1938 (L) 104	1937 AIR
(L) 680	313
Murad v Official Receiver Jhang 1 LR (1938) (L) 120	69
(L) 952	676, 688
I C VI 425	
1116	144, 747
	326, 605

TABLE OF CASES

ACVH

Page

Murli & Sohan Lal Bansi Lal, 127 I C 360 1930 A I R (Lah) 855	232
Murray, In Re, an Insolvent, 3 Cal 59	260
Muruga Konar & Official Receiver of Madura (1930) M W N 470 126 I C 483	62
Murugappa Chettyar, A M M & N C Gulliam 12 Rang 150 1934 A I R (R) 87	103 107, 116 148, 176
Murugesu & Chinanthabai 24 Mad 421	650
Mushahor Sahu & Hakim Lal, 43 Cal 521 (P C)	560 561, 579
Muthan Chettiar & Venkateswami Naicken 1 L R 49 M 928 1936 M W N 753 44 L W 194 71 M L J 170	331, 512 518, 522
1936 A I R (M) 819	
Muthia Chettiar & Luxmi Narasa Aiyar 13 L W 141 61 Ind Cas 756	137
Muthiah Chettiar & Official Receiver Tinnevely 64 M L J 382 141 I C 101 1933 A I R (Mad) 185	145, 542, 577
Muthu Chettiar & Nagindas, 28 Bom L R 680	86 119 142 174
Muthu Karuppan Chhettiar v Muthu Raman Chettiar, 12 L W 1012 1914 M W N 899 26 I C 282	192
Muthu Mohammad v Ramaswami Chetty, 39 L W 80 (P C), 149 I C 858 1934 A I R (P C) 1	282
Muthu Pillay v Lakshminarayan 6 Rang 254	76
Muthu Swami Chettiar v Official Receiver, North Arcot 51 M L J 287 1926 M W N 935 97 I C 407 (1926) A I R (M) 1019	494, 541
Muthuswami Swamiar & Somoo Kandiur 43 Mad 869 39 M L J 438	282 601, 619
Muthu Veerappa Chettiar v Sivagurunath Pillai 49 Mad 217 49 M L J 697 1926 M W N 63 22 L W 617 92 I C 603 (1926) A I R (M) 133	187, 236
Muthu Venkataramia Reddier v Official Receiver, South Arcot 49 Mad 227 50 M L J 90 92 I C 398 (1926) A I R (M) 350	312
Muttayya Chettiar v Periatambi Tevan 1931 M W N 1014 1231 A I R (M) 784	751
Mutton Re (1897) 19 Q B D 102	438
My Po Yeik v Power, 1934 A I R (Rang) 112	607

N

Nabin v Mritunjoy, 40 Cal 50 17 C W N 1241	202
Nachiappa v Subbiar, 46 Mad 506 (F B)	505
Nachimuthu Chettiar & Ramakkal, 1933 A I R (M) 475	77
Nachlappa Chetty & Thangarajah Chetty, 34 I C 696	193
Nagappa Chettiar & Official Assignee, Madras 60 M L J 355 1930 M W N 1077 134 I C 161 1931 A I R (M) 251	657

Nagara Sambayya & Nagara Pedda Subbayya	1937 M W N	
929 46 M L W 559	1937 2 M L J 703	1938 A I R
(M) 19		328 751
Nagarathna Mudaliar v Chidambaram	1928 M W N 617	
1928 A I R (M) 860		570
Nagar Mirdah v Gokuleshwar Biswas	41 C W N 349	109
Nagasubramania v Krishnamachariar	50 M 981	53 M L J
403 104 I C 642	1927 A I R (M) 922	18 133 138 152
Naghchock & M Pwa	1913 U B R 1	24 I C 767
Nagindas & Ghelabhai	44 Bom 673	22 Bom L R 322 56
1 C 449		82 310 696 701
Nagindas Dayabhai v Gordhondas	49 Bom 730	27 Bom
L R 967 88 I C 941	(1925) A I R (B) 480	329 535
Naginlal Maganlal Jaichand Re	49 Bom 788	382
Naginlal v Official Assignee Bombay	35 Bom 473	686
Nagoba v Zinzarde	1929 A I R (Nag) 338	61 611 615
	8 C L J 531	113 I C 854
	349 23 A L J 503	(1925) 343
		587 720
Nainar Rowthen v Kuppari Pichai Rowthen	1929 M W N	
168 120 I C 889	(1929) A I R (M) 609	26 284 291 323
Nak Ched Shah v Kashmiri Bank Ltd	134 I C 878	1932
A I R (O) 69		750
Nalam Viswanatham v Official Assignee	32 I C 795	16
	an 47 M L J 783	85
		73 213
	143 I C 628	1933
A I R (S) 85		586
Nanak Chand v Official Receiver	1935 A I R (Lah) 935	419
Nand Gopal Das v Batuk Prasad Gupta	1932 A L J 36	
133 I C 541	1932 A I R (All) 78	286 547
Nand Kishore v Suraj Mal	37 All 426	13 A L J 642 29
1 C 998		708
Nandlal v Girdhari Lal	5 O W N 347	109 I C 633 1928
A I R (O) 263		7 429 437 446
Nand Lal v Nathmal Srinivas	3 Patna 443	83 Ind Cas
877 (1924) A I R (Pat) 559		215
Nanhi Mal v Emperor	17 O C 138	25 Ind Cas 363
Naoraji Sarabji Talati In Re	33 Bom 462	208 695 742
Naoraji v Chartered Bank of India (1868)	L R 3 Ch Prac	444
Narain Das v Bankim Chandra	85 I C 396	475
Narain Das Dori Lal v Mihil Lal	3 A W R 481	1934 A I R
(All) 521		7 432 661
Naraindas Sunderdas In Re	93 I C 331	(1926) A I R (S)
133		51 540 563

TABLE OF CASES

xciv

Page

Narain Mistri v Ram Das, 9 P L T 444 (1928) A I R (Pat) 477	232
Narain Singh v Gur Baksh, 9 Lah 305 (1928) A I R (L) 111	186, 190
Narsi v Gopalji, 1930 A I R (S) 282	244
Narasimha Sastri v The Official Assignee of Madras, 59 M L J 321 1930 M W N 396 129 I C 650 1930 A I R (M) 751	142
Narasimhulu Setty v Seshayya 1933 M W N 1309 39 L W 87 1934 A I R (Mad) 31	76
Narasimulu v Basava, (1925) A I R (Mad) 249 85 I C 439	603
Narasingha v Virasghavah 41 Mad 440 42 I C 525 6 L W 694 (1917) M W N 857	38, 644
Narasinhamurthi v The Official Receiver, West Godavri 1 L R 59 Mad 438	522
Narayan v Nathu, 10 N L J 12 103 I C 486 1927 A I R (N) 166	528 550
Narayan Das v Chiman Lal, 25 A L J 219 (1927) A I R (A) 266	109 688
Narayan Ganesh v Sagunabai, 26 Bom L R 1200	267
Narayan Mistri v Ram Das 7 Pat 771 111 I C 647	230
Narayana Ayyar v Official Receiver, South Malabar 1933 M W N 1049 39 L W 449 1934 A I R (M) 294	144 542 563, 573 582
Narayanamma v Venkatasomayajulu 67 M L J 616 40 L W 693 1934 M W N 1034 1935 A I R (M) 46	53
Natesa Chettiar v Annamalai Chettiar 73 I C 213 (1923) A I R (M) 487	287, 291, 466
Nathmull v Ganeshmull, 34 C L J 349	192, 236
Nathumal v District Judge of Benares 32 All 547 7 A L J 702 6 Ind Cas 870	223, 708
Nathu Mal v Lala Dina Nath 34 P L R 1032 146 I C 840 1933 A I R (L) 651	271
Nathuram Mantri In Re, 34 Bom L R 1166	590
Nathu Ram v Madan Gopal 1932 A L J 391 1932 A I R (All) 408	681
Navivahoo v Narottamdas 7 Bom 5	614
Nawab v Topan Ram, 62 P W R 1916 35 I C 494	708
Nawab Bahadur, Murshidabad v Karnani Industrial Bank Ltd, 59 Cal 1	314
Nayantara v Sambhunath 52 Cal 662 89 I C 761 (1925) A I R (C) 932	62 67
Nazareth, M F, Re, 25 S L R 367 129 I C 898 1931 A I R (S) 31	455
Nazar Khan Kabuli v J J S Barraclough, 41 C W N 221 167 I C 277 1936 A I R (Cal) 807	358
Nazir Hossain v Matin uz Zaman, (1925) A I R (O) 299	

	Page
Nazukrao v Jaiwantras, 18 N L J 145	468
N C. Gallara v Murugappa Chetty, 12 Rang 355	82, 736
Neehaldas v Official Receiver, 107 I C 210	583
Net Ram v Bhagirath 40 All 75	240
Net Singh v Receiver of the Estate of Gajraj Sing, 47 All 952 23 A L J 648 49 I C 488 (1925) A I R (A) 467	314
Newprance and Garard's Trustee v Hunting (1927) 2 Q B 19	581
New South Wales Taxation Commissioner v Palmer, (1907) A C 179	462
Newton, Re, (1896) 2 Q B 403	483
Nga Chock v M Pwa, (1914) U B R 1 24 I C 767	708
Niaz Ahmad v Phul Kunwar, 54 All 428 1932 A L J 237 138 I C 361 1932 A I R (All) 336	369
Nickoll, Ex parte, 13 Q B D 469	109
Nidamarti, In Re, 7 M H C R 119	441
Nidhon Mullick v Ramani Mohan, 63 Ind Cas 848	36, 726
Nihal Chand v Gela Ram 1930 A I R (L) 75	229
Nihal Chand v Jai Dayal Munni Lal, 126 I C 442 1930 A I R (Lah) 749	179
Nikka Mal v Marwar Bank Ltd, 52 Ind Cas 188	577, 590
Nilakanta Subudhi v Sri Sri Sri Ramachandra Das, 35 L W 161 1932 A I R (Mad) 250	274, 306, 309
Nilkantha Narayan Tewari v Debendra Nata Roy, 15 Pat 363 15 P L R 39 16 I C 167 1936 A I R (P) 115	270, 627
Nilmont Choudhuri v Basanta Kumar, 19 C W N 865	550
Nilmont Choudhuri v Durga Charan, 22 C W N 704 47 I C 377	38, 609, 621, 625
Nizam v Babu Ram, 34 P L R 464 143 I C 175 1933 A I R (L) 688	330, 364
Nagendra Nath v Pramatha Nath, 43 C W N 575	561
Noor Muhammad v Lal Chand, 7 L L J 201 90 Ind Cas 254 (1925) A I R (L) 436	139, 146
Norden v James, Dickens 533	89
Nordenfelt, Re, (1895) 1 Q B 151	163
Norris, Ex parte, 17 Q B D 728	483
Norrie, Re, Ex parte, 11 Morr 11	163
Ghosh, 43 Cal 640 19 I C 128 33 I C 543	100, 564, 566, 567, 573, 582
Nrishinha Kumar v Deb Prosanna, 39 C W N 384	612, 618
Nune Narasingham v Donapudi Subramaniam, 98 Ind Cas 446	294, 297
Nurasimulu v Basava Sankaram, (1925) A I R (M) 249	267, 283, 603
Nur Din v Amar Nath, 33 P L R 620 (1932) A I R (L) 478	424, 622
Nuthally, Re, (1891) W N 55	333

TABLE OF CASES

ci

Page

O

Official Assignee v Punjab National Bank Ltd, 26 S L R	606, 621
61 1932 A I R (S) 82	527
Official Assignee v Ramachandra, 33 Mad 134	256, 387
Official Assignee v Ramalinga 8 Mad 79	658
Official Assignee v Subala, 14 R 109 161 I C 435 1936	724
A I R (R) 98	607
Official Assignee v Trustees, Port Trust, Madras, 1 L R	549
1937 (Mad) 178	654
Official Assignee, Bengal, v Yokohama Specie Bank, 29	563
C W N 374	
Official Assignee, Bombay v Brijkishore, 3 A L J 614 (1916)	100
A W N 250	
Official Assignee Bombay v Firm of Chandulal Chimanlal,	15, 275
76 Ind Cas 657	280
Official Assignee, Bombay v Moulvi Abdul, 58 Bom 67	603
Official Assignee, Madras v Aiyu Dikshithar, 48 M L J	563
530	361
Official Assignee Madras v Bangy Abdul Razack Sahib,	657
1915 M W N 332	
Official Assignee, Madras v G Smith, 32 Mad 68	
Official Assignee Madras v Krishnaji Bhat, 59 M L J 718	
31 L W 792 1930 M W N 362 125 I C 533 1930	
A I R (M) 693	
Official Assignee, Madras v Krishnaji Bhat 60 I A 203 56	
Mad 570 65 M L J 1 (P C) 37 C W N 713 1933	
M W N 575 57 C L J 433 33 Bom L R 756 1933	
A L J 637 143 I C 162 1933 A I R (P C) 148 28 280, 656	
Official Assignee, Madras v Mercantile Bank of India Ltd,	
61 I A 416 39 C W N 209	301
Official Assignee Madras v Minakshi Vidyasalai Sangam, 52	
Mad 919 34 C W N 40 (notes)	27, 279, 656
Official Assignee, Madras v Moideen Rowther, 50 Mad	
948 1927 A I R (M) 1013	94, 531 550, 563
Official Assignee, Madras v Narasinha Mudaliar, 52 Mad	
717 (F B) 57 M L J 145	60, 64, 644
Official Assignee, Madras v Official Assignee, Rangoon, 42	
Mad 121	383
Official Assignee Madras v Palaniappa Chetty, 41 Mad 824	
35 M L J 473 49 I C 220	134
Official Assignee, Madras v Rajam Aiyar, 36 Mad 499	361

Official Assignee, Madras v Sambanda Mudaliar, 43 Mad 739 39 MLJ 345	550
Official Assignee, Madras v T B Mehta & Sons, 42 Mad 510 1919 MWN 293	99, 570, 582
Official Assignee, Madras v V K Natesa Chetty, 1929 AIR (M) 141	496
Official Receiver Exp, In re Read (1887) 19 QBD 174	724
Official Receiver In Re 1930 ALJ 1497 130 IC 695	607
1931 AIR (All) 94	
Official Receiver, In the matter of 1932 ALJ 152 1932 AIR (All) 260	607
Official Receiver v Abdulla Khan 1937 AIR (Pesh) 51	313
Official Receiver v Janki Bai 114 IC 112 (1929) AIR (S) 135	36, 44, 602
Official Receiver v Kewalmul Ajumal, 93 IC 372 (1926) AIR (S) 123	583
Official Receiver v Lachmi Bai, 92 IC 5 (1926) AIR (S) 140	550, 562
Official Receiver v Lakshmiarayan 54 Mad 727 61 MLJ 774 33 LW 562 1931 MWN 444 132 IC 297	
1931 AIR (M) 474	12, 602
Official Receiver v Natarindas 89 IC 492	131, 756
Official Receiver v P L K M R Chettyar Firm, 58 LA 115 9 Rang 170 (PC) 35 CWN 577 60 MLJ 652	549, 550, 551
Official Receiver v Titathdas 97 IC 321 1927 AIR (S) 66	48, 63, 329, 525
Official Receiver v Zenabai, 120 IC 513	64
Official Receiver, Anantapur v Ram Chandrappa, 55 MLJ 721	266
Official Receiver, Coimbatore v Arunachallam Chettiar, 1931 AIR (Mad) 118	269
Official Receiver, Coimbatore v D D Kanga, 14 LW 655 1921 MWN 858 69 IC 908	255, 634
Official Receiver, Coimbatore v M R M K A R R M Arunachalam Chettiar, 1934 MWN 113 39 LW 338 1934 AIR (M) 217	270
Official Receiver, Coimbatore v Palaniswami Chetty, 48 Mad 750 1075 MWN 672 40 MLJ 303 66	
984	480, 508
Official 1 IC 564 (1927) AIR (M) 403	9
Official Receiver, East Godavary, Rajmundry, v The Imperial Bank of India, 1 LR 59 Mad 296	339
Official Receiver, Guntur v Secy of State, 1 LR 58 M 1014 1935 MWN 733	271
Official Receiver, Jullunder v Labhu Ram, 14 Lah 724 42 507	393

Official Receiver, Kistna & Gogineni Kodandaramayya, 58 M 1056 1935 M.W.N. 499 68 M.L.J. 681 157 LC. 826 1935 A.I.R. (M) 65	519
Official Receiver, Kistna & Imperial Bank of India, L.L.R. 58 M 403 1935 A.I.R. (M) 151	604
Official Receiver, Lahore & Chiman Lal, 31 P.L.R. 245 123 I.C. 286 1930 A.I.R. (Lah.) 645	31, 269, 525
Official Receiver, Mandalay & Succaram, 14 R. 63	393
Official Receiver of Moradabad & Murtana Ali, 1932 A.L.J. 402	273
Official Receiver, South Arcot & Perumal Pillai 79 LC 322 (1924) A.I.R. (Mad.) 387	62, 64
Official Receiver, South Kanara & Bastiao Souza, 23 M.L.W. 643 95 LC. 300 (1926) A.I.R. (M) 826	533
Official Receiver, Tanjore & Nagarajna Mudaliar, 49 M.L.J. 643 (1925) M.W.N. 871 91 LC 377 (1926) A.I.R. (M) 194	520
Official Receiver, Tanjore & Natiraja Sastrigal, 46 Mad. 405 72 Ind. Cas. 225 (1923) A.I.R. (M) 355 44 M.L.J. 251	75, 457, 621, 724
Official Receiver, Tanjore & Venkatarama Iyer, 42 M.L.J. 352 (1922) M.W.N. 51	508
Official Receiver, Tanjore & Vidappa Mudaliar, 47 M.L.J. 431 1924 M.W.N. 506 82 LC 450 (1924) A.I.R. (M) 865	549, 550
Official Receiver, Tinnevelly & Krishna Pillai, 1935 M.W.N. 910 32 L.W. 707 69 M.L.J. 818 159 LC. 88 . 1935 A.I.R. (M) 1058	363
Official Receiver, Tinnevelly & Sanagaralinga Mudaliar, 44 Mad. 524	610
Official Receiver, Trichinopoly, & Mohammad Meerza Sahib 1937 2 M.L.J. 378 1937 M.W.N. 1090 : 1937 A.I.R. Mad. 872	547, 571
Official Receiver, Trichinopoly & Somasundaram Chettiar, 34 Ind. Cas. 602 30 M.L.J. 415	528, 533
Official Receiver, West Godavery v. Sagiraju Subbayya, 1933 M.W.N. 206 37 L.W. 508 . 1933 A.I.R. (M) 527 42, 555	
Official Trustee of Bengal v. Kissen Gopal Behari, 57 Cal. 1210 . 51 C.L.J. 392 . 34 C.W.N. 751	362, 365, 658
O. M. Chene v. Kishun Prasad, 1935 A.L.J. 115c . 1935 A.W.R. 1118 - 159 LC. 616 - 1935 A.I.R. (All) 952	41
Omerro Lal Daw, In re, 13 B.L.R. App. 2	361
Om Prakash v. Moti Ram, 44 All. 400 : 24 A.L.J. 417 : 1926 A.I.R. (All) 447	267
Orkney v. Budachand, 75 Ind. Cas. 1037 : 1923 A.I.R. (Naz.) 290	274, 594, 597

Official Assignee, Madras v Sambandir Mudaliar, 43 Mad 739 39 M L J 345	550
Official Assignee, Madras v T B Mehra & Sons, 42 Mad 510 1919 M W N 293	99, 570, 582
Official Assignee Madras v V K Natesa Chetty, 1929 A I R (M) 141	496
Official Receiver, Exp In re Read (1887) 19 Q B D 174	724
Official Receiver, In Re 1930 A L J 1497 130 I C 695 1931 A I R (All) 94	607
Official Receiver, In the matter of 1932 A L J 152 1932 A I R (All) 260	607
Official Receiver v Abdulla Khan 1937 A I R (Pesh) 51	313
Official Receiver v Janki Bai, 114 I C 112 (1929) A I R (S) 135	36, 44, 602
Official Receiver v Kewalmul Ajumal, 93 I C 372 (1926) A I R (S) 123	583
Official Receiver v Lachmi Bai, 92 I C 5 (1926) A I R (S) 140	550, 562
Official Receiver v Lakshmiarayan, 54 Mad 727 61 M L J 774 33 L W 562 1931 M W N 444 132 I C 297 1931 A I R (M) 474	12, 602
Official Receiver v Naraindas, 89 I C 492	131, 756
Official Receiver v P L, K M R Chettyar Firm 58 I A. 115 9 Rang 170 (P C) 35 C W N 577 60 M L J 652	549, 550, 551
Official Receiver v Tirathdas 97 I C 321 1927 A I R (S) 66	48, 63, 329, 525 64
Official Receiver v Zenabai, 120 I C 513	64
Official Receiver, Anantapur v Ram Chandrappa 55 M L J 721	266
Official Receiver, Coimbatore v Arunachallam Chettiar, 1931 A I R (Mad) 118	269
Official Receiver, Coimbatore v D D Kanga, 14 L W 655 1921 M W N 858 69 I C 908	255, 634
Official Receiver, Coimbatore v M R M K A R R M Arunachalam Chettiar, 1934 M W N 113 39 L W 338 1934 A I R (M) 217	270
Official Receiver, Coimbatore v Palaniswami Chetty, 48 Mad 750 1925 M W N 672 49 M L J 203 88 I C 984 (1925) A I R (M) 1051 16 296 321, 323, 334 338, 480, 508	339
Official Receiver, Cuddapah v Kalawa Subbamma, 99 I C 564 (1927) A I R (M) 403	271
Official Receiver, East Godavary, Rajmundry, v The Imperial Bank of India, 1 I R 59 Mad 296	393
Official Receiver, Guntur v Secy of State, 1 I R 58 M 1014 1935 M W N 733	42, 507
Official Receiver, Jullunder v Labhu Ram, 14 Lah 724	

Official Receiver, Kistna & Gogineni Kodandaramayya, 58 M 1056 1935 M W N 499 68 M L J 681 157 I C 826 1935 A I R (M) 65	519
Official Receiver, Kistna & Imperial Bank of India, I L R 58 M 403 1935 A I R (M) 151	604
Official Receiver, Lahore & Chiman Lal, 31 P L R 245 123 I C 286 1930 A I R (Lah) 645	31, 269, 525
Official Receiver, Mandalay & Succaram, 14 R 63	393
Official Receiver of Moradabad & Murtaza Ali, 1932 A L J 402	273
Official Receiver, South Arcot & Perumal Pillai 79 I C 322 (1924) A I R (Mad) 387	62, 64
Official Receiver, South Kanara & Bastiao Souza, 23 M L W 643 95 I C 300 (1926) A I R (M) 826	538
Official Receiver, Tanjore & Nagaratna Mudaliar, 49 M L J 643 (1925) M W N 871 91 I C 377 (1926) A I R (M) 194	520
Official Receiver, Tanjore & Nataraja Sastrigal, 46 Mad 405 72 Ind Cas 225 (1923) A I R (M) 355 44 M L J 251	75 457, 621, 724
Official Receiver, Tanjore & Venkatarama Iyer, 42 M L J 352 (1922) M W N 51	508
Official Receiver, Tanjore & Vidappa Mudaliar, 47 M L J 431 1924 M W N 506 82 I C 450 (1924) A I R (M) 865	549, 550
Official Receiver, Tinnevely & Krishna Pillai 1935 M W N 910 42 L W 707 69 M L J 818 159 I C 88 1935 A I R (M) 1058	363
Official Receiver, Tinnevely & Sanagaralinga Mudaliar, 44 Mad 524	610
Official Receiver Trichinopoly, & Mohammad Meera Sahib 1937 2 M L J 378 1937 M W N 1090 1937 A I R Mad 872	547, 571
Official Receiver, Trichinopoly & Somasundaram Chettiar, 34 Ind Cas 602 30 M L J 415	528, 533
Official Receiver, West Godavery & Sagiraju Subbayya, 1933 M W N 206 37 L W 508 1933 A I R (M) 527 48, 555	
Official Trustee of Bengal & Kissen Gopal Behani, 57 Cal 1210 51 C L J 392 34 C W N 751	362, 365, 658
O M Chiene & Kishun Prasad, 1935 A L J 1158 1935 A W R 1118 159 I C 616 1935 A I R (All) 982	41
Omerto Lal Daw, In re, 13 B L R App 2	361
Om Prakash & Moti Ram, 44 All 400 24 A L J 417 1926 A I R (All) 447	267
Onkarsa & Budhichand, 73 Ind Cas 1037 1923 A I R (Nag) 290	274, 594, 597

Oomet Ahmed Brothers, <i>In the matter of the Estate of</i> , 4 Rang 254 100 IC 265 (1927) AIR (R) 105	78
Oriental Bank & Richer 9 AC 413	237
Origanti v Desikachari, 36 MLJ 461	209
O'Shea's Settlement Courage & O'Shea, (1865) 1 Ch D 325	593
Oswell, Re, 2 Mor 202	420
Otway, Re <i>Ex parte</i> Otway (1895) 1 QB 812	236
Owen v Ruth (1854) 23 LJ CP 105	140

P

Padam Parshad & Firm Mittar Sain Ganesh Lal, 38 P L R 414 164 IC 540 1936 AIR (L) 690	482
Paine, <i>In Re</i> , (1897) 1 QB 122	361
Paine, <i>In Re</i> , (1891) W N 208	402
Painter, <i>In Re</i> , (1895) 1 QB 85	240, 374, 375
Palaiya, D, v T P Sen 16 PLT 167 156 IC 159 1935 AIR (P) 211	316
Palaneappa Chetty v Subramaniam, 1920 M W N 135 38 MLJ 48 54 Ind Cas 740	700, 723
Palaniappa v Official Receiver, Trichinopoly, 32 MLJ 84 20 MLT 334 4 LW 51 25 IC 948	529, 609, 626
Palaniappa Chettiar v Chidambaram Chettiar 1937 M W N 1190 46 LW 815 (1937) 2 MLJ 737	148
Palani Gounden & Official Receiver 53 Mad 288 58 MLJ 369	74, 250, 453
Palanivelu Odayar v The Official Receiver, West Tanjore, 61 MLJ 763 1932 AIR (M) 66	60, 64
Palmer v Carey, (1926) AC 703 95 LJ PC 145	25, 30, 478
Pamanmal v Hemanmal 35 Ind Cas 541 10 SLR 28	464
Panangupalli v Ramchandra 28 Mad 152 (FB) 15 MLJ 1	462
Pandit Brindaban & Official Receiver, 8 Rang 187 (1930) AIR (R) 168	451
Pandu Rang & Nand Lal, 125 IC 686 1930 AIR (N) 272	587
Panja Ram & Gurraju, 18 LW 272 76 Ind Cas 877 (1924) AIR (Mad) 147	685 687
Panmall Jesraj v J Macleod, 60 CLJ. 253 1934 AIR (C) 190	583 588
Panna Lal v Abdulla, 1932 ALJ 1095 143 IC 330 1930 AIR (All) 117	77, 391
Panna Lal v Hiranand, 8 Lah 593 28 PLR 634 102 IC 37 1928 AIR (L) 309	295 296 335, 464
Panna Lal v The Official Receiver, 53 All 313 1931 AIR (All) 71	388 391, 562, 729

Pappanna v. Narasim Reddi, 68 M L J 699 1935 M W N 414 41 L W 809 156 I C 453 1935 A I R (M) 646	421
Paran Chandra Sen v Blackwood & Blackwood, 36 C W N 345	73, 214
Paras Ram v Amir Chand, 10 L L J 207 (1928) A I R (L) 354	132
Parbati v Raja Shyamrikh, 44 All 296 20 A L J 147 60 I C 214 1922 A I R (A) 74	16, 156, 648
Paresram v Official Assignee of Calcutta, 50 Cal 313	415, 677
Parkinson & Ors v Noel, (1923) 1 K B D 117	272
Parmanmall Hemanmall, In application by, 35 I C 541	215
Parmers, H W v Cowasji, 14 A L J 230 33 I C 723	506
Parmeshwari Das, L v Municipal Board, Bareilly, 133 I C 909 1932 A I R (All) 58	715
Parvatheesam v Bapanna, 13 Mad 447	264
Pascal, Ex parte, (1876) 1 Ch D 509	121
Patit Paban Daw v Dinesh Chandra 66 C L J 70	604
Patit Paban Daw v Hari Sadhan Nandi, 1 L R (1938) 1 Cal 245 66 C L J 61 1938 A I R (C) 182	196, 198, 204, 206
Pattison v Banks, Cooper 540	139
Paul Ram v Sheonath Pershad, 2 P L J 235	499
Peacock v Bajnath, 18 I A 78 18 Cal 573	25
Pearey Lall v Allahabad Bank, 24 A L J 334 92 I C 14 1926 A I R (A) 244	495
Pearey Lal, L, v Mohammad Salamat Ullah, 1 L R 1937 (All) 616 1937 A L J 491 1937 A W R 413 170 I C 535 1937 A I R (All) 435	108, 186, 722
Pearse, Ex parte, (1832) 2 D & C 451	564
Pedda Kondappa v Ganni Pullappa, 119 I C 46 1929 A I R (M) 910	87, 142
Pelayudhum Pillai v Official Receiver Tinnevely, 26 M L T 139 1919 M W N 622 52 Ind Cas 689	377
Pennel v Deffell, (1853) 4 De G M & G 372	27, 656
Pennel v Reynolds, (1861) 11 C B N S 709	93
Peoples' Bank of Northern India v Yusuf Ali, 1937 A I R (L) 495	95
Periammal v Official Receiver Coimbatore, 1930 M W N 651	6, 18, 124, 372, 374, 543
Periya Kuruppan Chettiar v Angappa Chettiar, 21 M L W 52 86 Ind Cas 229 1925 A I R (M) 483	165, 167, 228
Phani Bhusan Basu v Shashi Bhusan Maity, 39 C W N 366 60 C L J 581	285
Philips, Re, 76 L T. 531	1
Phillips, In Re, Ex parte Barton, (1900) 2 Q B 329	90
Phillips v Hunter, (1795) 2 H Bl 402	13, 3

Piari Bai Mt v Firm Tulsidas Tarlochan Mal, 100 I C 110 (1927) A I R (L) 152	269
Pichamma v The Official Receiver Cuddappah, 54 Mad 12 (F B) 59 M L J 686 1930 M W N 882	536
Pillers, In Re Ex parte Curtois, (1881) 17 Ch D 653	493
Pilling, Re, (1903) 2 K B 50	401
Pilling, Re, Ex parte, (1906) 2 K B 644	641
Pirithi Nath v Basheshwar Nath 69 I C 403	579, 583
Pirithi Raj v Vishnu Das 144 I C 888 1933 A I R (All) 340	462
Pitaram v Jujhar Singh 39 All 626 15 A L J 661 33 I C 739	684, 686, 690
Pitchford, In Re, (1924) 2 Ch D 260	368
Pollard, Re, (1903) 2 K B 41	505
Pollard, In Re, Exp Dickin (1878) 8 Ch D 377	65
Ponlete v Hood 35 Beav 274	23
Ponusami v Kaliaperumal, 113 I C 550 1929 A I R (Mad) 480	297, 464
Ponnuswami Chetty v Narayanaswami Chetti 14 M L T 304 25 M L J 445 21 Ind Cas 293	106, 240, 375
Ponnuthaye Ammal v Official Receiver, Coimbatore, 38 L W 762 65 M L J 833 146 I C 417 1933 A I R (M) 858	284, 291
Ponsford v Union Bank, etc, (1906) 2 Ch 244	256, 318
Ponsford v Walton, (1868) L R 3 C P 167	98
Poona Lal v Kanhya Lal, 19 Cal 730	429
Poonamechand Pratapji v Motilal Kapurchand 1 L R 60 Bom 69	310
Pope, In Re, Exp, Dicksee (1908) 2 K B 169	533
Pope v Official Assignee, Rangoon 60 I A 362 12 Rang 105 (P C) 39 L W 1 146 I C 743 1934 A I R (P C) 3 36 Bom L R 137	531, 551
Poreshnath Mookerjee v Omerto Nath Mitter, 17 Cal 614	640
Potter v Brown, 5 East 124	468
Potter v Brown, 5 East 124	96
Potter v Brown, 5 East 124	672
Potter v Brown, 5 East 124	607
Potter v Brown, 5 East 124	633, 683
Pramatha Nath v Mohini Mohan 19 C W N 1200 13 I C 573	505
Pratapmall Rameshwar v Chunilal Jahuri, 60 Cal 345, 155 226, 233	
Premchand Mallik v Neelmoni Das 61 Cal 281 38 C W N 283	308, 710
Premasukhdas Asram v Udairam Gungabux 28 C L J 498	7
Preo Nath v Nibaran, 15 C L J 631 15 Ind Cas 870	236, 239
Price, Ex parte, In Re, Roberts (1882) 21 Ch D 553	64

TABLE OF CASES

CIVIL

	Page
Priddey, <i>Ex parte</i> , Cooke Bankruptcy Law 48	18
Prince, Victor N Narayan v Kumar Bhairabendra, 34 CWN 53 125 1C 85 1930 A 1 R (C) 388 11, 337, 339, 602	677
Prior, <i>In Re</i> , (1921) 3 KB 333	677
Probodh Chandra v Rord Oils Ltd, 57 Cal 1101 34 CWN 570 127 1C 454 1930 A 1 R (Cal) 782	25
Promotho Nath v Saurav Dasi, 24 CWN 1011	8
Pullu Goundan v Kumaraswami Goundan, 55 Mad 313 61 MLJ 714 1932 MWN 552 1932 A 1 R (M) 162	725
Pulpati Hanumaya v Ravuri Ramayya, 41 MLJ 126 1921 MWN 381 64 1C 270	8
Puninthavelu v Bhashyam, 25 Mad 406 12 MLJ 288 23 29, 299, 303, 324	
Punjab National Bank Ltd, v Mustt Champo, 36 PLR 627 1937 A 1 R (L) 402	326
Punnayyah v Viranna, 1 LR 45 M 425	616
Puran v Atwargir, 13 ALJ 434 29 1C 217	97
Puran Chand v Puran Chand (1923) A 1 R (L) 652	566 570
Puran Chand v Punjab National Bank Ltd, 3 UPLR 6 59 1C 578	567
Puran Chand v Ram Chandra Gupta, 33 PLR 65 133 1C 539 1931 A 1 R (L) 651	558, 587, 734
Purshatam Naidu v Ponnurangam, 1913 MWN 897 15 MLT 92 21 1C 576	267
Purshotam Das v E B David 13 ALJ 893 30 1C 779	477, 505, 509
Pursingh v Aladkhin, 28 NLR 286 1933 A 1 R (N) 9 713, 721, 724	
Purshottam Naidu v Ramaswamy (1925) A 1 R (M) 245	320
Purushothamdas, <i>In the matter of</i> 55 MLJ 657	2
Purunsottam Sinha v Satyendra Ch Ghosh Moulik, 42 CWN 142 164 1C 747	315
Pyari Chand <i>In Re</i> , 6 BLR 558	177

Q

Quantock v England, (1770) 2 W Bl 704	139
Quarme <i>In Re</i> , 8 Mad 503	150
Quartermaine's case, (1892) 1 Ch 639	Page 481, 493
Quasim Ali v Emperor, 43 All 407 19 ALJ 378 64 Ind Cas 37	642, 698
Queen v Gopal, 3 Mad 971	231
Quelley, <i>Ex parte</i> , <i>Re</i> , Adams, (1878) 9 Ch D 307	121

R

R v Beck, (1889) 6 Cox CC 718
R v Creese, (1874) LR 2 CCR 105

Piari Bai Mt v Firm Tulsidas Tarlochan Mal, 100 I C 110 (1927) A I R (L) 152	269
Pichamma v The Official Receiver Cuddappah, 54 Mad 12 (F B) 59 M L J 686 1930 M W N 882	536
Pillers, In Re, Ex parte Curtois (1881) 17 Ch D 653	498
Pilling Re (1903) 2 K B 50	401
Pilling Re, Ex parte, (1906) 2 K B 644	641
Pirithi Nath v Basheshwar Nath 69 I C 403	579, 588
Pirithi Raj v Vishnu Das 144 I C 888 1933 A I R (All) 340	462
Pitaram v Juhar Singh 39 All 626 15 A L J 661 33 I C 739	684, 686, 690
Pitchford In Re, (1924) 2 Ch D 260	368
Pollard Re (1903) 2 K B 41	505
Pollard, In Re Exp, Dickinson (1878) 8 Ch D 377	65
Ponlete v Hood 35 Beav 274	23
Ponusami v Kaltaperumal 113 I C 550 1929 A I R (Mad) 480	297, 464
Ponnuswami Chetty v Narayanaswami Chetty 14 M L T 304 25 M L J 445 21 Ind Cas 293	106 240, 375
Ponnuthaye Ammal v Official Receiver, Coimbatore, 38 L W 762 65 M L J 833 146 I C 417 1933 A I R (M) 858	284, 291
Ponsford v Union Bank etc, (1906) 2 Ch 244	256, 318
Ponsford v Walton (1868) L R 3 C P 167	98
Poona Lal v Kanhya Lal 19 Cal 730	429
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	310
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	533
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	531, 551
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	640
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	468
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	96
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	672
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	607
Poonamchand Pratappi v Motilal Kapurchand 1 L R 60 Bom 69	633, 683
Pramatha Nath v Mohini Mohan 19 C W N 1200 13 I C 573	505
Pratapmall Rameshwar v Chunilal Jahuri, 60 Cal 345, 155 226, 233 C W N 283	308, 710
Premchand Mallik v Neelmoni Das 61 Cal 281 38 C W N 283	7
Premasukhdas Asram v Udairam Gungabux, 28 C L J 498	236 239
Preo Nath v Nibaran 15 C L J 631 15 Ind Cas 870	64
Price, Ex parte In Re, Roberts (1882) 21 Ch D 553	

TABLE OF CASES

cvi

	Page
Priddey, <i>Ex parte</i> , Cooke Bankruptcy Law 48	18
Prince, Victor N Narayan v Kumar Bhairabendra, 34 CWN 53 125 IC 85 1930 AIR (C) 388 11, 337, 339, 602	677
Prior, <i>In Re</i> , (1921) 3 KB 333	
Probodh Chandra v Road Oils Ltd, 57 Cal 1101 34 CWN 570 127 IC 454 1930 AIR (Cal) 782	25
Promotho Nath v Saurav Dasi, 24 CWN 1011	8
Pullu Goundan v Kumaraswami Goundan, 55 Mad 313 61 MLJ 714 1932 MWN 552 1932 AIR (M) 162	725
Pulpati Hanumaya v Ravuri Ramayya, 41 MLJ 126 1921 MWN 381 64 IC 270	8
Punithavelu v Bhashyam, 25 Mad 406 12 MLJ 288 23, 29, 299, 303, 324	
Punjab National Bank Ltd, v Mustt Champo, 36 PLR 627 1937 AIR (L) 402	326
Punnayyah v Viranna, ILR 45 M 425	616
Puran v Atwargir, 13 ALJ 434 29 IC 217	97
Puran Chand v Puran Chand, (1923) AIR (L) 652	566 570
Puran Chand v Punjab National Bank Ltd, 3 UPLR 6 59 IC 578	567
Puran Chand v Ram Chandra Gupta 33 PLR 65 133 IC 539 1931 AIR (L) 651	558, 587, 734
Purshatam Naidu v Ponnurangam, 1913 MWN 897 15 MLT 92 21 IC 576	267
Purshotam Das v E B David 13 ALJ 893 30 IC 779	477, 505, 509
Pursingh v Aladkhan, 28 NLR 286 1933 AIR (N) 9 713, 721, 724	
Purshottam Naidu v Ramaswamy, (1925) AIR (M) 245	320
Purushothamdas, <i>In the matter of</i> 55 MLJ 657	2
Purusottam Sinha v Satyendra Ch Ghosh Moulik, 42 CWN 142 164 IC 747	315
Pyari Chand <i>In Re</i> , 6 BLR 558	177
Q	
Quantoock v England, (1770) 2 W Bl 704	139
Quarme, <i>In Re</i> , 8 Mad 503	156
Quartermaine's case, (1892) 1 Ch 639	Page 481, 493
Quasim Ali v Emperor, 43 All 407 19 ALJ 378 64 Ind Cas 37	642, 698
Queen v Gopal, 3 Mad 971	231
Quelley, <i>Ex parte</i> , <i>Re</i> , Adams, (1878) 9 Ch D 307	121
R	
R v Beck, (1889) 6 Cox CC 718	697
R v Creese, (1874) LR 2 CCR 105	699

	Page
R v Dyson (1894) 2 Q B 176	695 711
R v Ellis (1898) 19 Cox CC 210	711
R v Hopkins & Farguson (1896) 1 Q B 652	140
R v Juby 55 LT 788 35 WR 168	712
R v Northalerton Country Court Judge (1898) 2 Q B 680	205
R v Page (1819) Russ & Ry 392	695
Rantz Re Exparte Raatz (1897) 2 Q B 80	119
Rachamadugu Rangiah v Appaji Rao 51 MLJ 719 1926	329 535
MWN 972 99 IC 241	
Racharla Narainappa v Konduri Bheemappa 92 IC 541	129 228
(1926) AIR (M) 494	
Radha Krishen Tirath Ram v Fateh Mohamed 33 PLR	
905 137 IC 800 1932 AIR (Lah) 455	534
Radhakishin v Gangaba 110 IC 730 (1928) AIR (S)	
121	60 237
Radha Krishna Thakur Sree Sree v The Official Receiver	
59 Cal 1135 36 CWN 492 56 CLJ 446 1932 AIR	
(Cal) 642	45 49 59 62 595
Radha Krishnaiah Chetty In the matter of 84 IC 128	133
Radha Mohan v Ghasiram 40 IC 96 38 PWR 1917 93	
PR 1917	725
Radha Mohan v M C Whyte 45 All 364 21 ALJ 216	
73 IC 413 (1923) AIR (A) 466	674
Radha Vallab v Raja Ram 141 IC 48 28 NLR 295	76
Muhammad 35 PLR	
534 584 587	
Taqur 72 Ind Cas 911	
11 PLT 138 124 IC	343
639 1930 AIR (Pat) 305	45
Ragho Prasad v Lala Mewa Lal 15 CLJ 327 (PC) 34 All	
223	652
Raghuinandan Singh v Bhupal Gir 1937 ALJ 405 1937	
AWR 342 169 IC 224 1937 AIR (All) 399	313
Raghuinath Cai v Sundar Das 42 Cal 72 (PC) 20 CLJ	
555 16 Bom LR 814 24 Ind Cas 304	597
Raghuraj Sidgh v Abdul Rahman 1938 OWN 271 1938	
AIR (O) 206 FB	184
Rahuman v Nagar Mal 1933 AIR (L) 1010	312 479
Rament Re Exp Parkes (1899) 6 Mans 288	88
Rain v Bank of Bengal 5 CWN 16	323
Raja Debi Baksh Singh v Habib Shah 17 CWN 822	178
Raja Mulraju v Official Assignee Madras 2 MLW 312 17	
MLT 247 1915 MWN 262 28 MLJ 403 29 Ind	
Cas 37	278
Raja Ram v Chandu Prasad 9 OWN 102 1932 AIR	
(O) 107	137 219

Rajendra Chandra v Bepin Chandra, 60 Cal 1298 37 CWN 973 1934 AIR (Cal) 64 320, 323 325, 368, 479	
Raj Raghunath Singh v Jasindra Bahadur Singh, 42 All 158 (PC) 402	
Raj Rani v Jawahar Lal 26 ALJ 41 108 IC 156 1928 AIR (A) 158 51	
Raj Singh v Official Receiver, Lahore, 160 IC 173 1935 AIR (Lah) 810 675	
Rakhal Chandra v Sudhindra Nath, 46 Cal 991 24 CWN 172 52 IC 744 117, 328, 499, 534	
Rala Ram Sant Ram v Gayan Singh 126 IC 439 1930 AIR (Lah) 746 232	
Rali Ram v Sant Ram 142 IC 644 1933 AIR (L) 101 353	
Ramabrahman v Gudimilla Andalamma 34 LW 537 1931 MWN 287 1931 AIR (Mad) 597 543	
Ramachandra Naidu v Emperor, 1931 MWN 1312 700	
Ramachandra Rao v Ramachandra Rao 49 IA 129 45 Mad 320 58, 557	
Ramakrishna Reddi v Official Receiver Bellary, 1938 MWN 18 176 IC 48 1938 AIR (M) 461 733	
Ramalinga Ayyar v Rayalu Ayyar 53 Mad 243 58 MLJ 170 491, 754	
Ramalinga Ayyar v Subba Ayyar 145 IC 764 1933 AIR (Mad) 168 491	
Ramanadha Aiyar v Nagendra Aiyar 45 MLJ 827 (1924) AIR (M) 223 76 IC 805 310	
Rama Nanda Pal v Pankaj Kumar Ghosh 1 LR (1938) 2 Cal 275 1938 AIR (C) 417 145 532 561 569 570, 572, 578	
Ramanandi Kuer v Kalawati Kuer 55 IA 18 7 Pat 221 1928 AIR (PC) 2 6 481	
Ramanath Aiyar v Nagendra Aiyar 45 MLJ 827 18 LW 868 1924 AIR (Mad) 223 264, 307	
Ramanatham v Subramanya, 26 Mad 179 502	
Ramanatha Mudaliar v Vijayaraghavalu 30 MLT 369 106 IC 34 (1927) AIR (M) 983 718	
Ramanathan Chettiar v Subramama 48 Mad 656 47 MLJ 759 85 IC 216 20 LW 872 (1925) AIR (M) 248 2, 191, 503, 504	
Raman Chetty v A V P Firm 31 Ind Cas 884 685, 686	
Rama Pillai v Krasamuthu Nader, 1929 MWN 369 121 IC 485 1929 AIR (M) 715 750	
Ramappa Naidu v Lakshmanan Chettiar 54 MLJ 272 (1928) AIR (M) 190 281	
Ramaraja Nadar v Chidambara Nadar, 1933 MWN 75 35 LW 720 143 IC 613 1933 AIR (M) 345 71, 728	
Ramarayudu v Sitalakshamma 1937 MWN 1014 1937 AIR (M) 915 46 LW 550 631	

Ramasamayajullu v Official Receiver Godavari	23 L W	
80 1926 M W N 169 92 I C 249 (1926) A I R (M)		
360		55
Ramasami v Murugesu	20 Mad 252	385
Ramasami Nayakar v Venkatasami Naicker	38 L W 494	
65 M L J 298 145 I C 876 1933 A I R (M) 653		558 587, 731
Ram Asray Sahu v Sri Ram Dubey	11 O W N 71 1934	
A I R (O) 94		173
Ramasubba Raju v Seshamma (1929) A I R (M)	242	
	483 487, 490	
Ramaswami P v Subramania Iyer	79 Ind Cas 443	
(1925) A I R (M) 172		542
Ramaswami Aiyangar v the Official Receiver Coimbatore		
1926 M W N 419 50 M L J 448 23 L W 734 94 I C		
535 (1926) A I R (M) 672		533, 556
Ramaswami Chettiar v Muthualuswami Chettiar	109 I C	
83 (1928) A I R (M) 903		108
Ramaswami Chettiar v Ramaswami Aiyangar	45 Mad	
434 42 M L J 195 1922 A I R (M) 147 1922 M W N		
110 65 I C 394	40 60 61 77 610 630 644	
Ramaswami Gounden v Emperor	1935 M W N 919	208 695
Ramaswami Iyenger v Chinnathambi	1932 A I R (M) 459	568
Ramaswami Iyer v Subramania (1938) 2 M L J 179	1938	
A I R (M) 267	237 242 243 244	
Ramaswami Pillai v Gobindaswami Naikar	42 Mad 319	
25 M L T 247 49 I C 626		293 332 755
Ramaswami Pillai v Venkateswara Aiyar	42 Mad 13 48	
I C 952		744
Ramaswamy v Power	151 I C 625 1934 A I R (R) 117 735	745
Ramathai Anni v Kaniappa Mudaliar	51 Mad 495 27	
M L W 508 1928 A I R (M) 480 110 I C 167		94 186 183
Rama Vilas Nidhi Ltd v Pera Naicken	1 L R 59 M 770	
1936 M W N 79 161 I C 723 1936 A I R (M) 161		604 617
Rambadia Chetty v Ramaswami Chetty	44 M L J 284 73	
Ind Cas 375		621 630 686
Ram Bahudra v T V Nipunj (1924) A I R (B) 49		598
Rambarda Chetty v Ramaswami Chetty	44 M L J 284 73	
I C 375		686
Ram Behari Lal v Jagannath	19 O C 89	694
Ram Chand v Ahmad Yez	34 P L R 31 140 I C 808	
1933 A I R (L) 65		57
Ramchand v Mohra Shah	1931 A I R (Lah) 725 135 I C	
511		418, 721
Ram Chand v Parmanand	110 I C 824	575
Ram Chand v Shah Mohra Shah	11 L L J 198 119 I C	
427 1929 A I R (L) 622		628 735

Ram Chander Sarup v. Mozhar Hussain, 1 U P L R 69	51
1 C 55	353, 355
Ram Chandra v. Rakhai, 17 C W N 1045	615
Ramchandra v. Ramchandra, 27 N L R 179	134 1 C 687
1931 A I R (Nag) 153 (F B)	47, 731
Ram Chandra v. Shama Charan, 18 C W N 1052	19 C L J
83 21 Ind Cas 950	258, 259, 373
Ram Chandra Aiyar v. Sankar Aiyar, 50 M L J 239	23
M L W 145 1926 M W N 159	93 Ind Cas 271 (1926)
A I R (M) 357	197, 198
Ramchandra Genuji v. Sripati Sukaji 118 1 C 252	333
Ram Chandra Narayan v. P. V. Nipunge, 25 Bom L R 499	
73 1 C 379 (1924) A I R, (B) 49	678
Ram Chandra Sahai v. Dalpat 1937 A W R 384	168 1 C
159 1937 A I R (All) 526	443
Ram Chandra Sonaram v. Prithwise Narain Sarkar, 14	
P L T 739 145 1 C 524 1933 A I R (Pat) 564	551
Ramcharan v. Basdeo 102 1 C 92	591
Ram Charan Sahu v. Salik Ram Sahu 52 All 217	121 1 C
702 1930 A I R (All) 628	52
Ramdas v. Rogers, 32 P L R 438	133 1 C 436 1931 A I R
(L) 586	725
Ram Das v. Sultan Husain Khan 6 O W N 100	115 1 C.
107 1929 A I R (Q) 149	127
Ram Dayal v. Mukut Monohar 1937 A L J 304	1937
A W R 241 168 1 C 683 1937 A I R (All) 317	21
Ram Devi v. Ganesh Lal 24 A L J 480	95 Ind Cas 416
(1926) A I R (A) 501	649
Ram Dhon Dhur v. Mahesh Chander 9 Cal 406	11 C L R
565	26
Ram Ditta Mal v. The Official Receiver Lahore 15 Lah	
294 35 P L R 271 147 1 C 1026 1934 A I R (L) 365	46, 62, 551, 555
Ramesh Chandra v. Charu Chandra 34 C W N 445	188
Ram Ghulam v. Kailash Narain, 52 All 493	1931 A I R
(All) 59	269
Ram Gopal Ram Parsad v. Gulua Mal Ghasiram, 128 1 C	
292 1930 A I R (Lah) 851	515 517
Ramiah v. Gopaliar, 41 Mad 1053	509
Ramjas v. Katha Singh, 9 P L R 192	14 P W R 1921 59
Ind Cas 51	70
Ram Karan v. Official Receiver, Ferozepore, 31 Punj L R	
18 121 1 C 373	722
Ram Kirpal Shukul v. Mt. Rup Kuari, 11 I A 37	6 All 269 58, 557
Ram Kissen v. Umrao Bibi, 18 P W R 1916	33 Ind Cas
730	727, 738, 7
Ram Komol Saha v. Bank of Bengal, 5 C W N 91	340, 615,

Ranagappa v Rangappa	56 Mad 395	63 MLJ 778	140
IC 461			58 557 585
Ranga Reddi v Official Receiver Anantapur	46 LW		
895 (1937) 2 MLJ 893	1938 AIR (M) 177		567
Rangasami Gouden v Nichappa Gouden	46 IA 72	42	
Mad 523	23 CWN 777		95
Rangiah Chettiar v Annasami Alwar	1923 MWN 840		
18 LW 836	79 Ind Cas 408	(1924) AIR (M) 368	8
Rangya Chetti v Tanikchella Mudaly	19 Mad 74		267
Raoji Bapuji v Panditkar Bawachekar	37 Bom LR 478		
157 IC 680	1955 AIR (B) 316		49
Rarichan v Kainhamu	57 Mad 808	39 LW 639	291
Rash Behari v Bhagwan Chandra	17 Cal 209		708
Ras Jas v Katha Sing	59 IC 51	9 PLR 192	14
PWR 1921			189
Rasul Bakhsh v Gulab Rai	113 IC 20		281
Rasul Huzi Cussum In Re	13 Bom LR 13		680
Ratan Chand v Smail	1933 AIR (L) 821		145 542
Ratan Lal v Govinda	90 IC 349	(1926) AIR (N) 29	319
Rathu Mal v Kunj Behar Lal	1936 AWR 1149	166	
IC 801	1937 AIR (All) 4		566 729
Rati Ram v Sant Ram	142 IC 644	1933 AIR (L) 101	754
Raymond v Ferch	(1835) 41 RR 797		276
Read Ex parte Re Pain	(1897) 1 QB 122		564
Reed In re Ex parte Official Receiver			724
Reg v Dyson	(1894) 2 QB 176		711
Reg v Ellis	(1898) 19 Cox CC 210		711
Reloomal Tolaram In Re	112 IC 134	1929 AIR (S) 24	165
Revati Mohan v Jatindra Mohan	61 IA 171	61 Cal 470	
38 CWN 517 (PC)	148 IC 482	59 CLJ 252	
1934 AIR (PC) 96			327 606
Rex v Wells	(1812) 16 East 278		652
Reynolds Re	(1915) 2 KB 186		124
Richards v Overseers of Kidderminster	(1836) 2 Ch 212		651
Richardson In re Ex parte St Thomas's Hospital	(1911) 2 KB 705		278 477
Richardson v Pratt	52 LT 614		104
Ridgway Re	(1889) 6 Morr 277		641
Ridgway Re	(1811) 8 Mor 289		641
Roberts In Re	(1900) 1 QB 122		259
Robins & Co v Gray	(1895) 2 QB 78		24
Rodick v Gandell	1 DM & G 763		30
Rodrigues v Ramaswami	40 Mad 783		16 565
Roeborn M A v Tollkoffer	2 Rang 193		574
Rogers Re Ex parte Holland	(1891) 8 Morr 243		595

Rogers v Spencer, 67 P R 736	276
Rolla Ram v Ram Labhya Mal, 6 L L J 232 20 Ind Cas 509	515
Roop Narain v King Co 94 Ind Cas 234 (1926) A I R (L) 370	388, 454
Roora Mal v Official Receiver Karnal 33 P L R 464 1932 A I R (L) 381	571
Rose v Hart 2 Smith's Leading Cases 9th Ed 324	475
Ross Ex parte, 2 Gl & Jameson's Bankruptcy Cases, 46 & 330	363, 364, 749
Ross v Hayock, (1884) 1 Ad & El 460	97
Rouch v G W R Co 1 Q B 51	101
Rowe & Co v Tanthean Taik 2 Rang 643 84 I C 909	288, 431, 443, 562
Rowland Hudson v John Pierpont Morgan 13 C W N 654 9 C L J 563	66, 611, 618
Rowlandson v Champion 17 Mnd 21	305, 308, 310
Rufford, Ex parte, 2 De G M & G 234	439
Rukmani v Rajagopala 47 M L J 495 (1924) M W N 813 84 Ind Cas 281	122
Rumsey v George, 1 M & S 176	121
Rup Narain Singh v Har Gopal Tewari 55 All 503	309
Rup Ram v Fazal Din 1 Lah 237	630
Rup Singh v Official Receiver, 10 L L J 156 1928 A I R (L) 82 107 I C 394	251, 452
Rura v Official Receiver Amritsar 125 I C 625 1930 A I R (L) 708	296, 605
Rustomji Ardesht Cooper v Bymanj Bomanji Talati 36 Bom L R 79	275
Rustomjee Dorabjee v K D Brothers 53 Cal 866	725
Ryley, Ex parte, 14 L T 707	441

S

Sabhapatti, Re, 21 Bom 297	173, 375
Sacker, In Re, Ex parte Sacker, 22 Q B D 179	16
Sadasiva Mudaliar v Hajee Mahomed Sait, 27 C W N 677 (P C) 37 C L J 569 62 I C 48 44 M L J 396	133
Sadhuram v Kishori Lal, 1 L R 1938 (L) 535 1938 A I R (L) 490	39 41, 59 60, 63, 223
Sadler v Whiteman, (1910) 1 K B 686	757
Sadodin v W Spiers 3 Bom 437	633
Safdar Ali Khan v Mian Umar Baksh 163 I C 621 1936 A I R (Pesh) 151	683
Safiq Uz zaman v Deputy Commissioner, Oudh 18 O C 125 30 I C 694	399

	Page
Sahay Narain v. Wajid Hussain, 49 I C 848	268
Sahu Durga Suman v. Beni Pershad, 1933 A L J 1342	146
1 C 832 1933 A I R (All) 559	520
Sailendra Krishna v. Rashmohan, 33 C W N 709	646
Sajjan Mal v. Bodh Raj, 1934 A I R (Peshawar) 89	389
Sakhwat Ali v. Radha Mohan, 41 All 243 17 A L J 299	
49 I C 816	682
Salamatmal, In Re, 139 I C 851 1932 A I R (S) 161	183
Salig Ram v. Lachmi Prasad, 1930 A L J 1048 1930 A I R (All) 622	52
Saligram v. Official Receiver, 91 I C 467 (1926) A I R (S) 94	248, 451
Salig Singh v. Ram Kishan, 10 A L J 51	172
Salsiccion, L. E., In Re, 39 C W N 324	165
Sambamurthi v. Ramakrishna, 52 Mad 337 33 C W N 164 (notes) 55 M L J 837 1929 A I R (M) 43	252, 731
Sambasiva Reddi v. Official Receiver, South Arcot, I L R (1937) Mad 565 45 L W 313 (1937) I M L J 654 171 I C 495 1937 A I R (M) 444	32, 33
Samiruddin v. Kadumoyee, 15 C W N 244 12 C L J 445	
72, 173, 223, 238, 240, 375, 421, 693	
Sanchi Khan v. Karim Chand, 73 I C 705	685
Sanjirat, Musstr v. Ram Chandra Gupta, 33 P L R 669 143 I C 630 1933 A I R (Lah) 197	47
Sankar v. Vithal, 2 Bom 45	35
Sankara Narayana v. Alagiri 49 I C 283 (1918) M W N 487 24 M L T 149 35 M L J 296	329 534, 577
Sankaranarayanan Pillai v. Rajamani 47 Mad 462 46 M L J 314	623
Sankara Rao v. Turlapati Rama Krishnaia 46 M L J 184 78 I C 294 (1924) A I R (M) 461	619, 690
Sankar Lal Pt. v. Porcha Ram, 1936 O W N 56 160 I C 33 1936 A I R (O) 177	291
Sanyasi Charan Mondol v. Asutosh Ghosh, 42 Cal 225 22 I C 836	123, 134, 374, 609, 626
Sannyasi Charan Mondol v. Krishna Dhan Bannerjee, 49 I A 108 49 C 560 (P C) 26 C W N 954 43 M L J 41 35 C L J 498 20 A L J 409 (P C) 67 I C 124	133, 266
Santiago, S A., v. Emperor, 165 I C 303 1937 A I R (N) 237	194, 204, 208, 695
Sant Lal v. Rajnarain, 119 I C 4 (1929) A I R (All) 858	436, 739
Santon v. Collier, 23 L J Q B 116	632
Sant Singh v. Shew Dut Singh, 2 Pat 724	150, 267, 268, 319, 327, 479, 604, 625
Sarabji v. Gobindramji, 16 Bom 91	502
Sarat Chandra v. Barlow & Co., 56 Cal 712 (F B) 33 C W N 15 (F B) 48 C L J 298	78, 127, 382

Searle v Choal, (1884) 25 Ch D 773	680
Searle Hoare & Co, In Re, (1924) 2 Ch D 325	666
Secretary of State v Chund Mal, 160 IC 1025	620
Secretary of State v Dabir Reddi Narayan 25 MLT 12 36 MLJ 180 50 IC 593	88
Secretary of State v Judah 12 Cal 652	217
Secretary of State v Jumna Das, 11 Pat 584 140 IC 561 1930 AIR (Pat) 311	317
Secretary of State v Official Assignee, 174 IC 157 1938 AIR (S) 49	654
Secretary of State v The Punjab Industrial Bank, 12 Lah 678 1931 AIR (L) 351 134 IC 200	653
Secretary of State v S C Niyogi 158 IC 361 1935 AIR (R) 273	596, 653
Seldana, A F, Re, Ex parte, Suklal Karnani, 33 CWN 679	646
Sellamuthu Servai, In Re 47 Mad 87 (FB) 1924 MWN 94	267
Sellayammal v Periantha Pillai 1934 MWN 1144	217
Selvan Chettiar v Venkatachalam Chettiar 59 MLJ 710 32 LW 446 129 IC 36 1931 AIR (M) 10 249, 388	730
Seshagiri Rao v Canara Bank Ltd 1936 MWN 1070	659
Seshayya v Rangiah, (1939) 1 MLJ 203	507
Seth Ghanshamdas v Uma Prasad 23 CWN 817 (PC) 50 IC 264	528, 580
Seth Nemi Chand v Must Maluk Begum 50 IC 316	526
Seth Radhakissen v Firm of Gangaram Radha, 59 PLR (1914) 23 Ind Cas 927	472
Sethurama Chettier v Official Receiver, Tanjore, 49 Mad 849	268
Seth Vishandas v Thawerdas 80 IC 642 (1922) AIR (S) 72 and 118	264
Sevugan Chettiar v Murugappa Chettiar 54 Mad 823 61 MLJ 173 132 IC 134 1931 AIR (Mad) 344 400, 404, 405	
Sh Faral Azim v Tulshi Ram 1937 OLR 570 1937 OWN 1143 171 IC 609 1938 AIR (O) 8	753
Shackleton In Re, Ex parte Shackleton, (1890) 61 LT 648 6 Mor 304	305
Shadhan Chandra Bhandari v Sewnarain Golabrai, 37 CWN 718 57 CLJ 467	254, 431
Shankar Das v - - - - - 18 OC 125	400
- - - - - AIR (L) 867	639
- - - - - 171 (notes)	172
Shaikh Golam Rahaman v Shaikh Wahed Ali, 10 CWN 859 16 IC 470	223, 238, 239
Shakar Khan v Ishar Das, 38 PLR 273 163 IC 1007 1936 AIR (L) 568	

Shibjee Shah v. Hiralal Rakhal Chand, 104 I.C. 613 : 1928 A.I.R. (P.) 23	159, 734
Shib Lal Rathi, <i>In Re.</i> , 19 Bom. L.R. 365 : 40 I.C. 207	178
Shib Narain v. Lachmi Narain, 30 P.L.R. 533 : 119 I.C. 733 (1929) A.I.R. (L.) 761	8, 38, 40, 56
Shields, <i>Re.</i> , 106 L.T. 345	444
Shikri Prasad v. Aziz Ali, 44 AIL 71 : 19 A.L.J. 862 : 63 Ind. Cas. 601	54, 67, 539, 547, 554, 732
Shiogopal v. Sukhru, 87 I.C. 957 : (1925) A.I.R. (N.) 418	267
Shiv Deo Saran v. Kidar Nath, 38 P.L.R. 218 : 164 I.C. 1087 : 1936 A.I.R. (L.) 840	437, 441
Sho Idon Lachmi Narain v. Bahadur Chand, 100 I.C. 137	392
Sholapur Spinning etc. v. Pandharinath, 30 Bom. L.R. 839 : (1928) A.I.R. (B.) 341	530, 573
Shrigopal Chiranjilal v. Dhanalal Ghasiram, 35 B. 393	752
Shri Goswami v. Shri Govardhan, 14 Bom. 541	162
Shw Wa v. Sullivan, 15 I.C. 368	626, 639
Shyama Charan, Pt., v. Mt. Auguri Devi, 1 L.R. 1938 All. 486 : 1938 A.I.R. (All.) 253	348
Siddaya v. Muddappa, 1935 M.W.N. 886	413
Siddheswar Nath v. Deoki Din, 10 O.W.N. 1233 (F.B.) : 1934 A.I.R. (O.) 1	269
Siddik Ahmed v. M. K. M. Firm, 79 I.C. 813 : (1923) A.I.R. (Rang.) 149	16, 565
Sidebotham, <i>Ex parte</i> , (1880) 14 Ch. D. 458	682, 723, 724
Sidhraj Bhojraj v. Ali Haji, 47 Bom. 244 : 24 Bom. L.R. 509 : 67 I.C. 575	750
Sigubalah v. Ramasamiiah, 6 L.W. 283 : 42 Ind. Cas. 608	700
Sillitoe, <i>Ex parte</i> , 1 Gl & J 374	662
Sime Darby v. The Official Assignee, 47 C.L.J. 339 (P.C.) : 30 Bom.L.R. 290 : 54 M.L.J. 337 : 107 I.C. 233 : 1928 A.I.R. (P.C.) 77	101, 573, 580, 583
Simhadri Venkatanarasayya v. Official Receiver, Godavari, 53 M.L.L. 136	329
Sinclair v. Brougham, (1914) A.C. 393	27, 656
Singer Mfg. Co. v. London & S. W. Ry. Co., (1894) 1 Q.B. 833	24
Singha v. Chiranjil Lal, 1939 A.I.R. (L.) 35	145
Sinnam Chetti v. G. S. Alagiri Iyer, 1924 M.W.N. 6	135
Sinnaswami v. Aligi Goundan, 47 M.L.J. 530 : 1924 M.W.N. 836 : 84 I.C. 938 : (1924) A.I.R. (Mad.) 893	212, 345
Sirur v. Mythili Ammal, 61 M.L.J. 683 : 1932 A.I.R. (M.) 170	394, 634
Sisram v. Ram Chander Mal, 52 AIL 439 : 1930 A.L.J. 350 : 126 I.C. 252 : 1930 A.I.R. (All.) 104	...
Sital Prasad, <i>Re.</i> , 43 Cal. 1157 : 20 C.W.N. 1065	123,
Sitaram, <i>In Re.</i> , 10 Bom. H.C. 58	...

Sitaram v Beni Prasad, 47 All 263	84 I C 790	1925 A I R	
(All) 221			58, 267
Sita Ram v Hukum Chad	101 I C 424		229
Sita Ram v Kartar Singh	34 P L R 477	146 I C 239	1933
A I R (L) 416			361
Sita Ram v Kishan Lal	1931 A L J 39	126 I C 16	1930
A I R (All) 580			349, 751
Sita Ram v Musst Nathi Bai	1933 A I R (N) 365		541, 590, 623
Sita Ram v Receiver of the Estate of Ram Prasad,	1932		
A I R (All) 353	1932 A L J 285		269
Sitaram v Redden,	91 I C 760	(1926) A I R (C) 529	425
Sitaram v Shaikh Sardar	13 N L R 215	42 I C 710	312
Sita Ram Abbaji In Re,	10 Bom H C 58		187
Sitaram Bajirao Bhalerao v Amrutrao Ganpatrao,	1937		
A I R (N) 226			100, 233
Sitharama v Vaithilinga	12 Mad 472		727
Sivaramiah v Bhujanga	39 Mad 593		689, 738, 744
Sivasami Odayar v Subramania Aiyar	55 Mad 316	62	
MLJ 68	1932 A I R (M) 95		199 517, 519, 617
Sivasubramania Pillai v Theethappa Pillai	47 Mad 120	45	
MLJ 166	1923 M W N 895	75 I C 572	357, 360, 363, 428, 749
Skegg In Re,	63 L T 90		442
Skippers & Co, Ltd v E V David	48 All 821		326, 605
Slater, Re, 4 Mans	118		87
" v ore (1903) 2 K B	517		595
"	1 135		64
"	Bl 35		261
"	444		93
"	349		278
Smith v Duni chand,	1933 A I R (L) 261		103
Smith v L S W Ry	L R 5 C P 102		345
Smith v Pearson (1920)	L R 1 Ch D 247		441
Snowdon Exp rite, (1881)	17 Ch D 44		278
Sodhi Lal Singh v Behari Lal Lakshare	171 I C 31	1937	121
A I R (L) 895			149
Sohan Lal v Sheo Nath	26 A L J 941	111 I C 136	1928
A I R (A) 676			577
Sohan Singh v Official Receiver,	40 P L R 8	1937 A I R	
(L) 782			313
Sohna Mal v Jewan Das,	34 P L R 69	142 I C 690	1933
A I R (Lah) 330			225, 240
Sohna Mal v Sardar Gian Singh	1937 A I R (L) 494		22
Sohna Ram v Tarachand,	117 I C 87	1929 A I R (L) 399	250
Solayappa Narker v Shunmugasundaram,	50 MLJ 237		

TABLE OF CASES

cxvi

Page

(1926) M W N 281	22 M L W 673	93 I C 3	(1926)	
A I R (M) 510			9	291
Somasundaram v Periakaruppan	58 M L J 658		389	419
Somasundaram Chettiar v R. J. Kannoo Chettiar	118 I C			
494 1929 A I R (M) 573		115	132	134
Soniram Ramesh v Mary Pinto	11 R. J. 467			652
Sonkaraniyana Pillai v Rajomani	47 Mad 462	46 M L J		
314				267
Sooniram Ramniranjandass v Alagu Nachiyar Koil	42 C W N			
1125 (P C)				281
Soorji Money v Dinobondhu	9 M I A 124			277
Spackman In Re Foley Ex parte (1890)	24 Q B D 728		87	90
			94	524
Sreepoot Singh v Ram Sarup	95 I C 463	(1926) A I R (C)		
982				354
Srichand v Murarilal	34 All 628			499
Sridhar Chowdhury v Mugni Ram Banger	3 Pat 357	78		
1 C 620		66	380	743
Sridhar Narain v Atmaram	7 Bom 455	319	322	468
Sridhar Narain v Krishnaji	12 Bom 272		318	482
Srigopal Chobey v Dhonalal	35 Bom 393			606
Sri Kishna v Nagoba	76 I C 634			752
Sriman Chunder De v Gopal Chunder	11 M I A 28			312
Srimati Mrinalini Dasi v Harihar De	59 Cal 1335	36		555
C W N 741	56 C L J 307			204
Srinivas Ayyangar v Official Assignee Madras	38 M 472			
25 M L J 299	21 I C 77	1914 M W N 45		80
Srinivasa v Sitaram	19 Mad 72	5 M L J 151		502
Srinivasulu Naidu v Sundaresa Iyer	1937 M W N 404	172		
1 C 797	1937 A I R (M) 677			463
Sripat Singh v Maharaja Sir Prodyot Kumar Tagore	57 I C			
810			70	189
Sri Ram v Ram Chandra Mal	1930 A I R (All) 104			463
Sriramulu v Andalmal	30 Mad 145	17 M L J 14	307	308
Sriramulu Chettiar v Sornam Pillai	67 M L J 924	1955		309
A I R (Mad) 202			148	176
Sris Chandra v Muni Bewa	9 C W N 14			29
Stainton Re (1887)	4 Mour 242	(1887) 9 Q B D 102	438	441
Stamp Exp (1846)	De Gex 345			18
Stanton v Collier	23 L J Q B 116			632
Steel Wing Co Ltd Re (1921)	1 Ch 349			121
				4

	Page
Subba Aiyar v T S Ramaswami 40 M L J 209 62 I C 346	601
Subban Asari v The Official Receiver Tinnevely 1934 M W N 681	545
Subbaraya v Virappa 57 Mad 89 (F B) 146 I C 521 1933 A I R (M) 851	285 502
Subbaraya v Vythilinga 16 Mad 85	676
Subbaraya Chettiar v Lakshmi Ammal 1918 M W N 289	633
Subbarayudu v Official Receiver Cuddappah 1935 M W N 494 156 I C 284 1935 A I R (M) 433	390
Subbayyar & Bros v J K Munuswami Aiyar 51 M L J 613 98 I C 516	17 275 276
Subbiah Aiyar v The Official Receiver Tinnevely 63 M L J 727 1933 A I R (M) 25 141 I C 822	188 538
Subbrayalu v Rowlandson 14 Mad 134	487 488
Subramania v Theetheppa 47 Mad 120 45 M L J 166	721
Subramania Aiyar v Dharapuram Nadhi 1928 M W N 216 (1928) A I R (M) 454	198 617
Subramania Ayyar v Meenakshisundaram 1 L R 1937 M 679 1937 M W N 577 45 L W 565 1937 I M L J 637 1937 A I R (M) 577	364
Subramania Aiyar v Official Receiver Tanjore 23 M L W 300 93 I C 877 (1926) A I R (M) 432 197 199 282 334	
Subramaniam Iyer v Krishna Iyer 102 I C 266 (1927) A I R (M) 266	269
Subramaniam Chettiar v Official Receiver Madura 1932 M W N 59	551 558
Subramaniam Chettiar A L S P P L v Subbaraya Gounden 1934 M W N 801	576
Subramanya Iyer v Venkatarama Raju 1936 M W N 197 43 L W 194 161 I C 717 1936 A I R (M) 424	407 413
Subramanya Iyer v Venkatarama Raju 1936 M W N 197 43 L W 194 161 I C 717 1936 A I R (M) 424	178 374
Subramanya Iyer v Venkatarama Raju 1936 M W N 197 43 L W 194 161 I C 717 1936 A I R (M) 424	271
Subramanya Iyer v Venkatarama Raju 1936 M W N 197 43 L W 194 161 I C 717 1936 A I R (M) 424	88 I C 89 (1925)
Subramanya Iyer v Venkatarama Raju 1936 M W N 197 43 L W 194 161 I C 717 1936 A I R (M) 424	543
Sudhendu Mohan Bagchi v Khitish Ch Das Gupta 39 C W N 563	367 465
Sugamantam v Pichi 10 I C 786	164
Sugra Bibi v Gaya Prasad 52 All 560 1930 A L J 1038 123 I C 754 1930 A I R (All) 580	355 368
Suka v Ramchandra I L R (1937) Nag 380 170 I C 161 1937 A I R (N) 171	463
Sukhlal v Official Assignee Calcutta 34 C L J 251	210
Sukrit Narain v Raghunath 7 All 445	696
Suleman Latif Hasaf Kachi v Laxman 177 I C 760 1938 A I R (N) 312	390
Sultanuddin v Hakim Aminuddin 7 O W N 941 128 I C 272 1930 A I R (Oudh) 474	419 449

	Page
Sultzberger, Re, 4 Mor 82	422
Sumtermull Suran, In re 59 Cal 818	262, 301
Sumermul Surena v Rai n l l - n 35	13, 263
C W N 997 and 406 1	487
Summers Boswell, Re v G	649
Summon Gope v Raghurir, 24 Cal 140	287, 292
Sundarappa v Arunachella, 18 M L J 487	336
Sundarappaiyar v Ramhari, 18 M L J 487	365
Sundar Das v Official Receiver 1937 A I R (L) 790	284
Sundayee Ammal v Krishnan Chetty, 51 Mad 858	670
Sunderjee, In Re 107 I C 439 1928 A I R (S) 105	91
Sunderland, Re, (1911) 2 K B 658	34
Sunder Singh Sachar v Official Receiver, Rawalpindi, 34 P L R 436	574, 582
Sunder Singh v Ram Nath 7 Lah 12 27 P L R 228 93	675
1 C 1013 1926 A I R (L) 167	
Supptiah Moopnar v Mallappa Chetty 124 I C 219	251
1930 A I R (Mad) 342	267
Suraj Bansi v Sheo Pershad 5 Cal 148 (P C)	591
Surajmali Mangalchand, Re, 26 C W N 803	436
Suraj Pal v Shib Lal, 119 I C 16 (1929) A I R (All) 843	649
Surendra v Hari Mohan, 31 Cal 174	614
Surendra Nath v Chief Justice of Bengal, 10 Cal 78 (P C)	337
Surendra Nath v Tripura Pada 32 C W N 304	63
Surja v Girindra 79 I C 552 9 O & A L R 419	616, 741
Suresh Chandra Gooyee Re 23 C W N 431	96
Sureshwar Misser, Chowdhury v Musst Moheshrami Misrain 41 C L J 433 (P C)	528, 539
Surja Kumar Naik v Bejoy K Hazra 41 C W N 105	551, 556
Susarmoy Sen v Bibhuti Bhushan Jana 37 C W N 675	291, 336, 343
1933 A I R (Cal) 689	
Swami Katayya v Shunee Guntla 68 M L J 148 41 M L W 167 1935 A I R (M) 239	501, 520
Swaminatha v Official Receiver South Malabar, 57 Mad 330 65 M L J 402 145 I C 999 1933 A I R (Mad) 703	246
Syed Jaharali v Mt Musharatam, 9 Pat 304	261
Syed Kazim In the matter of 5 Rang, 73	534, 550
Syed Mahomed v Choudhury Mahomed 46 C L J 168	46, 48
Syed Mahomed Rowther v Official Receiver, Coimbatore 1936 M W N 857 168 I C 97 1937 A I R (M) 32	28
19 C W N 1159	
Rughoonath Pershad, 14	
T	2
Tabor, In Re, (1920) 1 K B 808	
Tailby v Official Receiver, (1888) 13 A C 523	

Tangathur Ramayya & K V Sreenivasayya 1935 M W N	347	238
Tannenbergh Re 6 Mor 49		91
Tan Seik Ke & C A M C T Firm 6 R 27 109 1 C	769 (1928) A I R (R) 109	288 291 293 443
Tar Mahomed Vally Mahomed & Adamjee Hoosein	1 C 721 1931 A I R (Rang) 188	131
Tarachand & Jawahar Mal 1931 A I R (Lah) 121	1 C 208	131
Tara Chand v Jugal Kishore 46 All 713 22 A L J 684	83 1 C 907 (1924) A I R (All) 686	73 214
Tara Singh v Sarmukh Singh 34 P L R 991 146 1 C	532 1933 A I R (L) 812	233
Tarak Dass Dhur & Santosh Kumar 1 L R (1937) 2 C 786	41 C W N 875	439 445
Tarunicharan Guha In Re 11 B L R App 25		284
Tate Ex parte (1876) 35 L T 531		161
Taylor Ex parte In Re Goldsmid (1888) Q B D 295		583
Teja Singh v Balwant Singh (1930) A I R (L) 16		569
Tejmal Marwari v (Finy) Jokhiram Surajmali 17 P L T	313 160 1 C 146 1936 A I R (Pat) 112	128
Tejpal Jamnadas & E V David 32 C W N 1146 (P C)	48 C L J 415 28 L W 204 111 1 C 240 1928 A I R	256 501
Tele In Re (1912) 2 K B 367		30
Thakurdeen v J Dubay 12 Bur L T 218 55 1 C 250		197
Thakur Prasad v Panna Lal 35 All 410 11 A L J 603	20 1 C 673	290 346
Thakur Singh v Ganga Singh 9 L L J 257 103 1 C	623 (1927) A I R (L) 424	689 745 748
Thakur Singh & Hardit Singh 106 1 C 574 (1928) A I R	(L) 237	733 735 737
Thana Velayutha Nadar v Subramania Pillai 109 1 C	636 1928 A I R (M) 609	225
Thangeswari Chettiar v Ramamurthi 1935 M W N 380	42 L W 399 159 1 C 689 1935 A I R (M) 602	242 375 423
Thimmiah & The Official Receiver Bellary (1939) 1 M L J	158	412
Thiruvankatachariar v Thangia Ammal 39 Mad 479		663
Thomer Ex parte 1 Asking 125		621 683 720
Thomas v Patent Leonite Co (1881) 17 Ch D 250		368
Thomson v -	17	22
	1 K B 271	664
	1 B 527	278
Thunbalam Gooty Thimmiah & Official Receiver Bellary	(1939) 1 M L J 158	305
		271

Thurlow Lord, <i>In re, Exp</i> , Official Receiver, (1895) 1 Q B 724	250, 452
Tin Ya v Subya Pillay, 6 L B R 146 5 Bur L T. 277 18 1 C 500	236, 240
Tirpat Thakur v Ram Perakash Das, 12 Pat L T 103 125 1 C 783 1930 A I R (Pat) 406	514
Tirumala v Kolakula, 51 Mad 839 54 M L J 344 27 M L W 311 (1928) M W N 177 109 1 C 851 (1928) A I R (M) 26	450
Tobias, <i>In Re</i> , 8 Mor 30	348
Tokee Bibi v Abdul Khan, 5 Cal 536	215, 464
Tong Hoc v Eng Ho Seng, 1928 A I R (R) 327	583
Topham, <i>Ex parte</i> , (1873) 8 Ch 614	581
Trasi Deva Rao v Parameshwaraya, 39 Mad 74 27 1 C 144	147
Trayam Keshar v Basanta Kumar, 6 O W N 977 1930 A I R (O) 36	268
Trenchard v Same L R (1918) 1 Ch D 423	707
Trikamji v Emperor, 145 1 C 550 1033 A I R (N) 53	698
Triloki v Ganga Prasad, 1937 O W N 94	387
Trilokinath v Badridas 36 All 250 12 A L J 355 23 1 C 4	236, 240, 375
Triloki Prosad v Kunja Behari Law, 1935 A L J 507 1935 A W R 479 157 1 C 986 1935 A I R (All) 448	256
Trimbak v Ramchandra 23 Bom L R 537 63 1 C 906	473
Trimbak v Sheoram 65 1 C 941	296
Trustees, <i>Ex parte</i> (1928) 2 Ch D 1	567
Trustees of Lord Hill v Rowlands (1886) 2 Q B 124	111
Trustee of the Property of Ellis & Company v Dixon Johnson, (1925) A C 489	474
Tucker, W Re, <i>Ex parte</i> , Tucker (1895) 2 Mans 358	120
Tulsidas Kissendoyal, <i>In Re</i> , <i>Ex parte</i> , Chajuram Chowdhury, 40 C W N 1029	409
Tulsidas Lalubhai v The Bharat Khand Cotton Mill Co., Ltd, 39 Bom 47	179, 237, 374
Tulsi Lal v Girsham, 38 1 C 410	674
Tulsi Ram v Golam Mohtuddin 10 P W R 1903	239
Tulsi Ram v Muhammad Arif, 109 1 C 373 (1928) A I R (L.) 738	22, 283, 603
Twyne's Case, (1601) 1 Smith's Leading Cases, 11th Ed, P 1 88, 528	667
Tyler, <i>In Re</i> , (1907) 1 K B 865	173
Tynte, <i>Ex parte</i> , (1880) 15 Ch D 125 42 L T 598	

U

U Ba Sung v Ma Shein 1936 A I R (R) 506	
U Ba Sein v Mg Sin, 12 Rang 263 151 1 C 670 1934 A I R (Ran.) 216	145, 547

U Ba Thwin v U Tun Tha	160 I C 367	1935 A 1 R (R)	435	140
U On Maung v Maung Shwe Hpaung	1937 R L R 375	1936 A 1 R (R)	446 F B	578
U Po Hnyin v The Official Assignee	6 Rang 689	117 I C 51		261
U Po Yin v U Ba Chit	12 Rang 610			752
U Tha Hlaing v Mahomed Isaq	128 I C 597	1930 A 1 R (R)	332	557, 591
Ubakobin v District Court	3 U B R 97	49 I C 55		255 694
Udichand Maiti v Ram Kumar Khara	15 C W N 213	12 C L J 400	106 153 223 238	421 693
Uderam Boduram v Clement Griffith Hall	34 Bom L R 844	139 I C 591		166
Umar Bahadur v Khwaja Muhammad	79 I C 56	(1923) A 1 R (Pat)	287	306
Umbica Nandan Biswas	In the matter of	3 Cal 434	1 C L R 551	38
Umesh Chandra Seal v G H Falkner	36 C W N 337		551	589
Umrao Bibi v Syad Mahomed	27 Cal 205	4 C W N 76		649
Umrao Singh v Punjab National Bank	3 L L J 44			570
Union Bank of Bijnpur v Bhimrao	31 Bom L R 463	119 I C 189	(1929) A L R (B)	258 479 482
Unnopurna v Ganganarain	2 W R 296			25
Upendra v Brindabon	33 Ind Cas 188			541 548
Upendra Nath v Rai Janakt Nath	22 C W N 611			147
Usharani Devi v Shub Kumar Das	41 C W N 368	30 524	551	555

V

Vadilal v Shah Khushal	27 Bom 157		115	660
Vaikunta v Moidin	15 Mad 89			727
Vaithinatha Aiyar v Vaithinatha Aiyar	61 M L J 544	1932 A 1 R (M)	112	139 147 149 746
Vanderlinden Experte	(1882) 20 Ch D 289			151
Van Laun Re	14 Mans 281			421
				495
	1 K B 162 & 163			495
			545	547
	15			278
	Bom L R 677			111
	42 Mad 684	36		
		15	256	286
Varava Rao	57 M			689
Veerabrahmam v Jagannadhacharyulu	42 L W 427	69		

TABLE OF CASES

cx vii

Page

MLJ 184 1935 M W N 551 158 I C 966 1935 A I R (M) 589	109
Veerappa Chettiar v Subramaniam Ayyar, 52 Mad (FB)	536
Veerayya v Srinivase Rao, 58 M 908 1935 M W N 886	413
Veerayya Chetty v Doraiswami, 110 I C 737 (1928) A I R (M) 393	86, 107, 143, 220
Veethaldas Kalidas <i>In the matter of</i> , 9 I C 632	209
Velagapeti Veerayya v Kandepu Narasemharao, 1937 2 MLJ 883 1938 A I R (M) 142	753
Velayutha Nadar v Subramania Pillai, 109 I C 636	242
Vellachami Chetty v Arunachallam Chetty, 60 MLJ 339 1931 A I R (Mad) 325	449
Vellayappa Chettiar v Ramanathan Chettiar, 47 Mad 446 46 MLJ 80 1924 M W N 163 19 L W 251 78 I C 1017 (1924) A I R (M) 448	759
Veluswamy Thevar M V R, <i>In the matter of</i> , 13 R 192	97, 167
Venkanna v Chennayya, 57 MLJ 393 1929 A I R (M) 900	11
Venkatachalam Chettyar v Collector, Bassein 167 I C 493 1937 A I R (R) 50	362
Venkatachelam Chettyar v Murugesam, 9 Rang 231 (S B) 131 I C 732 1931 A I R (Rang) 122	681, 687
Venkata Hanumantha v Yeru Gulapati, 1928 M W N 175 110 I C 611 1928 A I R (M) 608	184
Venkatanarayana Chetty v Sevugan Chetty, 47 Mad 916 47 MLJ 240 80 Ind Cas 620 1924 A I R (M) 769	671
Venkatappayya v Punnaya, 38 L W 257 1932 M W N 153 (FB)	76, 372
Venkatarama v Lakshmanaswami 34 M L W 143 1931 M W N 937 1931 A I R (M) 729	7
Venkatarama Aiyar v A Buran Sariff 50 Mad 396 51 MLJ 680 24 M L W 858 1926 M W N 946 99 I C 536 (1927) A I R (M) 153	17, 137, 141
Venkatarama Ayyar v Official Receiver, 51 Mad 495 54 MLJ 585 27 L W 437 109 I C 94 (1928) A I R (M) 476	188
Venkatarama Chetty v Angathayammal, 38 L W 896 146 I C 204 1933 A I R (M) 471	540, 541, 681
Venkata Rama Lakshmayya v Subba Rao 1937 M W N 406 45 L W 260 170 I C 65 1937 A I R (M) 433	105
Venkataramayya v Subbarayudu 1936 M W N 49 43 L W 520 161 I C 186 1936 A I R (M) 290	751
Venkataramanayya Pantulu, <i>In the matter of</i> , P C 1931 A I R (M) 441	354, 75
Venkataraman v Chokkier, 109 I C 516 27 L W 515 (1925) A I R (M) 531	

Venkataramanayya v Bangarayya	40 L W 864 67 M L J	683, 721
942		
Venkatrayan v Kesavan Pittar	114 I C 425 1999 A I R	268
(Mad) 773		
Venkatasubba Rao v Venkataswamulu	1936 M W N 996	275, 633
Venugopalachariar v Chinnu Lal	49 Mad 935 51 M L J	
209 1926 M W N 674 97 I C 706 (1926) A I R (M)		
492		71, 159, 174, 457
Victor N Narayan Prince v Kumar Bhairabendra,	34	
C W N 53		11, 337, 339
Victoriar Re (1894) 2 Q B	387	237
Vidanathasami v Samasundaram	28 Mad 473	105
Vikarppa v Thuppara,	38 Mad 664	261
Villayappa Chettiar v Ramanatham Chettiar	47 Mad 446	
78 I C 1017 46 M L J 80 1924 M W N 163 19 L W		
251 1924 A I R (M) 448		53
v L. J. R. Lakshmi 55 Ind Cas	717	701
	36 1928 A I R (S) 85	705
	44 Mad 100 (F B)	505
	Assignee Madras 58 M L J	
	1 C 129 1930 A I R (M)	
544		154, 163, 170
Vithal v Ramchandra	72 Ind Cas 327	363
Vithaldas Kalidas In the matter of	9 I C 632	240
Vrij Lal Mansukhrani v Chunilal Fatehchand	55 Bom	
220 33 Bom L R 148 131 I C 881 1931 A I R (Bom)		
210		668, 670, 671
Vythialinga Padaickal v Ponnuswami	41 M L J 78 62 Ind	
Cas 996		619

W

Wadhawa Singh v Emperor,	16 Cr L J 272 44 I C 128	696
Walaiti Ram v Partap Singh,	32 P L R 1905 135 I C 194	
1932 A I R (L) 173		353 394, 754
Walchand Molagi Marwari v C A Williams	1 L R 59 Bom	
317 37 Bom L R 494 159 I C 144 1935 A I R (Bom)		
396		20 316
Walcot v Batfield (1854) Kay,	343 101 R R 719	162
Walker, Re (1886) 3 Morr	69 53 L T 660 34 W R 95	188
Walker v Mottram (1881) 17 Ch D	355	265
Willer, Ex parte, L R	15 Eq 412	655
Wally Mohamed Cassim v Haji Ayook Haji Abba & Co,		
144 I C 869 1933 A I R (R) 133		250 449
Walmsley, In Re, (1907) 98 L T	55	446
Walsh, Re, Ex parte, The Trustee, (1835) 2 Morr	112	111

Walter Edward Stead, <i>In the matter of</i> , 11 Ring	93	315
Walton & Cook, 40 Ch D	325	417
Waman Rambhau Marathe & Harnoom, 1 L R 1937 (Nag)		
485 168 1 C 212 1937 A 1 R (N) 60		138
Wanzari & Amrita, 44 1 C	537	52
Ward, Re, (1897) 1 Q B	266	259
Ward, Re, <i>Ex parte</i> , Monkhouse (1879) 40 L T	296	698
Warner & Barber, (1816) Holt, N P	175	102
Warren, Re Exp, The Trustee (1900) 2 Q B	138	565
Waryam & Wadhava, 8 P W R 1918 46 1 C	586	745, 748
Watkins & Customs L R 8 Ch App	520	299
Wazir Sing & Janki Das, 97 1 C 174 (1927) A 1 R (L) 679		247
Webb & Fox, 7 T R	391	307
Webb, In Re, (1914) 3 K B	387	402
Wells & Girling (1819) 1 B & B	447	139
Wenley, <i>Ex parte</i> (1852) 1 De G J & S	273	98
West & Baker 1 Ex D	44	412
West & Skip 1 Ves	239	263
West Riding Union Banking Co <i>Ex parte</i> , Re, Turner, (1881)		
19 Ch D 105		21
Wethered, <i>Ex parte</i> Salamar (1926) 1 Ch	167	533
Wheatleys Trustee & Wheatly Ltd (1901) 85 L T	491	68
Wheelers Settlement Trust, Re, (1899) 2 Ch	717	95
White, <i>Ex parte</i> , (1885) 14 Q B D	600	440
White, In Re Exp Nichols, (1902) W N	114	637
White & Foljambe 11 Ves	343	628
White & Simmons, (1871) 6 Ch	555	323, 479
Williamson & Co 24 T R	159	492
h Law etc (1909) 1 Ch	291	533
(1921) 2 K B	835	305
Q B D	317	592
(1882) 22 Ch D	788	97
L R	486	613
70		101
of, 11 Cal	451	156
resham Trust Ltd, (1934) A C		
252		582
William Watson, <i>In the matter of</i> , 31 Cal 761 8 C W N		
553		101, 113, 381
Wilson, Re, 14 L T 402 85 L J K B	1408	91, 440
Wilson & Heather, 5 Taunt,	649	23
Wilson & Nathumal, 1930 A 1 R (Mad) 458 124 1 C		
144		264, 606
Wilson & United Counties Bank Ltd, L R (1920) 1 App		
Cas 102		243, 276, 637
Winter Bottom, Re, <i>Ex parte</i> , Winter Bottom, (1886) 18		/
Q B D	446	

	Page
Wood, Re , (1872) 7 Ch App 302	93, 94, 97, 98, 101
Wood, In Re , 210 U S 246	743
Woodroff, Re , 4 Mans 46	91
Woolford s Estate Trustee v Levy (1892) 1 Q B 772	515, 516
Woonwalla & Co v N C MacLeod 30 Bom 515 8 Bom L R 470	626
Worseley, In Re , (1901) 1 K B 309	102, 124
Worseley & De Mattos (1758) 1 Burrow 467	92, 96
Wright, In Re , (1925) App Cas 717	162

Y

Yahia, In Re , 1 L R 1937 Mad 90	216, 348
Yaramati Krishnayya v Chandra Papayya, 20 Mad 326	98
Yerra Venkatagiri & Maddipatta 1927 M W N 176 39 MLJ 118 101 I C 349 (1927) A I R (M) 579	71
Yokohama Specie Bank Ld v S Curlander & Co , 43 C L J 436	13, 36, 262, 602
Young v Fletcher, (1865) 3 H & C 732	88
Young v Wand (1852) 8 Ex 221	93

Z

Zibal v Laxman, 27 N L R 304 134 I C 861 1932 A I R (Nag) 17	697, 712
---	----------

THE
PROVINCIAL INSOLVENCY ACT, 1920.
(V OF 1920)
CONTENTS

Sections

- 1 Short title and extent
- 2 Definitions

PART I

Constitution and Powers of Court

- 3 Insolvency jurisdiction
- 4 Power of Court to decide all questions arising in insolvency
- 5 General powers of Courts

PART II

Proceeding from Act of Insolvency to Discharge

Acts of Insolvency

- 6 Acts of Insolvency

Petition

- 7 Petition and adjudication
- 8 Exemption of corporation etc from insolvency proceedings
- 9 Conditions on which creditor may petition
- 10 Conditions on which debtor may petition
- 11 Courts to which petition shall be presented
- 12 Verification of petition
- 13 Contents of petition
- 14 Withdrawal of petition
- 15 Consolidation of petitions
- 16 Power to change carriage of proceedings
- 17 Continuance of proceedings on death of debtor
- 18 Procedure for admission of petition
- 19 " " " "
- 20 " " " "
- 21 " " " "
- 22 Duties of debtors
- 23 Release of debtor
- 24 Procedure at hearing
- 25 Dismissal of petition
- 26 Award of compensation

Order of Adjudication

- 27 Order of adjudication
- 28 Effect of an order of adjudication
- 29 Stay of pending proceeding

Sections

- 30 Publication of order of adjudication
Proceedings consequent on order of adjudication
- 31 Protection order
- 32 Power to arrest after adjudication
- 33 Schedule of creditors
- 34 Debts provable under the Act
Annulment of Adjudication
- 35 Power to annul adjudication of insolvency
- 36 Power to cancel one of concurrent order of adjudication
- 37 Proceedings on annulment
Compositions and schemes of arrangement
- 38 Compositions and schemes of arrangement
- 39 Order on approval
- 40 Power to re-adjudge debtor insolvent
Discharge
- 41 Discharge
- 42 Cases in which Court must refuse an absolute discharge
- 43 Adjudication to be annulled on failure to apply for discharge
- 44 Effect of order of discharge

PART III

Administration of Property

Method of proof of debts

- 45 Debt payable at a future time
- 46 Mutual dealings and set off
- 47 Secured creditor
- 48 Interest
- 49 Mode of proof
- 50 Disallowance and reduction of entries in schedule
Effect of insolvency on antecedent transactions
- 51 Restriction of rights of creditor under execution
- 52 Duties of Court executing decree as to property taken in execution
- 53 Avoidance of voluntary transfer
- 54 Avoidance of preference in certain cases
- 54A By whom petitions for annulment may be made
- 55 Protection of *bona fide* transactions
Realisation of Property
- 56 Appointment of receiver
- 57 Power to appoint Official Receivers
- 58 Powers of Court if no receiver appointed
- 59 Duties and powers of receiver
- 59A Power to require information regarding insolvent's property
- 60 Special provisions in regard to immovable property

Distribution of Property

Sections

- 61 Priority of debts
- 62 Calculation of dividends
- 63 Right of creditor who has not proved debt before declaration of a dividend
- 64 Final dividend
- 65 No suit for dividend
- 66 Management by and allowance to insolvent
- 67 Right of insolvent to surplus
- 67A Committee of inspection

Appeal to Court against receiver

- 68 Appeal to Court against receiver

PART IV.

Penalties.

- 69 Offences by debtors
- 70 Procedure on charge under section 69
- 71 Criminal liability after discharge or composition
- 72 Undischarged insolvent obtaining credit
- 73 Disqualifications of insolvent

PART V.

Summary Administration.

- 74 Summary administration

PART VI

Appeals

- 75 Appeals

PART VII.

Miscellaneous.

- 76 Costs
- 77 Courts to be auxiliary to each other
- 78 Limitation
- 79 Power to make rules
- 80 Delegation of powers to Official Receivers
- 81 Power of Local Government to bar application of certain provisions to certain Courts
- 82 Savings
- 83 Repeals

Schedule I

Decisions and orders from which an Appeal lies to the High Court under section 75 (2)

Schedule II

Provisions of the Act application of which may be barred by Local Governments

Schedule III . . .

Enactments repealed

Sections

- 30 Publication of order of adjudication
Proceedings consequent on order of adjudication
- 31 Protection order,
- 32 Power to arrest after adjudication
- 33 Schedule of creditors
- 34 Debts provable under the Act
Annulment of Adjudication
- 35 Power to annul adjudication of insolvency
- 36 Power to cancel one of concurrent order of adjudication
- 37 Proceedings on annulment
Compositions and schemes of arrangement
- 38 Compositions and schemes of arrangement
- 39 Order on approval
- 40 Power to re-adjudge debtor insolvent
Discharge
- 41 Discharge
- 42 Cases in which Court must refuse an absolute discharge
- 43 Adjudication to be annulled on failure to apply for discharge
- 44 Effect of order of discharge

PART III

Administration of Property

Method of proof of debts

- 45 Debt payable at a future time
- 46 Mutual dealings and set off
- 47 Secured creditor
- 48 Interest
- 49 Mode of proof
- 50 Disallowance and reduction of entries in schedule
Effect of insolvency on antecedent transactions
- 51 Restriction of rights of creditor under execution
- 52 Duties of Court executing decree as to property taken in execution
- 53 Avoidance of voluntary transfer
- 54 Avoidance of preference in certain cases
- 54A By whom petitions for annulment may be made
- 55 Protection of bona fide transactions
Realisation of Property
- 56 Appointment of receiver
- 57 Power to appoint Official Receivers
- 58 Powers of Court if no receiver appointed
- 59 Disposal of property

Distribution of Property

Sections

- 61 Priority of debts
- 62 Calculation of dividends
- 63 Right of creditor who has not proved debt before declaration of a dividend
- 64 Final dividend
- 65 No suit for dividend
- 66 Management by and allowance to insolvent
- 67 Right of insolvent to surplus
- 67A Committee of inspection

Appeal to Court against receiver

- 68 Appeal to Court against receiver

PART IV

Penalties

- 69 Offences by debtors
- 70 Procedure on charge under section 69
- 71 Criminal liability after discharge or composition
- 72 Undischarged insolvent obtaining credit
- 73 Disqualifications of insolvent

PART V

Summary Administration

- 74 Summary administration

PART VI

Appeals

- 75 Appeals

PART VII

Miscellaneous

- 76 Costs
- 77 Courts to be available to each other
- 78 Limitation
- 79 Power to make rules
- 80 Delegation of powers to
- 81 Power of local courts
to make rules
- 82 Savings
- 83 Penalties

Schedule I

Schedule II

Schedule III

THE PROVINCIAL INSOLVENCY ACT, ACT V of 1920

PASSED BY THE INDIAN LEGISLATIVE COUNCIL

*Received the assent of the Governor General on the
25th February, 1920*

An Act to consolidate and amend the Law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Town of Rangoon

Whereas it is expedient to consolidate and amend the law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Towns of Rangoon and Karachi, It is hereby enacted as follows —

1. (1) This Act may be called the Provincial
Short title
and extent Insolvency Act, 1920

(2) It extends to the whole of British India, except the Scheduled Districts

Amendment.

By section 11 of the Provincial Insolvency (Amendment) IX of 1926, the words "Towns of Rangoon and Karachi" in the preamble have been substituted for the words "Town of Rangoon".

The Law of bankruptcy, its policy and effect

"Bankruptcy is a proceeding by which, when a person is unable to pay his debts or discharge his liabilities or the person who owes money or has incurred liabilities cannot obtain satisfaction of their claims, the State, in certain circumstances, takes possession of his property by an officer appointed for the purpose, the property is realised and distributed in equal proportions among the creditors."

the persons to whom the debtor owes money or has incurred pecuniary liabilities"—*Blackstone* The debtor at the same time obtains protection from the legal proceedings by the persons to whom he has incurred debts or liabilities subject to certain clearly defined exceptions. When a man becomes bankrupt, he is during the bankruptcy, subject to certain disqualifications as a citizen. In earlier English law on bankruptcy, the creditor was the only party, whose interests were consulted and even the complete realisation of the estate and its equitable division were made secondary objects compared to the infliction of punishment on the debtor, while he has to be stripped of all his property no provision was made for affording him even temporary freedom and protection after his surrender of everything. But at length it appeared harsh to strip a man of all his resources without relieving him at the same time from his difficulties, and by the Statute of Queen Anne (4 Anne) it was provided that a bankrupt who had been compelled to surrender the whole of his effects and had in all matters conformed to the law of bankruptcy, should be entitled to his discharge from all further

the modern law of
ase of an individual
pay his debts. Its
property among the
creditors in the most expeditious and economical manner, and
secondly, to give the debtor a new start in life, free from the
demands of his creditor, when he has not been guilty of certain
serious of

page 1
All 398
the protection of creditors and the relief of debtors. It has been
held in *Bower v Hett*, (1895) 2 Q B 51, that the policy and object
of the Statute is to secure the even distribution of a debtor's estate
among the creditors, and to prevent the more active creditors from
getting an undue advantage over those who are less active, *Rama
nathan Chettiar v Subramania Chettiar*, 48 M 656. The policy of the
bankruptcy laws seems to be to treat all creditors alike. It is based
on the ground of public policy, In the matter of *V Purushothamdas*,
55 M L J 657. The provisions of the Insolvency Act have been
enacted to secure the object underlying the following principles —
(1) It is the policy of the law of insolvency that when a debtor
commits an act of insolvency there must be an even distribution of

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of the amount
ulable for distri
olicy of the law
ion creditor and

deprive him of the fruits of his execution. *Mamudi Chinn Venkata
Sitayya v Nilkant Suryanarayana*, 1938 M W. N 841 1938 A I R
(M) 906

Law of insolvency in India in the Presidency towns.

The law of insolvency as administered in the Presidency towns before 1909 was the Indian Insolvency Act of 1848, (11 and 12 Vict., c 21) The Presidency-towns Insolvency Act, III of 1909 was passed in complete supersession of 11 and 12 Vict., c 21, and it applies to the Presidency towns, viz., Calcutta, Madras and Bombay, and the town of Rangoon, and has been extended to the town of Karachi by Act IX of 1926 and the Courts having jurisdiction in insolvency under this Act are (1) the High Courts of Calcutta, Madras and Bombay, (2) the High Court of Rangoon, and (3) the Court of the Judicial Commissioner of Sind.

Law of insolvency in India outside the Presidency towns.

I. C. P. Code : The first enactment on the law of Provincial Insolvency in British India is to be found in the Insolvency Chapter of the Civil Procedure Code of 1859. The provisions there enacted were somewhat extended by the C P Codes of 1877 and 1879, but from 1877 till the enactment of Act III of 1907 they remained in the C P Code (Chapter XX of Act XIV of 1882) unchanged and in the words of Lord Hobhouse, as "a germ and nothing more than a germ of an Insolvency law." The scope of the insolvency chapter in the Code of Civil Procedure was limited to creditors who had obtained decrees for the payment of money and to judgment debtors who had been arrested or imprisoned or whose property had been attached in execution of such decrees. No restriction was placed upon the rights of an individual creditor until the debtor's property had actually vested in the Receiver appointed under section 354, and in the interim, suits might proceed and decrees might be executed with the result that while the petition was pending the whole of the property of the debtor might be sold for the benefit of a single decree holder and to the exclusion of the rest of his creditors who might have refrained from embarrassing the estate with litigation because their claims had been duly scheduled. On the other hand, the relief to the insolvent was most inadequate, since it was strictly confined to discharge from the scheduled debts, all liability for which was terminated, by a rough and ready procedure, through the satisfaction of one third or the efflux of twelve years. For the Punjab, there was a special, but incomplete law contained in eleven sections of the Laws Act, IV of 1872. In the words of the Hon'ble Mr (now Sir) Earle Richards, K.C., the law for provincial insolvencies as contained in the C P C, and the Punjab Laws Act was too limited in scope, and neither afforded adequate relief to honest debtors nor sufficiently secured the rights of creditors.

II. Act III of 1907 : To remedy the above defects the Government of India considered that the insolvency provisions may with advantage be separated from the Code of Civil Procedure and

In introducing the Bill on the 28th of January 1907, the Hon'ble Mr. (now Sir) James Wilson, then a member of the Legislative Council, said:—
 "The Bill removed these restrictions by declaring that an insolvency petition might be presented by any creditor or by any debtor if the debtor had committed 'an act of insolvency' and an 'act of insolvency' was defined in the Bill (following English legislation and to some extent, the law of the Presidency towns) to include acts which have the effect of defeating or delaying the rights of creditors. The scope of the Bill was therefore much more extensive than that of the present law. Further, under the Bill, the debtor would be released from prison immediately on the making of an order adjudging him insolvent; and after his discharge, speaking generally no proceedings could be taken against him in respect of any debts provable in insolvency. Then as regards creditors, it would be found that the rights of the creditor were much better secured under the Bill than the existing law. The order of adjudication was to relate back to the date of the presentation of the petition and from that time the property of the debtor was to be available only for the payment of debts under the insolvency. Provisions had also been added, following English law, for the avoidance of voluntary settlements and of transfers of property giving undue preference to particular creditors and the provisions intended to prevent dishonesty on the part of the debtors. In addition to this, clauses had been added for summary administration, etc."
 The Bill was passed into Act III of 1907 and was based on the lines of the English Insolvency Act of 1862, in a simplified form, a form which it was adapted to the requirements of the circumstances in the Presidency towns and to the capacities of the Courts which have to administer it.

III. Act V of 1920 : A Bill to amend the Provincial Insolvency Act, 1907, was introduced in the Imperial Legislative Council on the 4th September, 1918 "in order that it might take the place of the rudimentary provisions for dealing with the insolvents outside the Presidency towns which were contained in the Act." The Bill was referred to a Select Committee and the Report of the Select Committee to amend the Provincial Insolvency Act, 1907, was presented to the Council on the 11th February 1920. The Bill was passed into law as Act V of 1920. Act III of 1907 was repealed and the new Act having received the assent of the Governor-General on the 25th February 1920 and as amended by subsequent amendments is now the law of insolvency in British India outside the Presidency towns, the towns of Rangoon and Karachi and the Scheduled Districts. For Statement of Objects and Reasons for the enactment, *Proceedings in Council and Report of the Select Committee*, vide Introduction, supra.

Amendments of Act V of 1920

The Provincial Insolvency Act V of 1920 has subsequently been amended by the following Acts —

(1) The Insolvency (Amendment) Act IX of 1926 which received the assent of the Governor General on the 26th February 1926

(2) The Sird Courts (Supplementary) Act XXXIV of 1926 which received the assent of the Governor General on the 9th September 1926

(3) The Provincial Insolvency (Amendment) Act XXXIX of 1926 which received the assent of the Governor General on the 9th September 1926

(4) The Repealing and Amending Act X of 1927, which received the assent of the Governor General on the 4th April 1927

(5) The Insolvency (Amendment) Act XI of 1927 which received the assent of the Governor General on the 2nd September 1927

(6) The Repealing Act XII of 1927 which received the assent of the Governor General on the 8th September 1927

(7) The Repealing and amending Act XVIII of 1928, which received the assent of the Governor General on the 25th September, 1928

(8) The Repealing and Amending Act VIII of 1930 which received the assent of the Governor General on the 16th March 1930

(9) The Insolvency Law (Amendment) Act X of 1930 which received the assent of the Governor General on the 29th March 1930

(10) The Provincial Insolvency (Amendment) Act X of 1935 which received the assent of the Governor General on the 28th September 1935

Nature and Scope of the Act

The insolvency law is mainly an administrative or adjective law, a law of machinery to bring about certain results namely the satisfaction of the insolvent's debts. The provisions contained in the Act are therefore of a general character. *Anand Prakash v. Nirmal Das* 53 All 239 (FB) 1931 A L J 122 1931 A I R (All) 162 FB

The Act a Complete Code

The opinion expressed by the Allahabad High Court in *Dropadi v. Hiralal* 34 All 496 (FB) that the Provincial Insolvency Act was not a complete code does not hold good after the enactment of sec 78 in Act V of 1920 and the Act has now been held to be a complete code and it lays down a definite procedure and there is no room for having recourse to any

other procedure, *Periammal v. Official Receiver, Coimbatore*, 1930 MWN 651. In England the Bankruptcy Act was intended to be a complete code of bankruptcy and the judge is to set aside an adjudication only in those cases in which that Act authorises him to do so, not in any case in which it may seem to him in his discretion proper to do so. His discretion is limited by the Act. *In Re Hester, Ex parte Hester* (1889) 22 QBD 632. In *Jhan Bahadur v. The Bailiff*, 5 R. 384 (1927) AIR (R) 263, it has been held that "the Insolvency Acts were intended to be complete codes of the insolvency law applicable to the areas to which they applied, and to prescribe their own period of limitation."

Application of the Act.

The Insolvency Act is intended for the protection of persons or body of persons called a 'firm' when they are not in a position to pay their just debts as they become due. Hence it follows that any person who is *sui juris* and not *non compos mentes* or any body of persons called a 'firm' can take the protection of the law when they find that they are no longer in a position to pay their dues to their creditors. The Act does not apply to minors, lunatics, juridical persons and to corporate bodies inasmuch as they have their special laws by which they are governed, and to persons who are not liable personally for the debts.

Interpretation of the Act in the light of English law.

The Judicial Committee remarked in *Imambundi v. Mutsuddi*, 45 IA 73 45 Cal 878 that Their Lordships cannot help deprecating the practice, which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts, to which Indian practitioners cannot be expected to have access based often on considerations and conditions totally different from those applicable to conditions prevailing in India, are likely to confuse administration of justice. In *Ramanandi Kuer v. Kalawati Kuer*, 55 IA 18 7 Pat 221 1928 AIR (PC) 2, their Lordships of the Privy Council again observed. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded," *Sharfuzzaman v. Hunter*, 6 O WN 982 1930 AIR (O) 20. The Provincial Insolvency Act is an Act to consolidate and amend the law relating to insolvency in British India, and it must be presumed that the Indian Legislature in passing this Act was aware of the exceptions made by the Courts in England to the English Bankruptcy Act on which the Indian enactment is based. If it was the intention of the Legislature to allow exceptions to the rule as

laid down in sec 61 (4) of the Act, we should expect to find a provision to this effect in the Act itself, *Narain Das Dori Lal v Mih Lal*, 56 All 1041 3 A W R 481 1934 A I R (All) 521 The correct method of interpretation is to interpret the Provincial Insolvency Act as it stands without reference to the companion Acts, *Haridas v Lallubhai*, 55 Bom 110 32 Bom L R 1362 129 1 C 153 1931 A I R (B) 50

But in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces the language of the English enactment, the Indian Courts are in practice, if not in theory bound by the decisions of the English Court of Appeal, *Premasukdas Asram v Udaram Gungabux*, 28 CLJ 498 Indian Legislature has borrowed from the English Bankruptcy Act when enacting the Insolvency Acts in this country Courts in India are bound in the first instance to construe the words of the Indian Act whenever any question arises and in case of difference between the wordings of the Indian Act and the English Statute, they are bound to give effect to the words of the Indian Act and confine themselves to the law as enacted in the Indian Act Where, however, the language of the Indian Act and English Statutes is identical the Indian Courts are entitled to seek guidance and help from the decisions of English Court in such matters, *Venkataraju v Lakshmanaswami*, 34 MLW 143 1931 M W N 937 1931 A I R (Mad) 729 The provision in the English Bankruptcy Act is an old one, a reproduction from the repealed Debtors Act, 1869, and is a salutary one which should be followed in this country as a rule of justice equity and good conscience, *A T Ganguly v E L Watson*, 53 Cal 929 44 CLJ 350 (354) In *Nandlal Mukherjee v Girdhari Lal*, 3 Luck 588 5 O W N 347 109 1 C 633 (1928) A I R (O) 263 the District Judge was of opinion that the decision of the Court of Appeal in *Re Kutner*, (1921) 3 KB 93 was not authority and did not bind him In appeal it was held that "the provisions of the Indian Act V of 1920, are so closely akin to the provisions of the English Bankruptcy Act that the views of the learned Judge of Appeal are of the greatest value in determining the point before us In determining the weight to be attached to the pronouncements of English Courts of Law the first consideration to be applied is whether the English Courts were dealing with facts similar to the facts in the particular case before the Indian Courts "

Date of operation of the Act.

The Act is silent as to the date from which it is to come into operation But by virtue of section 5 of the General Clauses Act (X of 1897) which provides that "where an Act of the Governor General in Council is not expressed to come into operation on a particular day, then it shall come into operation

the day on which it receives the assent of the Governor General the new Act V of 1920 came into force from the 25th February 1920, the date on which it received the assent of the Governor General

Retrospective effect of the Act

In *Promotho Nath Pal Choudhury v. Surat Das Chaudhary*, 24 CWN 1011 it has been laid down that the rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons is deeply founded in good sense and strict justice and it has been repeatedly laid down that in the absence of clear word to that effect a statute will not be construed so as to take away a vested right of action acquired before it was passed *Budhu Koor v. Hafiz* 18 CLJ 274, and *Gopeswar v. Jibanchandra* 41 Cal 1125 18 CWN 804 19 CLJ 549. The general rule for the interpretation of statutes is that alterations in the procedure are always retrospective unless the alteration is of adjudication of the property to the property of the new Act and the claim is determined according to the procedure prescribed by the new Act the decision of the insolvency Court will be final even though the order of adjudication was passed under the Provincial Insolvency Act of 1907 *Shib Naram v. Lachmi Naram* 119 IC 733 1929 AIR (L) 761. The provisions of the Provincial Insolvency Act 1920 have no application to a petition to adjudicate a debtor an insolvent made under the Provincial Insolvency Act 1907 which was pending when the Act of 1920 came into force nor in the discretion given to the Court statedly in applications made under the Act of 1920 be extended to applications made under the Act of 1907 *Pulpatu Hanumaya v. Ravi Ramaya* 41 MLJ 126 1921 MWN 381 64 Ind Cas 270 followed in *Mohini Idm Molla v. Gayan Nath Poddar* (1928) AIR (C) 221. But all orders passed after the commencement of this Act are subject to appeal or revision according to the provisions of the new Act although the adjudication had been made before it came into force *Chunilal v. Biharlal* 21 PWR 1916 38 Ind Cas 995. Even though a petition was presented as in force the new Act passed even in respect of the old Act or rights the new Act Rangiah 1 MWN 840 79 Ind Cas 101. The right of an insolvent adjudicated as such under Act III of 1907 to have execution proceedings against him stayed unless the insolvency Court gives leave to prosecute them is a substantive right and is not abrogated by Act V of 1920 and so in order for his arrest without leave of

the insolvency Court is without jurisdiction, *Solayappa Naicker v Shunmugasundaram*, 22 M L W 673 (1926) A I R (M) 510 93 I C. 3

Extent of the Act.

It extends to the whole of British India except (1) the Presidency towns, (2) the Towns of Rangoon and Karachi and (3) the Scheduled Districts

British India.

According to section 3, cl 7 of the General Clauses Act, X of 1897, "British India shall mean all territories and places within His Majesty's Dominion which are, for the time being, governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India"

Karachi excluded from the operation of the Act.

By section 11 of the Insolvency (Amendment) Act, IX of 1926, the words "Towns of Rangoon and Karachi", in the preamble have been substituted for the words "Town of Rangoon". The above amendment was made pursuant to the recommendations of the Civil Justice Committee to exclude Karachi from the operation of the Provincial Insolvency Act on account of its commercial developments *vide Civil Justice Committee Report 1924-25, Chapter XIV, para 22*. Karachi is now therefore excluded from the operation of the Provincial Insolvency Act, and has come within the operation of the Presidency Towns Insolvency Act, though by sec 10 of the said Act proceedings under the Provincial Insolvency Act, 1920, pending in the Court of the Judicial Commissioner of Sind at the commencement of the Act shall continue, and all the provisions of the said Act shall apply thereto as if this Act had not been passed

Scheduled Districts.

"Scheduled Districts" means the territories mentioned in the First Schedule of the Scheduled District Act, XIV of 1874, viz.,

Bengal Presidency—The Jalpurguri and Darjeeling Districts, the Hill Tracts of Chittagong the Sonthal Parganas, the Chutia Nagpur Division and the Mahal of Angul

Bombay Presidency—The Province of Sindh, Aden, certain villages of the Mehwani Chiefs

—Zemindaris of Chattisgarh and Chanda,

—Mahals in Ganjam, the Joypur Zemindari and certain Mahals and other Muttas and Golconda Hills in the Vizagapatam District, the Bhadrachalam Taluq,

Rakapilli Taluq and the Rampa country in the Godavari District, the Laccadive Islands including Minicoy in the Indian Ocean

United Provinces—Kumaon and Garwal, the Terai Pergunnahs comprising Bazpur, Kashipur, Jaspur, Rudarpur, Gadarpur, Kilpur, Nanak Mattha, and Bilheri, some tracts in the Dehra Dun District and some Tappas in the Mirzapur District

N W Frontier Provinces—Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan

Punjab—Dera Ghazi Khan Lahaul and Spiti Districts

Miscellaneous—The Chief Commissionerships of Coorg, of the Andaman and Nicobar Islands of Ajmer and Merwara, of Assam, the Hill Tracts of Arakan and the Pergunnah of Manpur

Extension of the Act to the Scheduled Districts.

By notification under sec 5 of the Scheduled District Act, XIV of 1874, the Act has been extended to—The Province of Sind (vide Gazette of India 1920, pt I, page 2052 and Bombay Government Gazette, 1920 part I p 2765) Coorg (vide Gazette of India 1920, pt II, p 1333), Upper Burma (vide Burma Gazette, 1920, pt I, p 1303), District of Cachar (excluding the North Cachar Hills), Sylhet, Goalpara, Kamrup, Darrang, Nowgong (excluding the Nowgong Mikir Hills Tract) Sibsagar (excluding Sibsagar Mikir Hills Tract) and Lakshmipur (excluding the Lakshmipur Frontier Tract) (vide Assam Gazette 1920 pt II p 2511), District of Darjeeling (vide Calcutta Gazette, 1921 pt I p 288) British Baluchistan, (vide Baluchistan Local Rules and order, pt II p 244) This Act has been declared in force in the Pargana of Manpur (vide sec 2 and Schedule of the Manpur laws Regulation, 1926), in Panth Piplodra (Regulations I of 1929 s 2) and to all the Scheduled Districts in N W F Province, (vide notification No 2286 G, dated 20th May 1920, Gazette of India, 1920 pt II, p 910)

Bankruptcy in England and its effect in India.

Under the English law a person being adjudged a bankrupt, all his properties, personal and real, vest in the trustees under sec 53 of the Bankruptcy Act, 1914. The real properties which vest in the trustee in Bankruptcy may be properties situated in England or elsewhere (sec 167). The law on this point has been widened by the Act of 1914, for previous to it, property which vested in the trustee was property within the dominions of His Majesty and, before that, it was property which was situated in Great Britain. Unless there is anything repugnant in the *lex loci* where the property is situate, the property wherever it may exist, is assigned to the trustee in Bankruptcy by virtue of the order of adjudication—Williams' *Bankruptcy Practice*, page 264 (13th Ed) *Dacey's Conflict of Laws*, page 363 (4th Ed). The jurisdiction of bankruptcy Court is partly local and partly imperial. As regards its local jurisdiction it is

confined to the claims of debtors who by the express terms of the Act, are made subject to its jurisdiction either by domicile or by residence. The imperial nature of the jurisdiction consists in this that it empowers the bankruptcy courts to discharge debts wherever contracted that is, the discharge of a debtor by a Bankruptcy Court in England, will discharge a debt contracted by the debtor in one of the colonies or colonial states or in India, *Bartley v. Hodges* (1861) 30 LJQB 352. And the provisions as to the vesting of property in the receiver extend all over the empire so that when a man is made bankrupt by Bankruptcy Court in England properties which he has in the colonies or colonial states or India will become distributable by the English Trustee in Bankruptcy who can enforce his title to it, *Callender Sykes & Co v. Colonial Secretary of Lagos and Datus* (1891) AC 460. In *Prince Victor N. Narayan v. Kumar Bharrabendra* 34 CWN 53, it was held that the petitioner being adjudged in England his property in India vests in the trustee in bankruptcy.

Adjudication by Foreign Court and its effect in India.

The definition of the term foreign Court as contained in the Code of Civil Procedure is not applicable to all other enactments. In the Provincial Insolvency Act there is nothing as regards the definition of the term and though for the purpose of sending processes or of execution provision is made in the Code, it is only for those purposes alone. A preliminary decree of Madras Court in favour of an insolvent was attached by a Bombay creditor. The judgment debtor was adjudicated insolvent by the District Court of Secunderabad which is a foreign Court and the Official Receiver objected to the continuance of attachment. It was held that the Official Receiver in a foreign Court could not take advantage of the provisions of the law applicable to Courts in British India and the execution proceeding in British India was not affected by adjudication as insolvent in foreign Court and so the attachment continued *Venkanna v. Chennayya* 57 MLJ 393 1929 A 1 R (M) 900 following *Ex parte Holthausen In re Schibler*, (1875) 9 Ch 722 and *Galbraith v. Grimshaw* (1910) AC 508. An order of adjudication as insolvent made by a foreign Court does not operate in British India *in statu* but only under the rule of private international law. Under that law no adjudication order is recognised as having the effect of vesting in the Receiver any immovables in another country. With regard to movables, after the date of a foreign adjudication order, it must be recognised as effective, but subject to the condition that it cannot interfere with any process at the instance of a creditor already pending even though such process is incomplete provided that at that date the insolvent's freedom of disposal was so affected by the process that he could not have assigned the subject matter of the process to the Receiver. Accordingly a prior attachment of movables

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this case of a preliminary decree in a partition suit directing inter alia payment of money) in execution of a decree will prevail over a foreign adjudication order made subsequently and the property attached will first be applied to the satisfaction of the attaching creditor. Although Secunderabad is a tract assigned by the Nizam to the British Government and the Provincial Insolvency Act was declared applicable to Secunderabad by virtue of the powers derived by the Governor General of India in Council under the Foreign Jurisdiction Act (53 & 54 Vict. c. 37) and the Indian (Foreign Jurisdiction) Order in Council dated the 11th June 1907 which delegated to the Governor General of India in Council powers under that Act for the purpose of constituting Courts and determining the law and procedure within areas extra territorial to British India the British cantonment in Secunderabad is still a part of the Nizam's dominions and in relation to the Courts of British India orders of the Secunderabad District Court are orders of a Foreign Court *Gummudelli Anantapadmanabhaswami v The Official Receiver of Secunderabad* 56 Mad 405 (P.C.) 37 C.W.N. 553 (P.C.) reversing *Official Receiver v Lakshminarayan* 54 Mad 727 61 M.L.J. 774 33 L.W. 562 1931 M.W.N. 444 132 I.C. 297 1931 A.I.R. (Mad.) 474. The adjudication of a debtor as insolvent in Penang under the Bankruptcy Ordinance in the Straits Settlements does not vest in the Official Assignee of Penang *statuti* the insolvent's immovable property in the Madras Presidency *Aiyaswamy Chetty v Official Assignee Madras* 57 Mad 616 1934 M.W.N. 81 67 M.L.J. 59 39 L.W. 541.

Adjudication under the Act and its effect outside British India

The adjudication of a debtor as an insolvent under the provisions of the Provincial Insolvency Act V of 1920 has not the effect of vesting his property outside British India in the Receiver. The effect of insolvency on the title to property of the insolvent outside British India varies according to whether the property be immovable notably land or movable like goods. It is a first principle of what is called Private International Law that the title to immovables is governed by the law of the country in which they are situated the *lex loci rei sitæ* as it is called by the learned whereas the title to tangible movables as opposed to intangible ones like debts and other things in action is in great part governed by the personal law of the owner which in the view of the English Courts is the law of domicile and not by the law of the country in which they are situated. Certainly the effect of a so called universal assignment such as takes place in bankruptcy depends upon the personal law *Mobilia Sequuntur Personam* is the appropriate maxim. As Japan the views of British Indian Courts not operate unless it is shown that the foreign law will give them effect *Cockerell*

v. *Dickens*, (1840) 3 Moo P C 98 (133) In *In the matter of Motilal Premasukhdas Rang* L R 166 there first occurred the adjudication in Calcutta of seven persons trading under the name of Ramnibas Ramnarain and a month later there was the adjudication in Rangoon of the firm of Motilal Premasukhdas of which six of these seven persons were partners. The official Assignee of Calcutta applied under Sec 22 of the Rangoon Insolvency Act (the same as the Presidency Towns Insolvency Act) to have the Rangoon adjudication order annulled or alternatively to have all proceedings therein stayed. It was *quæried* Whether an order of adjudication made after 1st April 1937 in British India would be sufficient to vest immoveable property of an insolvent in Burma in the official Assignee of Calcutta under Sec 17 of the Presidency Towns Insolvency Act.

As regards movables in a foreign country the basic principle is *Mobilia Sequuntur Personam* (movables follow the person) *Prima facie*, these are governed by the law of the insolvent's domicile *Phillips v Hunter* (1795) 2 H Bl 402 *The Yokohama Specie Bank Ltd v S. S. Curlander & Co* 43 C L J 436 In *Sumeru Mull Surana v Rai Bahadur Bansilal Abirchand* 35 C W N 997 1932 A I R (Cal) 310 in appeal from 35 C W N 406 1932 A I R (Cal) 124 a firm was adjudicated insolvent in Calcutta but subsequently on a scheme of composition having been approved by the Court the adjudication was annulled. An unsecured creditor domiciled in Bikanir but carrying on business in Calcutta who had taken no part in the insolvency proceedings had previously to the order of adjudication commenced a suit against the insolvents and certain other persons, alleging that they were the proprietors of the insolvent firm in the Bikanir State where the latter had immovable properties. The suit was admittedly for business debts contracted in Calcutta. In the schedule which the insolvents filed in Calcutta the immovable properties in the Bikanir State were shown as fully charged with a secured debt. And the insolvents did not execute any transfer of these properties in favour of the trustees of the composition so as to make the said properties available for distribution amongst the unsecured creditors. It was held that in injunction to restrain the Bikanir creditor from proceeding with his suit was rightly refused. In *Firm Manak Chand Raha Ram Jami v Lakhmi Das* 148 I C 832 1934 A I R (Lah) 507 it has been held that section 18 of the Punjab Colonisation of Government Land Act V of 1912 protects an interest in colony land from attachment and sale by a Civil Court or in insolvency proceedings. An attachment of insolvent's property by a foreign Court situated within its jurisdiction which is prior in date to an order of adjudication in British India is not affected by an order of adjudication in British India. *R. B. N. S. S. Ramall* 39 C W N 1135.

2. (i) In this Act, unless there is anything repugnant in the subject or context,—

- (a) "creditor" includes a decree-holder, "debt" includes a judgment debt, and "debtor" includes a judgment debtor,
- (b) "District Court" means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns, the Town of Rangoon and the limits of the ordinary original civil jurisdiction of the Chief Court of Sind as defined in section 2 of the Presidency towns Insolvency Act, 1909,
- (c) "prescribed" means prescribed by rules made under this Act,
- (d) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit,
- (e) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor, and
- (f) "transfer of property" includes a transfer of any interest in property and the creation of any charge upon property

(2) Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908, and not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code

Amendments

By section 11 of the Insolvency (Amendment) Act, IX of 1926, the words "the Town of Rangoon and the limits of the ordinary original civil jurisdiction of the Court of the Judicial Commissioner of Sind as defined in section 2 of the Presidency towns Insolvency Act, 1909" were substituted for the words "and section (1) Again of 1926 the words 'Court of the Judicial Commissioner of Sind' in clause (b) of sub sec (1)

Review.

This was section 2 of the Provincial Insolvency Act, III of 1907 and has been recast. It includes the definition of "transfer of property" and excludes those of "available act of insolvency" and "Court". The reasons for the changes introduced in the section are explained in clause (2) of Notes on Clauses, *supra*, thus — "The expression 'available act of insolvency' is not used anywhere else in the Act, and a definition therefore seems unnecessary. No such definition is to be found in the Presidency Towns Insolvency Act. The amendment in the definition of 'property' makes it clear that trust property is not to be dealt with under the Act as property of the insolvent. It is proposed to include a definition of the expression 'transfer of property' on the lines of the definition in section 2 of the Presidency Towns Act."

Sub-sec. (1), clause (a) ; Who is a creditor.

The word 'creditor' is not defined in the Act nor in the English Bankruptcy Acts of 1883 and 1914. By Bankruptcy Rule 3 a creditor is defined to include 'a corporation and a firm of creditors in partnership'. The word *creditor* means one that can compel the performance of an obligation by another person who is called the *debtor*, the person lying under an obligation. In Wharton's Law Lexicon *creditor* is said to be correlative to *debtor* and *debtor* is defined as he that owes something to another. "A creditor may be a decree-holder or otherwise." *Vasudeb Kamath v Lakshmi Narayan* 42 Mad 684 36 M L J 453 52 Ind Cas 442.

To entitle a person to file an application for adjudication as a creditor he must be a creditor at the time when the act of insolvency is committed.

Includes.

When in an interpretation clause, it is stated that a certain term 'includes' so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include. *The Official Assignee, Bombay v Firm of Chandulal Chimanlal*, 76 I C 657. The term 'creditor' includes a person who has obtained judgment in respect of a tort as well as of a debt, *Ex parte Moore*, (1885) 14 Q B D 627.

Benamidar of a creditor. Though in *Ketakicharan v Saratkumari*, 20 C W N 995 the term 'creditor' was held not to include a Benamidar it has since been held by the Privy Council in the case of *Choudhri Gurr Naram v Sheo Lal Sing*, 46 Cal 566 23 C W N 521, that the Benamidar represents the real owner, and is, so far as their relative legal position is concerned, a mere trustee for him, and there is no reason why an action cannot be maintained in the name of the Benamidar in respect of the property although the beneficial

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owner is no party to it, a proceeding by or against the *Benamidar* being in its ultimate result fully binding on the beneficial owner

Who is not a creditor.

The words creditor in sec 2 (a) does not include a secured creditor, *Official Receiver, Coimbatore, v Palaniswami Chetty*, 48 Mad 750 88 IC 934 (1924) AIR (M) 105 *Jadu Nath Haldar v Manindra Nath Chandra*, 27 CWN 816 A decree-holder under a mortgage decree is not a creditor, *Bay Nath v Gajadhar Prasad*, 1935 OWN 374 154 IC 908 1935 AIR (O) 406 A decree holder who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies is not a creditor under the Provincial Insolvency Act in respect of his rent or decree His decree is not a provable debt, *Parbati v Raja Shayamnikh* 44 All 296 20 ALJ 147, following *Kalka Das v Gajju Singh* 43 All 510

Contingent creditor The person who on the happening of not happen will become entitled against another person cannot be a contingent creditor, *Nalam* 32 Ind Cas 795 But a person who stands surety for the payment of a debt of the insolvent is a 'creditor' within the meaning of this section, *Rodrigues v Ramaswami*, 40 Mad 783 A surety, as such is clearly a creditor of the insolvent He is clearly a creditor as soon as he pays the money on his behalf *Siddiq Ahmed v M K M Firm*, 79 Ind Cas 813 1923 AIR (Rang) 149

Creditor whose debt is barred To entitle a person to file an application as a creditor he must be a creditor at the time when the act of insolvency is committed His debt must be 'a liquidated sum payable either immediately or at some future time' A barred debt cannot be said to be 'payable immediately or at some future time' The debt must be still 'due' to him i.e. legally recoverable and not barred by limitation, *Gopal Krishna Ayyar v Official Receiver, South Malabar*, 1930 MWN 837 1930 AIR (M) 998

The trustee in bankruptcy The trustee in bankruptcy of a judgment creditor is not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt He is only a legal representative of the creditor who could issue a bankruptcy notice It cannot be said that a trustee in bankruptcy stands in the same position as the personal representative of the debtor, *In Re Golding, Ex parte Harper*, 22 QBD 87 Lord Esher, MR in delivering the judgment in *In Re Sacker, Ex parte Sacker*, 22 QBD 179 observed 'Section 6 assumes that the debt which is to be a debt of a particular debtor to the petitioning creditor is a debt owing by the debtor to the petitioning creditor' the petitioner a debt owing

to him as a creditor of the appellant? The petition was filed by him. He is not a trustee. There is no debt due to him by the appellant."

Hindu joint family firm The term "firm" is not defined in the joint Hindu family business. This is clear from the decision in *Lalchand v. M. C. Boid & Co.* 38 CWN 914. It is held that two or more persons being partners, or any person carrying on business in partnership name, may take proceedings or file a petition against under the Act in the name of the firm, but there is no provision in the Act which would entitle a joint family to initiate proceedings in insolvency. *Re. Gobindlal Mehta* 11 CWN 275.

Debt

The word 'debt' is used in its ordinary meaning of a sum payable in respect of a money demand recoverable by the creditor. *Dorasami v. Vaithilinga* 40 Mad 31 (FB) 1917 MWN 113, 114 MLJ 422. Debt within the meaning of the Insolvency Act includes only those debts that are provable under the Act under section 31. It should be noted that the word debt means an actually existing debt that is, a perfected and absolute debt not merely a sum of money which may or may not become payable at some future time or the payment of which is dependent upon contingencies. *Haridas Acharya v. Barada Kishore Acharya* 27 Cal 35 4 CWN 87. Debt provable in bankruptcy or provable debt includes any debt or liability by this Act made provable in bankruptcy. Bankruptcy Act, 1914, s. 167. The definition of a debt under the Provincial Insolvency Act includes a decree debt because sec 2 (1) states that creditor is a decree holder and debtor includes a judgment-debtor, *and Bros v. J. K. Munusami Aiyar* 51 MLJ 613 95 IC 516. The debt under the Provincial Insolvency Act must be a sum (i.e., capable of being ascertained) payable either at some certain future time or at the time of the presentation of the petition against his debtor. *Ex parte Haywood* (1870) LR 6 Ch App 546. It is necessary that a petitioning creditor should be a creditor at the time of the presentation of the application. It is sufficient if he is a creditor at the date of adjudication. *Venkatarama Iyer* 50 M 396 51 MLJ 650 (1926) MWN 946 100 IC 536 (1927) AIR (M) 153.

Debtor

Debtor includes a judgment-debtor. *Sukumar v. Munnusami Aiyar*, 51 MLJ 613 95 IC 516. It includes a firm of debtors in partnership and includes a partner in the firm.

against under the Act, whether adjudged bankrupt or not [Rule 3, Bankruptcy Act, 1914] The term 'debtor' in the Insolvency Regulation includes also a firm and a firm can be adjudicated insolvent, *Aslaji Dhiraji Bros v Sunni Lal*, 9 Mys LJ 222

Debtor does not include : (i) *Infants, married women, etc*
No one who is not a debtor can be adjudged an insolvent, "but not every one who fails to pay what he owes is a debtor for the purpose of the bankruptcy law, whatever he may be, in plain English Considerations of convenience exclude the itinerant foreigner from the operation of the bankruptcy law, infants and married women are to a great extent immune for reasons of public policy, and companies have their own counterpart to the law of bankruptcy under which they may be wound up when they can no longer pay their way" *Ringuood*

(ii) *Lunatics* Whether a lunatic can be made a bankrupt has always been, and still is, an open question, *Re Farnham*, (1895) 2 Ch 799 A lunatic cannot at all events commit an act of bankruptcy involving an intent unless during a lucid interval, *Crisp v Peritt*, Willes 467, *Ex parte Pridley*, Cooke, Bkcy Law, 48, *Exp Stamp*, (1846) De Gex 345, *Periammal v Official Receiver, Coimbatore*, 1930 MWN 651

(iii) *Legal representatives of debtor* A decree against a person as the legal representative of another (such as a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act, *Nagasubramania Mudaliar v Krishnamachariar*, 50 M 981 53 MLJ 403 104 IC 642 (1927) AIR (M) 92 Where creditors who have obtained a decree against a joint Hindu family apply for adjudication of members as insolvents, a member who is not personally liable under the decree, it being passed against him in a representative capacity, cannot be adjudicated insolvent *Kalu Ram v Gita Singh*, 12 LLJ 96 1930 AIR (L) 592, *Kalagar* 61 MLJ 518 1931 AIR (M) *Rahaman Mia v Gajendra Lal* CWN 1288 66 CLJ 346, the sons of a deceased debtor are only liable for the debts of their deceased father to the extent of the assets coming to their hands and they are not personally liable for such debts In respect of such liability of the father, the sons are not debtors within the meaning of the insolvency law and are not entitled to present a petition under the provisions of the Provincial Insolvency Act

(iv) *Debtor under an award* An attachment in execution of a money award is not an "attachment in execution of a decree of any court for the payment of money" No insolvency petition can, therefore, be founded on the fact of such attachment An award cannot be treated as a decree except for the purposes of

enforcement The incidents of a decree in respect of other matters cannot be extended to an award by analogy from sec 15 of the Indian Arbitration Act, *Ram Sahai v Joylall*, 32 C W N 608

(v) *Debtor under a Certificate* The word decree in sec 6 of the Provincial Insolvency Act, 1920, has the same meaning as in sec 2 of the C.P. Code, 1908, a certificate under the Public Demands Recovery Act, 1913, is not a decree within the meaning of that word as used in the C.P. Code Therefore, a holder of a certificate under the Public Demands Recovery Act is not a creditor in the sense in which the term is used in this Act, *Debi Prosad Singha v Krishna Kumar Sarkar*, 41 C W N 800

(vi) *Debtor as representative* A debtor who is not personally liable for the payment of money under the decree but has been made liable in his representative capacity is not a debtor under this Act, *Bay Nath v Gajadhar Prasad*, 1935 O W N 374 154 I C 908 1935 A I R (O) 406

(vii) *Foreigner* The Court can not treat a man as being a debtor within the meaning of the Insolvency Act, unless he is either a subject of British India or has committed or suffered within British India an act of insolvency, if a foreigner is not within the jurisdiction of the Court at the time when his goods are seised in execution, can not be held to be a debtor to whom the Insolvency Act would apply *Ganeshnaram v Raja Pratap* I L R 1938 Bom 301

Clause (b) ; District Court.

Court was defined in the Act III of 1907 as "the Court exercising jurisdiction under that Act" This definition has been omitted because under section 3 of the present Act, it is the District Courts that shall be the Courts having jurisdiction under this Act and 'District Court' has been defined in section 2 sub-section (1) cl (b) Under section 3 (15) of the General Clauses Act X of 1897 District Judge means "the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction" By Acts IX and XXXIV of 1926, District Court does not include the Chief Court of Sind in the exercise of its ordinary original civil jurisdiction Under section 18 of the Bengal, N W P & Assam Civil Courts Act, XII of 1887, the jurisdiction of a District Judge extends to all original suits for the time being cognizable by Civil Courts Vide notes under S 5 *infra*

Clause (c) , Prescribed.

For rules framed under the Act prescribing the mode carrying into effect its provisions, vide section 79 and appen *infra*

Clause (d), Property

Blackstone in his Commentaries defines property to mean all 'subject of dominion' and they are things as distinguished from person and things are distinguished into two classes things real and things personal. Things real (otherwise called realty) consist of things substantial and immovable of the rights and property annexed to or arising out of these. Things personal (otherwise called personalty) consist of goods money all other movables and of such rights and profits as relate to movables. In section 167 of the Bankruptcy Act 1914 the word has been defined thus: Property shall include money goods things in action land and every description of property whether real or personal and whether situate in England or elsewhere also obligations easements and every description of estate interests and profits present or future vested or contingent arising out of or incident to property as above defined. When the Act refers to property of the bankrupt it invariably means such of his property as is divisible amongst his creditors. This and this alone is what passes upon adjudication to the trustee —Ringwood

The definition of the word property in sec 2(1)(d) of the Provincial Insolvency Act is not exhaustive. It was inserted to make it clear that certain kinds of property which do not actually belong to the insolvent are to be treated as his property for the purpose of the Insolvency Act e.g. property over which he may have a power of appointment exercisable for his own benefit. In *Handas v Lallubhai* 55 Bom 110 32 Bom LR 1362 1931 A I R (Bom) 50 it was held that the definition in sec 2(d) is not complete. The term property includes not only material objects but also rights over material objects. The insolvent's property includes in the case of a Hindu father his disposing power over his son's undivided interest. *Bajirao v Daulatrao* 128 IC 404 1930 A I R (Nag) 215. The rights of a Mitakshara father to sell the whole of the ancestral property including his son's interest in satisfaction of his just debts (debts which were not contracted for illegal or immoral purposes) is property within the meaning of S 2(1)(d) of the Provincial Insolvency Act. *Bishwanath Sao v Official Receiver* 16 Pat 60 18 Pat LT 1 1937 PWN 41 167 IC 765 1937 A I R (Pat) 185 (FB). *Bhagwan Das v Lakshmi Chand* 1935 A L J 673 1935 A W R 672. So also it has been held that the provident fund money becomes the property of the insolvent after it is paid to him and vests in the Receiver. *Walchand Molagi Maruani v Charles A Williams* 1 LR 59 Bom 517 37 Bom LR 494 159 IC 144 1935 A I R (B) 396. *D Palaya v T P Sen* 16 PLT 167 (FB) 1935 A I R (Pat) 211. *Mrs A T Marten v R K Dutt* 1938 A I R (N) 408. Property as defined in the Provincial Insolvency Act will not include the right to sue for breach of contract. Where a person executes a mortgage of immovable property to another on

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condition that the mortgagee shall make certain payments to the creditor of the mortgagor but fail to perform that agreement and the mortgagor subsequently becoming insolvent the receiver sold the equity of redemption to a third person it was held that the right to sue for the breach of the contract would not pass to the Official Receiver but remain with the insolvent mortgagor. The right to sue for breach of contract is non transferable under sec 6 (e) of the T P Act. *Ram Dayal v Mukat Manahar*, 1937 A L J 304 1937 A W R 241 168 I C 683 1937 A I R (All) 317. Property of an insolvent includes therefore the property which he is seized and possessed of or which is vested in him at the date of the petition or which he may become possessed of afterwards between the date of the admission of the petition and discharge (i.e., after acquired property) and which he could dispose of at his own will and also property which may be in his order or disposition in his trade or business. The word 'property' includes (a) movable property, (b) immovable property, and (c) actionable claims. Under sec 28 (5) of the Act the property which is exempted from the scope of adjudication is property of the insolvent which is exempted from attachment in execution of a decree under sec 60 of the C P Code.

For an enumeration of what constitute the properties of the insolvent that vest and that do not vest in the Receiver under the Provincial Insolvency Act, vide Notes under section 28 (2), (3), (4) and (5), *infra*

Clause (e), Secured creditor.

Secured creditor means a creditor who has got security for his debt, i.e., who can follow the property of the debtor for the realisation of his debts either in the hands of the debtor or in the hands of his assignees in preference to all other claims and as against the unsecured creditors, who can follow only the person of the debtor and the residue of the property, if any, that may be left after payment of the secured creditor. The property by which the debt of a creditor is secured is called "security". Under section 167 of the Bankruptcy Act, 1914, "secured creditor" means "a person holding a mortgage, charge or lien on property of the debtor or any part of his property as security for a debt due to him from the debtor." The mortgage or other charge, the holding of which constitutes a person a secured creditor, must be a mortgage or charge on the property of the debtor. A security on the property of a third person even though it is for the same debt, does not constitute the holder a secured creditor. *Ex parte West Riding Union Banking Co., Re Turner*, (1891) 19 Ch D 105. The holder of a Bill of lading or of a bill of exchange accepted by the consignee of goods for sale on the delivery up of the bill of lading is a secured creditor of the acceptor, *Ex parte Brett Re House*, (1871) 6 Ch App 838. The word "holding" used in the 'Bankruptcy Act' refers to the legal ownership.

the term secured creditor as given in clause (e) sub sec (1) of sec 2, Provincial Insolvency Act is in the present tense, and thus necessarily connotes the idea of a mortgage charge or lien which exists and excludes that of the mortgage charge or lien which is to come into existence at some future time *Sohna Mal v Sardar Gian Singh*, 1937 A I R (L) 494 A landlord whose rent is in arrear is not a secured creditor simply because he has a power of distress, *Thomas v Patent Leonite Co* (1881) 17 Ch D 250, *Middleton v Mucklow*, 10 Bing 401

Rights of a secured creditor.

Vide, Notes under sec 28 (6) and secs 47 51, *infra*

Proof of claim as a secured creditor.

Under the Provincial Insolvency Act when a person claims to be the secured creditor of an insolvent he has to prove his claim and may be required to do so in the insolvency proceedings, *The Luxmi Industrial Bank v Dinesh Chandra* 32 C W N 427 (1928) A I R (C) 609 The mere fact that the Receiver mentioned a certain person as secured creditor in a report submitted by him to the Court which was never approved by the Court either expressly or by necessary implication, does not mean that the Court approved of the Receiver's report that the person was a secured creditor An award obtained by a creditor during the pendency of an insolvency application by the same creditor in respect of the same debt, without obtaining the leave of the Court is a nullity and the creditor cannot claim to be secured creditor on the basis of such award, *Tulsi Ram v Muhammad Anif*, 109 IC 373 (1928) A I R (L) 738

Mortgage, charge or lien.

Sec 100 of the Transfer of Property Act draws a clear distinction between a "mortgage" and a "charge," the former being a transfer of an interest in immovable property made by the mortgagor as a security for a loan whereas the latter is not a transfer though it is none the less a security for the payment of debt to another. A charge may be created (1) by act of parties, (2) by operation of law. A mortgage, however, can only be created by act of parties and not by operation of law. Every mortgage is a charge but every charge is not a mortgage. A mortgage deed must be attested by at least two witnesses whilst a charge need not be made in writing and if reduced to writing it need not be either attested or registered. "Charge" says Day, J., "differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt" *Burlinson v Hall* 12 QBD 347, *Kishan Lal v Ganga Ram* 13 All 28, *Mattam v Vuhai*, 13 Bom 90 (F B). A mortgage is a transfer of interest in specific immovable property while charge

only secures payment of money out of that property. The distinction is not merely verbal as it carries with it very important consequences, because although a mortgage may be enforced against the property in the hands of a bona fide purchaser for value without notice, a charge of Calcutta, 42 Corporation 271 C 261

The term "charge" which in English law is defined to be an obligation which by implication of law and not by express contract binds the real or personal estate for the discharge of a debt or engagement but does not pass any property in the subject of the lien—Fisher, para 466 (5th Ed), *Wilson v Heather*, 5 Taunt, 649. But while a charge may be created by act of parties, a lien is created only by operation of law. The term appears to have been used in this sense in sec 95 of the Indian Contract Act (XX of 1872) but applicable only to moveable property. The term "charge" seems to be confined in its use only to immovable property. The term "lien" is used in this country in places where in English law "charge" would have been more appropriate. Words like 'vendor's lien' and the like have become too familiar to be easily discarded in favour of the more correct expression 'vendor's charge'.

Charge by act of parties—A charge is generally created by a settlement or will by which the property of the settlor or testator is specially appropriated to the discharge of a portion or legacy or debt or the support of religious or charitable endowments, *Khanhial Lal v Muhammad*, 5 All 11, *Chalamanna v Subbamma*, 7 Mad 23, *Muhammad v Muhammad*, 13 CLR 330, *Girish v Anundo*, 15 Cal 66. The creation of a charge does not necessarily imply the existence of a debt. It is merely an interest carved out of the estate which may be substituted by a mortgage—Fisher, para 225 (5th Ed), *Ponlete v Hood* 35 Beav 274, *Pinnithavelu v Bhashyam* 25 Mad 406, *Imbiolu v Achampt* 33 MLJ 58 39 IC 867. It is worthy of note that the charge may be created orally, although if it is created by an instrument in writing it must be registered unless made by will or the amount secured is less than one hundred rupees, *Bengal Banking Corporation v Mackertuch* 10 Cal 315, *Appaswami v Maniham*, 9 Mad 103. A charge may be created inter vivos or by a will. When there is a non testamentary instrument such as a deed of settlement, the charge cannot be enforced 17, Indian Registration Act,

Charge by operation of law—These charges do not rest upon an agreement and securities created by the express or implied consent of parties. They may be divided into two classes—"legal liens" and "judicial liens," the one constituting a part of the substantive law and the other part of the law of procedure.

Instances of legal liens—(1) The earliest instance is furnished

sec. 13 of the Bengal Reg VIII of 1819 which allows a taluqdar of the second degree who pays the herd-rent and thus saves the *putni* from sale, a lien on the tenure, (2) Sec 9 of Act XI of 1859 (Revenue Sale Law), Act II of 1864 (Madras), (3) Secs 65 and 171 of the Bengal Tenancy Act, VIII of 1885 (B.C.) as amended by Act IV of 1928 (B.C.), sec. 6 of the Bengal Rent Recovery Act, VIII of 1865 (B.C.); under sec 101 of the Oudh Rent Act, a landlord is a secured creditor of his tenant for his rent and when the tenant becomes insolvent the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of the crops of the insolvent before distribution is made amongst other creditors, *Bishambernath v. Rukha*, 81 Ind Cas 647; (4) Secs 55 (4), 72 73 and 95 of the T. P. Act and section 46 of the Indian Sale of Goods Act, III of 1930 (unpaid vendor's lien); (5) Partner's lien, (6) Salvage lien, (7) Trustee's lien under sec. 82 of the Trusts Act, II of 1882, (8) Lien of *cestui que trust* or charge on property purchased with trust money, (9) Solicitor's lien; (10) Insurer's lien, (11) Maritime lien.

The Indian Contract Act following the English law on the subject divided liens into 2 classes, *special* and *general*. A special lien authorises the holder of the goods to retain them only till the particular debt in respect of the goods is paid. But a general lien extends to any balance which may be due from the owner to the holder of goods. Special liens are defined by law. Bankers, factors, wharfingers, attorneys of High Courts and policy-brokers are alone entitled to a general lien, *Cunhan v. Bank of Madras*, 19 Mad 234. According to the Common Law in England a special lien arises not only in favour of a person who spends labour on another's goods but also in favour of various other persons. Common carriers, for instance, are entitled to lien, because they are obliged to receive any goods which may be committed to their custody. On the same principle a Railway Company can claim a lien for cloak-room charges, *Singer Mfg. Co. v. London & S W Ry Co.*, (1894) 1 Q B 833 and sec. 55, Contract Act. Similarly, a ship-owner has a right of lien on goods carried by him, *Bristow v. Whitmore*, (1859) 4 De G. & J. 325. The peculiar feature of the liens is that they may be enforced against a true owner and it would seem to be almost immaterial whether the person who claims the lien did or did not know whether the goods belonged to a third person, *Robins & Co. v. Gray*, (1865) 2 Q B 78. But no such lien can be enforced against property in the wrongful possession of the debtor if the person who claims the lien has knowledge of such wrongful possession, *Johnson v. Hill*, (1822) 5 Stork. 172. A particular lien may be claimed by any person who has bestowed labour on goods bailed to him either by the owner or by some person who is authorised by him to do so, but not where the bargain is made by a stranger, *Buxton v. Bangham*, (1834) 6 C. & P. 674, *Keen v. Thomas*, (1905) 1 K B 136. An agent is entitled to a lien on the property of the principal whether movable or immovable in respect of his claim for commission, disbursements or services in

connection with that property (sec 221, Indian Contract Act), *In re The Bombay Saw Mills Co., Ltd.*, 13 Bom 314. But no lien can be claimed by a banian in the absence of some agreement or course of dealing from which it is implied, *Peacock v. Baynath*, 18 1 A 78 18 Cal. 573. An agreement between a company and a person as banian of the company that the latter would advance all necessary funds up to a certain limit and in return would have the sole right to collect all sums due on bills to the company and repay himself the advances made as also his remuneration is an agreement which, if otherwise binding, creates an equitable charge on the company's outstanding bills for the amounts owing to the banian, *Palmer v Carey*, 1926 A C 703, *Probodh Chandra v Road Oils Ltd.*, 57 Cal 1101, 34 C W N 570 127 1 C 454 1930 A I R (Cal) 782.

Exceptions to legal liens (1) *Creditor's lien under the Hindu Law*
 The property of a deceased person is not so hypothecated for his debts as to prevent his heirs from disposing of it to a third party or to allow a creditor to follow it and take it out of his hands who has purchased it in good faith and for valuable consideration. He can hold the person of the heir personally liable but he cannot follow the property, *Unnopurna v Ganganarain*, 2 W R 296. A suit was brought by a Hindu widow governed by the Mitakshara school for recovery of her arrears of maintenance from the estate of her deceased husband in the hands of the Official Assignee and for making a charge on the said estate for her future maintenance and residence. It was held that the suit must fail as the whole family property was liable for the payment of the debts incurred by the husband for the purpose of the family business, the shares of the minor co parceners being also liable, and the rights of the widow to the payment of her debts, 15 L 9. The heirs and devisees are liable in the hands of the purchaser for the testator's debts stands on the footing as a similar question would under the English law. The creditors of the ancestor or testator may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew that there were debts of the ancestor left unsatisfied and also that the heir or devisee to whom he paid the purchase money intended to apply it otherwise than in payment of such debts. But a purchaser ignorant of either of these points has a safe title, for no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the ancestor or the testator or to see to the application of the purchase money even when there is an express charge of debts on the devised estate by the testator, *Corser v Cartwright*, L R 7 Eng & Ir App 731. In India the general creditors had no bigger rights than the specialty creditors had under the Common Law in England. For if they had a charge upon the descended land, it would have been impossible for the heir to deal with it without the concurrence

of all the creditors *Greender Chander Ghosh v Mackintosh*, 4 Cal 897 In *Ramdhon Dhur v Mohesh Chander* 9 Cal 406 11 CLR 565, a testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs After one of the testator's creditors had obtained a decree against the heirs in their representative capacity which by its terms was to be satisfied out of the assets left by the testator one of the heirs mortgaged his share left by the testator Subsequent to the mortgage one of the mortgaged properties was sold in execution of the creditor's decree The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage It was held that "as neither the direction in the will for payment of debts nor the decree in creditor's suit created a charge upon the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage and the mortgagee was entitled to execute the decree against the property A decree in favour of a creditor to the estate of a deceased testator is a mere money decree and has not the effect of creating a charge upon the property *Ambika Charan Dutt v Mukta Kishori* 2 CLJ 138

(2) *Creditor's lien under the Mahomedan law* The debts of an ancestor seem to form no charge on the property inherited by the heir in Mahomedan law In *Abdu' Khad'n v Chidambara Chettiyar*, 32 Mad 276, it was held that each Mahomedan heir takes his share in severalty subject inter se to the liability to discharge his share of the ancestor's debt whereas, of course, in the procedure with an executor the legatees take their net shares after the debts etc., have been discharged and the Privy Council in *Jafri Begum v Amir Muhammad Khan* 42 Cal 72 (PC) held that the devolution on a Mahomedan heir is not contingent upon or suspended till the payment of the debts of a Mahomedan intestate The Privy Council held in *Bazayet Hossein v Dooli Chand*, 4 Cal 402 that a Mahomedan heir could pass a good title on the sale notwithstanding the debts due by his father and in *Abdu' Majeeth v Krishnamachariar* 40 Mad 243 it was ruled that a sale by one heir for the debts of the deceased was not binding on the others and in the case relied on in appeal (*Lakshmanarasimham v Jagannadha Rao* 18 MLT 147 33 IC 256) the Court held that there was no lien or charge on the property in the hands of the Official Receiver where Mahomedan heirs had become insolvents subsequent to the decree against the estate of their ancestors in their hands and the creditors must prove as ordinary creditors, *Nainar Rowthen v Kuppal Pichai Rowthen* (1929) MWN 168 120 IC 889 (1929) AIR (M) 609 Under Mahomedan law, although upon the death of the ancestor his estate devolves immediately upon his heirs the heirs take it subject to the payment of his debts and therefore, although there may not be a specific charge upon the estate for the payment of debts, the debts may be deemed to constitute a general charge on the estate That being

so, if such a estate devolves upon a person who is subsequently declared insolvent, the creditors of the insolvent cannot seize the property in competition with the creditors of the deceased, *Shankar Lal v. Mahammad Ismail*, 1930 A L J 989 125 I C 28 1930 A I R (All) 552

Judicial lien Judicial liens are liens created by the order of the Court that the payment of any money shall be secured by a charge on property, e.g. attachment of debtor's property in execution of a decree against him. Though attachment does not confer any title it cannot be said that the attaching creditor has no lien on the property attached because if he could realise the decretal amount before admission of the petition for adjudication by the debtor, he is entitled to be paid in preference to all other creditors, *vide* sec 51, *infra*. When a Civil Court passes an order under Or XX, r 11 (2), C P C, directing that the decree against the judgment debtor, shall be payable by monthly instalments, and that he shall give as security a mortgage on certain immovable property, and subsequent to this order the judgment debtor is declared insolvent, it is held (1) that the adjudication could not affect the position of the decree-holder who was entitled to obtain from the judgment debtor the mortgage ordered prior to the adjudication, (2) that the order that the mortgage be executed was one of provi
1 decree by reason
v Shaik Jooman, 85
m Kumari Roy, 28
1 C 291,
C W N clxxxvii 40 C L J 180 (1925) A I R (C) 57

Equitable lien Besides the legal and judicial liens there is another class of lien which is called *equitable lien* because the lien is enforced in equity. Where a trustee wrongfully mingles trust property with his own the beneficiary is entitled to a charge on the whole fund for the amount due to him. Where a banker who was one of the trustees of an endowed school, had a sum of money belonging to endowment entrusted to him by the co-trustees and he put that sum into his own business without the knowledge or consent of his co-trustees and his business came to a stand still and he was adjudicated insolvent it was held that the bankrupt's co-trustees were entitled to a charge on the whole estate in the hands of the Official Assignee in priority to other creditors on the basis of following moneys which have been misappropriated to the fund in which they must be supposed to have been sunk, *In re Hallett's Estate*, *Kantchbull v. Hallet*, (1879) 13 Ch D 696, *Sinclair v. Brougham*, (1914) A C 398, *Pennel v. Duffell*, (1853) 4 De G M & G 372, *The Official Assignee of Madras v. Minakshi Vidyasalai Sangam*, 52 Mad 919. Where it is admitted that Rs 10,000 of the respondents was a trust in the hands of the insolvents to be invested in their business and so invested, it must be taken to have remained a part of the assets of that business and to have been the

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the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency the assets passed to the Official Assignee but passed subject to the charge, *The Official Assignee of Madras v T Krishnaji Bhat*, 60 I A 203 56 Mad 570 65 MLJ 1 (PC) 37 CWN 713 1933 MWN 575 57 CLJ 433 33 Bom LR 756 1933 ALJ 637 143 IC 162 1933 AIR (PC) 148

Advocate's lien An advocate could not have a lien on the property of the insolvent for work done by him on behalf of the insolvent in the absence of an express agreement to that effect by the client. In *Krishnamachariar v The Official Assignee of Madras*, 55 Mad 455 62 MLJ 185 35 LW 166 1932 MWN 8 137 IC 571 1932 AIR Mad 256 an advocate put in a claim to the Official Assignee for certain moneys due to him by the insolvent for work done for the insolvent in a probate proceeding in respect of a will of which the insolvent was the executor and a legatee, and also for other work done by him on behalf of the insolvent contending that he was entitled to payment out of the estate of the testator on the ground that he had a lien on that property as having been recovered for the insolvent by his exertion in the probate litigation. It was held that the Insolvency Court could not make an order directing the Official Assignee to satisfy the claim out of the estate of the testator and that it could only be allowed against the estate of the insolvent and that the advocate could not have a lien on the property in the absence of an express agreement to that effect by the client.

Attachment of Receiver The mere factum of the insolvent's property before his appointment of Receiver within the category of a secured creditor, as the attachment at the most only creates a species of temporary lien, which continues until the insolvency petition has been admitted, *Ram Rao v Wasudeo*, 110 IC 893, *Frederick Peacock v Madan Gopal*, 29 Cal 428 (FB) 6 CWN 576. It is well settled that attachment creates no charge or lien upon the attached property, it merely prevents private alienation. It does not confer any title on the attaching creditor, *Syed Mohiuddin v Prithichand*, 19 CWN 1159 *Mon Lal v Karrabuddin*, 25 Cal 179 (PC). The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitled to be classed with the creditors all of whom are entitled to rateable distribution of the assets in the hands of the Receiver. Such creditor has no higher right than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him, *Haran Chandra v Joy Chand*, 57 Cal 122 (1929) AIR (C) 524. So also in the case of appointment of Receiver. A judgment-creditor obtained an order appointing a Receiver 'to receive the

stock in trade and other property belonging to' the judgment debtor, without prejudice to certain rights, all further questions being reserved until the further order of the Court. The receiver took possession of the goods under the order, and continued in possession of them, until a receiving order was made in bankruptcy against the debtor. No part of the goods had been then sold. The debtor was afterwards adjudicated insolvent. It was held, *first*, that the order appointing the receiver did not make the judgment creditor a 'secured creditor' of the bankrupt within the meaning of sec 9 of the Bankruptcy Act, 1883. *Secondly*, that, if it did sec 45 applied, and the execution not having been completed by the sale before the date of the receiving order, could not prevail against the title of the trustee in bankruptcy, *In Re Dickinson Exp Carrington & Co*, 22 QBD 187. Attachment before judgment of a debtor's property at the instance of a creditor of his, prior to his adjudication as an insolvent, does not confer any right of property on the attaching creditor as against the Receiver in bankruptcy, inasmuch as the attachment does not constitute the former a secured creditor, nor does it give him any charge or lien over the attached property. The above principle, however, does not apply to the case of a creditor in whose favour an order has been made by a Court directing the debtor to bring in Court or to deposit with a specified person, a certain sum of money which is to be kept as abiding the result of the creditor's suit or as earmarked for him and the insolvency Receiver gets no priority over the creditor in respect of such amount of deposit *Gouranga Behari Basak v Manindra Nath Das Gupta*, 58 CLJ 222 37 CWN 457 145 IC 826 1933 AIR (C) 625.

Charge by hypothecation of movables The word 'mortgage' or charge is not defined in the Code of Civil Procedure. Secs 58 and 100, T P Act relate to mortgage and charge respectively of immovable properties but that Act is not exhaustive and does not profess to be a complete code as also appears from its preamble, *Satyabadi v Musst Hirabati* 34 Cal 223 5 CLJ 192, *Mohd Safiq ul Huq v Krishna Gobind* 23 CWN 284 48 IC 428, 28 CLJ 77. The Indian Contract Act no doubt speaks only of bailment of goods by way of security but it appears from its preamble that it deals only with a part of the law of contract applicable to British India. From these, therefore, it by no means follows that there may not be mortgage or hypothecation of movable properties. Such hypothecation or mortgage, not accompanied by possession, confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it, *Sris Chandra v Mugni Beua*, 9 CWN 14, *Damodar v. Atmaram*, 8 Bom LR 344, *Hanpada v Anath De*, 22 CWN 758 44 Ind Crs 211, *Punimthavelu v Bhashyam*, 25 Mad 406 12 MLJ 288. When moneys are advanced to importers for the purpose of their trade and the goods are placed in the godown of the

lenders it is an exceedingly likely course of business that the goods should be regarded as security for the advances, but the fact that the arrangement was really to secure the advances by the creditor has to be proved *Tejpal Jamnadas v Ernest V David* 32 CWN 1146 (PC) 48 CLJ 415 28 LW 204 111 IC 240 1928 AIR (PC) 219

Charge by equitable assignment The law as to equitable assignment, as stated by Lord Truro in *Rodick v Gandell*, 1 DM & G 763, is this "The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund in other words will operate as an equitable assignment of the debts or fund to which the order refers" In *Palmer v Carey*, (1926) AC 703 by a written agreement a trader was to purchase goods from time to time and the respondent was to advance money to pay for them, the trader was to sell the goods and to pay the proceeds to the credit of the respondent at his bank the respondent after deducting the amount which he had advanced and one third of the gross profits, was to pay the remaining two thirds to the trader. The trader became bankrupt, and the appellant was appointed assignee in the bankruptcy. At the time of the bankruptcy a large sum advanced under the agreement had not been repaid and the trader had in his hands goods purchased under the agreement and the proceeds of other goods so purchased. The respondent claimed a charge on the above assets in respect of the advances not repaid. It was held that as the agreement did not either contractually or otherwise create any right of the lender (respondent) in either the goods or their proceeds it did not amount to an equitable assignment so as to entitle the respondent to the charge claimed.

Clause (f) . Transfer of property Transfer of property has been defined in sec 5 of the Transfer of Property Act (IV of 1882 as amended by Act XX of 1929) as an act by which a living person conveys property in present or in future to one or more other living persons or to himself or to himself and one or more other living persons and to transfer property is to perform such act. The transfers referred to in S 53 of the Provincial Insolvency Act appear to be only voluntary transfers as defined in the Transfer of Property Act. *Usharani Devi v Shib Kumar Das* 41 CWN 368. Under the Provincial Insolvency Act 'transfer of property' means not only the transfer, assignment or conveyance of the property itself but must also include transfer assignment or conveyance of any rights and profits annexed to or issuing out of the same. This definition is newly

added, and is on the line of the definition of the expression in section 2 of the Presidency Towns Insolvency Act, III of 1909. "Having regard to the definition of the expression 'transfer of property' contained in sec 2 (f), there can be no real doubt that a partition of joint family property amounts to 'transfer of property' which falls within the mischief contemplated by sec 53 of the Act," *Official Receiver Lahore v Chuman Lal*, 31 P L R 245 123 I C 286 1930 A I R (Lah) 645. Transfer includes transfer by decrees *Isamoodin v Ajmoodin* 38 Bom L R 225. For fuller treatment of the subject vide Notes under sec 6 (a), (b) *infra*.

Sub-section (2) : Words not defined :

Besides the words defined above, the words—Decree, District Judge, Judgment debtor, Movable property, Order and others have been used in this Act but have not been defined. They are used in the same sense in which they have been defined in sec 2 of the C P Code, V of 1908.

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Charge by equitable assignment The law as to equitable assignment as stated by Lord Truro in *Rodick v Gandell*, 1 DM & G 763 is this "The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund in other words will operate as an equitable assignment of the debts or fund to which the order refers" In *Palmer v Carey* (1926) AC 703 by a written agreement a trader was to purchase goods from time to time and the respondent was to advance money to pay for them, the trader was to sell the goods and to pay the proceeds to the credit of the respondent at his bank, the respondent after deducting the amount which he had advanced and one third of the gross profits, was to pay the remaining two thirds to the trader. The trader became bankrupt, and the appellant was appointed assignee in the bankruptcy. At the time of the bankruptcy a large sum advanced under the agreement had not been repaid and the trader had in his hands goods purchased under the agreement and the proceeds of other goods so purchased. The respondent claimed a charge on the above assets in respect of the advances not repaid. It was held that as the agreement did not either contractually or otherwise, create any right of the lender (respondent) in either the goods or their proceeds, it did not amount to an equitable assignment so as to entitle the respondent to the charge claimed.

Clause (f) : Transfer of property : Transfer of property has been defined in sec 5 of the Transfer of Property Act (IV of 1882 as amended by Act XX of 1929) as "an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself or to himself and one or more other living persons and to transfer property is to perform such act". The transfers referred to in S 53 of the Provincial Insolvency Act appear to be only voluntary transfers as defined in the Transfer of Property Act. *Usharani Deb v Shub Kumar Das*, 41 CWN 368. Under the Provincial Insolvency Act 'transfer of property' means not only the transfer, assignment or conveyance of the property itself but must also include transfer assignment or conveyance of any rights and profits annexed to or issuing out of the same. This definition is newly

added, and is on the line of the definition of the expression in section 2 of the Transfer of Property Act III of 1900. "Having regard to the definition of the expression 'transfer of property' contained in sec. 2 (1) there can be no real doubt that a partition of joint tenancy property amounts to 'transfer of property' which falls within the scope contemplated by sec. 53 of the Act. *Official Receiver v. Lawrence*, *Comyn L.* 51 P.L.R. 245, 103 L.C. 286, 1930 A.L.R. (Lan.) 645. Transfer includes transfer by donation. *Isambard v. Amourin*, 58 B.M.L.R. 225. For further discussion of the subject vide Notes under sec. 5 (1) (b) infra.

Sub-section (2) : Words not defined :

Besides the words defined above the words—*Deed*, *Debt*, *Judge*, *Judgment*, *debt*, *Movable property*, *Order* and others have been used in this Act but have not been defined. They are used in the same sense in which they have been defined in sec. 2 of the C P Code, V of 1905.

PART I.

Constitution and Powers of Court.

Insolvency jurisdiction 3. (1) The District Courts shall be the Courts having jurisdiction under this Act

Provided that the Local Government may, by notification in the local official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court

Review

The chapter consists of sections 3 5 and deals with the constitution and powers of the Provincial Insolvency Courts. Sec 3 corresponds to sec 3 of the old Act III of 1907. Sec 3 deals with the constitution of the Insolvency Courts, sec 4 with the powers of the Insolvency Courts and sec 5 with the procedure of the Insolvency Courts

Sub sec. (1) ; District Courts having jurisdiction.

The District Courts are the principal civil courts of original jurisdiction in any area outside the Presidency towns, the towns of Rangoon and Karachi and the judge that presides over such Courts is the District Judge. Vide, Notes under section 2, *supra*. It is, therefore, the Court of the District Judge that has jurisdiction to entertain the application for insolvency. By this section the District Courts are constituted the Courts of insolvency jurisdiction, i.e., the only Courts which have jurisdiction to entertain applications for insolvency, outside the Presidency towns the towns of Rangoon and Karachi and the Judge that presides over such Courts is the District Judge. Under s 3 of the Provincial Insolvency Act, the District Court is the only Court having jurisdiction to deal with insolvency petition in the absence of any notification of the Local Government investing subordinate courts with jurisdiction over such class of cases. *Sambasuta Reddi v Official Receiver, South Arcot*, 1 L R 1937 (M) 565 45 L W 313 (1937) 1 M L J 654 171 I C 495 1937 A I R (M) 444

Court of the Additional District Judge.

Where there are Additional District Judges appointed under section 8 of the Bengal N W P and Assam Civil Courts Act, XII of 1887 the Additional Judges shall discharge any of the function of a District Judge which the District Judge may assign to them and

in the discharge of their functions they shall exercise the same powers as the District Judge. In *Makhanlal v. Sreelal*, 34 All. 382 : 9 A.L.J. 371 : 14 Ind. Cas. 162, one of the grounds of appeal was that the Additional Judge had no insolvency jurisdiction inasmuch as he was not invested by the Local Government with powers under the provisions of section 3 (I) of the Act. It was held that "under section 3 of the Act the District Courts are Courts which have jurisdiction under the Act. The District Court means the principal civil court of original jurisdiction in the district. But section 8 of the Civil Courts Act provides that Additional Judges appointed under cl 1 of the section shall discharge any of the functions of the District Judge which the District Judge may assign to them, and in the discharge of these functions they shall exercise the same powers as the District Judge. In the present case, the District Judge having assigned one of the functions to the Additional Judge, the latter has exercised the same powers as the former would have done but for his order. He has jurisdiction." See also *Mulchand v. Murarilal*, 36 All 8. It will, therefore, appear that the Court of the Additional District Judge has no jurisdiction to entertain an application for adjudication, but he has jurisdiction to dispose of it if it is assigned to him by the District Judge for disposal and in disposing of it, he will exercise the same powers as the District Judge. An appeal against an order of the Additional District Judge lies to the High Court and not to the District Judge.

Courts invested with jurisdiction.

Under section 3 of the Provincial Insolvency Act, the District Court is the only Court having jurisdiction to deal with the petition for insolvency in the absence of any notification by the Local Government investing subordinate Courts with jurisdiction over such class of cases. In a case in which there was no such notification, the District Court had jurisdiction to entertain an application for disposal.

45 M.L.J. 68

(1924) A.I.R. (Mad.) 398. A subordinate Court has no jurisdiction whatever in insolvency and it is only by reason of s 3 and notification issued thereunder that it gets any jurisdiction. Even when there is such notification investing subordinate Court with insolvency jurisdiction, such Court, however, has no jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. An order of the District Court transferring the petition under S 53 to such Court for disposal is *ultra vires*, *Sambasita Reddi v. Official Receiver, South Arcot*, I.L.R. 1937 (M) 565 : 1937 A.I.R. (M) 444. The word "Court" is designedly used as distinguished from the word "Subordinate Judge or Munsiff" as used in section 25 of the Bengal, N. W. P. and Assam Civil Courts Act, XII of 1887. If a Court subordinate to a District Court is specially invested with powers under section 3 it will have jurisdiction unless and until it

withdrawn by the Local Government and it will not require to be re-invested in the case of transfer or removal of its presiding officers, as it will require in the case of a special Judge or Munsiff being so invested. Thus, where a Small Cause Court Judge was invested with insolvency jurisdiction and application was made to him, it was held that he had full jurisdiction to decide the case, *Debi Prasad v Staneley Ray*, 6 A L J 483 2 Ind Cas 223. It should be noticed that if a subordinate Court has once been invested with insolvency powers by a notification in the Local Official Gazette under the old Act III of 1907 it is not necessary that the said Court should again be re-invested under the new Act V of 1920. Section 3 of the old Act has been re-enacted word for word in the new Act V of 1920, and therefore, under section 24 of the General Clauses Act, X of 1897, the notification under the repealed Act would remain in force, *Chaturbhuj v Harlall* 80 I C 858 (1925) A I R (Cal) 335.

Jurisdiction of Courts Invested.

When by a notification under S 3 by the Local Government a subordinate Court is invested with jurisdiction to hear and determine insolvency cases of a value not exceeding a particular sum the jurisdiction of the Court so invested is determined by the total debts of the debtor, that at the date of the presentation of his petition, may appear to be outstanding and not according to the amount of debts as they appear in the petition. *Chettyar Firm v S Dutt* I L R 14 R 280 1937 A I R (R) 223.

Concurrent jurisdiction of Courts invested.

An Additional District Judge is not subordinate to the District Judge, *Makhanlal v Sreelal*, 34 All 382 9 A L J 371. In addition to the District Court, any other Court subordinate to it may have insolvency jurisdiction provided it is specially empowered by the Local Government in that behalf by notification in the official Gazette. Under section 3 of the C P Code, V of 1908, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes, is inferior to the High Court and the District Court. And under sections 9 and 39 of the Civil Courts Act "presiding officer of a Court subject to the administrative control of District Judge, shall be deemed to be immediately subordinate to the Court of a District Judge, and for the purposes of the Code of Civil Procedure, the Court of such an officer shall be deemed to be of a grade inferior to that of the Court of the District Judge." Under section 18 of the

such civil business cognizable by the Subordinate Judge subject to any general or special order of the High Court. Hence when the Court of the Subordinate Judge is invested with powers under the proviso of section 3 "within the local limits of its jurisdiction" it does not follow that he has jurisdiction only in cases arising within the local limits of his jurisdiction as fixed by the District Judge under section 13 (2) of the said Act, but that he has concurrent jurisdiction with the District Judge in entertaining applications for insolvency *Sankar v Vithal*, 2 Bom 45. For the purpose of the proviso to sec 3, cl (1) of the Provincial Insolvency Act, 1920, the local limits of the jurisdiction of the First Class Subordinate Judge are not confined to the local limits of the ordinary jurisdiction but includes the wide local limits within which the First Class Subordinate Judge exercises special jurisdiction under sec 25 of the Bombay Civil Courts Act, 1869, *Abaji Vithal Paranjpe v Narhari Keshava* 51 B 809 29 Bom LR 947.

Extent of Jurisdiction of Insolvency Courts.

The jurisdiction of each bankruptcy Court is partly local and partly imperial. As regards its local jurisdiction it is confined to the claims of the debtors who by the express terms of the Act are made subject to its jurisdiction either by domicile or by residence. The imperial nature of the jurisdiction consists in this that the Court has jurisdiction to deal with large debts wherever the debtor is situated. The jurisdiction of the bankruptcy Court extends to all debts due by or to the debtor in one of the colonies or colonial states or in India, *Bartley v Hodges*, (1861) 30 LJQB 352. And the provisions as to the vesting of property in the Receiver extend all over the empire so that when a man is made bankrupt by bankruptcy Court in England, properties which he has in the colonies or colonial states or India will become distributable by the English trustee in bankruptcy who can enforce his title to it, *Callender Styles & Co v Colonial Secretary of Lagos and Davies*, (1891) AC 460. Whereas, on the other hand, the adjudication of a debtor as an insolvent under the provisions of the Provincial Insolvency Act, V of 1920, has not the effect of vesting his property outside British India in the Receiver. The effect of insolvency on the title to property of the insolvent outside British India varies according to whether the property be immovable, notably land or movable, like goods. It is a first principle of what is called Private International Law that the title of immovables is governed by the law of the country in which they are situated the *lex loci rei sitae*, as it is called by the learned, whereas the title of tangible movables, as opposed to intangible ones like debts and other things in action, is in great part governed by the personal law of the owner, which in the view of the English Courts is the law of domicile and not by the law of the country in which they are situated. Certainly the effect of

so called universal assignment such as takes place in bankruptcy, depends upon the personal law *Mobilia Sequuntur Personam* is the approximate maxim. As regards immovables in a foreign country, such as Japan, the views of the International Law taken by English and British Indian Courts is that the English and Indian statutes do not operate unless it is shown that the foreign law will give them effect, *Cockerell v Dickens* (1840) 3 Moo P C 98 (133). As regards movables in a foreign country the basic principle is *Mobilia Sequuntur Personam* (movables follow the person). *Prima facie* these are governed by the law of the insolvent's domicile, *Phillips v Hunter*, (1795) 2 H Bl 402, *The Yokohama Specie Bank Ltd v S Curlander & Co* 43 CLJ 436. The whole of the insolvent's property in British India whether within or without the territorial jurisdiction of the Court vests under sec 28 (2) in the Court or its receiver, *Official Receiver v Janki Bai*, 114 IC 112 (1929) AIR (S) 135.

Appeal.

Though under section 3 the Local Government may invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act, still however anomalous it may seem, the appeals from the decision of the Subordinate Judge having concurrent powers with the District Judge should lie to the District Judge. Section 75 (1), formerly 46 (1), clearly contemplates the exercise of insolvency jurisdiction by a subordinate Court and expressly provides that appeals against such orders shall lie to the District Court. The state of things is not uncommon as for instance, it may be pointed out that appeals against the decisions of subordinate judges in suits below Rs 5000 lie to the District Judge although in respect of such suits they have concurrent jurisdiction. *Niothan Mullick v Ramani Mohan* 63 Ind Cas 846. An appeal from the decision of a Subordinate Judge with insolvency jurisdiction lies to the District Judge and not to the High Court. The mere fact that the Subordinate Judge has been invested with insolvency jurisdiction under section 3 does not imply that he is an "Additional District Judge" within the meaning of section 26 (1) of the Central Provinces Courts Act, so that appeals from his Court

lie to the High Court and not to the District Court. *Madharao v the proviso to section 26 of the Subordinate Judge* have concurrent jurisdiction, orders made by the Subordinate Judge when he has seisin of the case can only be interfered with by the District Court under the provisions of section 46, (now 75) or under the powers conferred by the Code of Civil Procedure in regard to civil suits as provided by section 47, (now 5), *Digendra Chandra Basak v Ramani Mohan Goswami*, 22 CWN 958, 48 Ind Cas 333.

4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and on the other hand, all claimants against him or it and all persons claiming through or under them or any of them

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

Review.

This section is new. It defines the powers of the Court exercising insolvency jurisdiction. There was no section in the old Provincial Insolvency Act, III of 1907, corresponding to sec 4 of the present Act. This section has been framed on the model of section 7 of the Presidency Towns Insolvency Act, III of 1909, which is based on sec 102 of the Bankruptcy Act, 1883, now sec 105 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, which runs as follows "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other question whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in such case. Provided, etc., etc." The powers given by 105 of the Bankruptcy Act, 1914, are only intended to a summary remedy in matters relating to the distrib

estate or otherwise arising in or really connected with bankruptcy proceedings *Exp Lyons*, (1812) L R 7 Ch 494

Object of framing the section.

Under the old Act there were conflicting decisions as to the powers of the Insolvency Court to decide questions of title in respect of the property of the insolvent and as to whether such decisions would be final. It was held in some cases that the Insolvency Court had such power and that its decision should operate as *res judicata*, *Khussali Ram v Bholarimal* 37 All 252 *Bansidhar v Khargut*, 37 All 65 *Irshad Hussain v Gopi Nath* 17 A L J 374 49 Ind Cas 590. But a contrary view was also entertained in some other cases, viz, *Hukumat Rai v Padam Narain* 39 All 353 *Narasingha v Virasghatahi* 41 Mad 440. In the matter of *Umbica Nundan Biswas*, 3 Cal 434, *Satya Kinkar Mukherji v Manager Benares Bank Ltd* 22 C W N 700, *Joy Chandra Das v Muhammad Amir* 22 C W N 702, *Nilmoni Choudhury v Durgacharan Chaudhuri* 22 C W N 704.

It was to set at rest the doubt that existed upon the subject that section 4 was introduced into the present Act. The introduction of this section is thus explained in the Statement of Objects and Reasons: "A further defect in the Act is the absence of provisions sufficiently defining the power of Courts to decide questions of law and fact arising in insolvency proceedings. This question has been recently the subject of conflicting decisions and it is desirable that this conflict between the High Courts should be terminated and having regard to the prevalence of *benami* transactions in India and the importance of arming courts with adequate powers of the speedy realisation of assets in the interests of creditors the Government of India are of opinion that Courts should be given full power to decide proceedings that is to say, Insolvency Court on any question

Retrospective effect of the section

The general principle governing the interpretation of statutes is that alterations in the procedure are always retrospective unless there is some good reason against it. When a claim to property is determined in accordance with the provisions of the Provincial Insolvency Act 1907, *Shub Narain v Lachmi Narain* 30 P L R 533 119 I C 733 1929 A I R (L) 761. The provisions of sec 4 are mere alterations in the procedure and are as such retrospective. Hence the mere fact that a deed of gift relied on by an objector was executed prior to the enactment of sec 4 which gave jurisdiction to the Insolvency Court to decide all questions whether of title or

priority or of any nature whatsoever, and whether involving matters of law or fact which may arise in case of insolvency coming within the cognisance of the Court is no bar to the decision of the matter in controversy in the proceedings before the Insolvency Court, *Ramratan Singh v Hari*, 139 IC 288 1932 AIR (Nag) 109

Application of Sec. 4.

Where an order is made and can be lawfully made under some other section of the Act sec 4 has no application to that order. The allegation of the adjudicating creditor in his insolvency petition that the debtor had made a fraudulent preference does not bring the case within the purview of sec 4. The transfer can only be set aside subsequent to adjudication upon a proper petition under sec 53 or 54 of the Act. *Maim Po Sai v The Bank of Chettinad* 13 R 717 160 IC 109 1936 AIR (R) 26. Before an order of adjudication is made, it is not necessary to enquire whether transfers made in favour of third persons are genuine or not. Proceedings under section 4 would be entirely futile in the event of the petition for adjudication being dismissed. *Bibhu Bhusan Khan v Birendra Nath Roy*, 39 CWN 1167 158 IC 704 1935 AIR (C) 558. The question whether a debt of a creditor is fictitious or not does not fall under Sec 4 of the Act as the summary enquiry under sec 24 as to whether a debtor is entitled to present a petition has nothing to do with sec 4 of the Act which section only comes into play after adjudication in dispute between the debtor's estate represented by a receiver and the claim of one or all his creditors. *Sadhuram v Kishori Lal* 1 LR 1938 (L) 535

Scope of Section 4.

The intention of the legislature in enacting sec 4 is to enable the Court to determine all questions necessary for proper settlement of claims of the various creditors of the debtor's estate. Before an order of adjudication is made it is necessary to enquire whether transfers made in favour of third persons are genuine or not. An order to an interim receiver to enter upon the property, *prima facie* belonging to third person to make an inventory thereof, before determining the question under sec. 4 is clearly not within the scope of sec 4. *Bibhu Bhusan Khan v Birendra Nath Roy*, 39 CWN 1167 158 IC 704 1935 AIR (C) 558. A certain house was claimed by the receiver as the property of the insolvent. The appellant objected in the Insolvency Court claiming to be the owner of the property and denied the title of the insolvent. The objection was dismissed for non appearance, and the receiver sold the house to the respondent who applied to the Insolvency Court for delivery of possession to her. She reiterated her objection which was summarily rejected. The court held that in the absence of a decision on the

either by decree in a separate suit or by an order under section 4, Provincial Insolvency Act the appellant could not be dispossessed from the property and the fact that the appellant has not pressed her objection in a certain occasion did not justify the Insolvency Court in treating the property as belonging to the insolvent *Dwarka Prasad v Sunder* 1935 A L J 484 155 I C 1037 1935 A I R (All) 546

Jurisdiction of the Insolvency Court to decide questions of title and priority.

It will be seen that very wide powers are given to the Court under sec 4, the Court may decide any question which it may deem expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property *Ramasuami Chettiar v Ramasuami Anangar* 42 M L J 185 1922 M W N 110 By the enactment of the present section the jurisdiction of the Insolvency Court has been considerably increased, and, in fact, it is now co extensive with the Civil Court. It is no longer confined to consider only those cases of 'voluntary transfers' and 'fraudulent preferences' as are referred to in sections 36 and 37 (now secs 53 and 54) but 'all questions of title and priority of any nature whatsoever' have been brought within its cognizance, *Barra Begum v Babu Sheo Narain* 1923 A I R (All) 293 Section 4 confers jurisdiction on the Insolvency Court to decide all questions of title which may arise in any case of insolvency coming within the cognizance of the Court, in order to enable the Court to make a complete distribution of the property, *Shib Narain v Lachmi Narain*, 30 P L R 533 1929 A I R (L) 761 119 I C 733 Section 4 covers questions such as disputes between the debtor's estate represented by a receiver on the one hand and the claims of one or all of his creditors on the other or other questions of priority or title. In order that section 4 may apply, it is necessary that there must have been a contest between the debtor's estate and the general body of creditors. Section 4 of Act V of 1920 has now given Courts full power to decide the merits of the claims of third parties and in future the plea that the Insolvency Court has no jurisdiction to investigate the alleged title of a third person would be obviously untenable, *Gangadhar v Sridhar*, 61 Ind Cas 589 Under section 4 of the Provincial Insolvency Act the Insolvency Court can deal with and decide questions of title as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which on the other hand, is claimed by the stranger as his *Fool Kumari v Khirad Chandra* C W N 502 The Insolvency Court can not only set aside alienations by the insolvent, but also alienations from the insolvent's transferees if their invalidity was consequent upon the invalidity of the insolvent's alienation and they did not raise independent considerations, 35 L W 24 (notes) Where an estate

has devolved on insolvents by inheritance and there are creditors of the deceased and also creditors of the insolvents, the question of priority between the two has to be decided by the Court of Insolvency. Under section 4 (1) the powers of the Court of Insolvency are very wide and do not in any way militate against sec 28 (2), *Shankar Lal v Mohammad Ismail*, 28 A L J 989 125 I C 28 1930 A I R (All) 552. It has been held that where property subject to several mortgages has been sold by the Receiver with the consent of the mortgagees and in the distribution of the sale proceeds disputes arise as to priority between mortgagees, the Insolvency Court has jurisdiction under sec 4 to decide the dispute, *Sardari Lal v Shiv Ram*, 121 I C 181 1930 A I R (L) 98. Where an Official Receiver applied to the Insolvency Court for a declaration that a certain sale deed in favour of the respondent was fictitious and that the real owner of the property comprised in the sale deed was the insolvent, and it was proved that the insolvent was the real purchaser and the name of the respondent was merely inserted in the sale deed in order to defeat creditors, it was held that the Insolvency Court could go into the facts and ascertain the true ownership of the property in question under the powers conferred by sec 4, Provincial Insolvency Act and declare that the property though standing in the name of the respondent formed part of the property of the insolvent and vested in the Official Receiver and could be distributed amongst the creditors. *O M Chiene v Kishun Prasad*, 1935 A L J 1158 1935 A W R 1118 159 I C 616 1935 A I R (All) 982.

Jurisdiction to decide questions "of any nature whatsoever."

The expression "of any nature whatsoever" in S 4 has to be read *ejusdem generis* with the first expression, viz, questions of title or priority, *Gopikabai v Chapsi Purshattam*, 59 B, 161 36 Bom L R 1236 151 I C 566 1935 A I R (B) 80. The term 'or of any nature whatsoever' in S 4 is very wide one. It must however be read in conjunction with the earlier part of the section which refers to questions whether of title or priority and with the opening words of S 4 "Subject to the provisions of the Act", in other words the term "or of any nature whatsoever" must be subject to the

tation to orders not speci

v *Ashrafi Lal*, 1937 A L J

v *Kishori Lal*, 1 L R 19 L

4 covered only questions

such as disputes between the debtor's estate represented by a receiver on the one hand and the claims of one or all of his creditors on the other together with other questions of priority or title. In order that S 4 might apply, it is necessary that there must have been a contest between the debtor's estate and the general body of creditors. The expression "of any nature whatsoever" in sub section (1) of S 4 had to be read *ejusdem generis* with the first expression

that is "questions of title and priority" and such questions of title and priority could arise only after adjudication was made. That is to say, ordinarily where a debtor presents a petition the Insolvency Court will ask for proof as to his right to do so and is entitled to go into that question but it does not follow that it is a final decision on any question then arising and will act as *res judicata* under S 4 of the Act

Jurisdiction to enquire into Mesne Profits.

When on the insolvency of a person the transfer made by him in favour of a person has been annulled, the Insolvency Court has, under S 4 jurisdiction to enquire into the mesne profits payable by the transferee of the insolvent, *Kishanlal Sheokaran Maruadi v. Dinaji Zamaji Marathe*, 1938 A I R (N) 50

Jurisdiction to decide questions of title between Purchasers.

Where certain property is sold by the insolvent to a stranger more than three years prior to his insolvency, the purchaser gets an absolute title to the property against the Official Receiver and the sale is unimpeachable. If the Official Receiver subsequent to the insolvency sells the same property to another ignoring the prior sale and dismisses the claim of the prior purchaser, a question of title arises in insolvency as between the two purchasers, and the Insolvency Court, if it deems it expedient to decide it for the purpose of decide that question under s
Ramasu *Kaliappa Nadalar v.*
 1209 • 1936 A I R (M) 955 W 650 1936 M W N.

Jurisdiction to decide questions as to partnership.

In *The Dinaipore Banking and Trading Co Ltd v Probbhash Chandra Sen*, 56 C L J. 440 142 I C 484 1933 A I R (C) 151, the District Judge refused to adjudicate a person insolvent as a partner of a firm. In appeal the High Court held that section 4 of the Provincial Insolvency Act empowers the District Judge to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of making a complete justice or making a complete distribution of property. Section 4 of the Provincial Insolvency Act read with sec. 75 and Schedule 1 of the Act confers a right of appeal to the aggrieved party in a case in which an order dismissing the petition of a creditor to include certain persons as debtors has been made by the District Judge.

Jurisdiction to order refund.

In *Official Receiver, Jullunder v. Labhu Ram*, 14 Lah 724, the question arose as to whether the Official Receiver is entitled to the

assets realised by a creditor in execution of his decree against the insolvent and whether it arises in an insolvency case. It was held overruling *Din Mohammad v. Tarachand*, 1930 A I R (L) 39, that sec 4 of the Insolvency Act applies and the Insolvency Court has full power to decide the question and in fact should decide this question which arises directly out of the insolvency proceedings before it. Sec 52 applies to a state of affairs antecedent to what is contemplated by sec 51 (1) of the Act. It is laid down in sec 51 (1) that the Official Receiver is entitled to the assets in question. It is enacted in sec 4 that the Insolvency Court shall have full power to decide all questions of any nature whatsoever arising out of the insolvency. Surely this was one of them, and it was the duty of the Insolvency Court to decide the questions and to direct the creditor to pay to the Official Receiver the money realised by him in execution of his decree against the insolvent, and the order will have the force of a decree.

Rights of secured creditors how far affected by section 4.

Section 16 (5) of the old Act which is section 28 (6) of the present Act provides that nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security or deal with his security.

28 (6) proceedings and free to choose his own remedy in realising or otherwise dealing with his security. Under section 4, however, it is quite within the competence of the Insolvency Court to question the validity or otherwise of the security of the secured creditor and the order of the Insolvency Court regarding the validity of his security shall be binding on him and shall be final and *res judicata*, *Barra Begum v. Babu Sheo Narain*, 1923 A I R (All) 293. The secured creditor's freedom of choice under section 28 (6) therefore seems to have been affected by the present section. *Moti Ram v. Roudell*, 21 A L J 32, 1923 A I R (All) 159. Under the Provincial Insolvency Act, when a person claims to be the secured creditor of an insolvent he has to prove his claim and may be required to do so in the insolvency proceedings. For such an order to be made, it is not imperative that the Receiver should file a regular petition in the nature of a plaint or that there must be at first an enquiry under secs 53 or 54. The Receiver of the estate of an insolvent wanted inspection of some ornaments deposited with a bank, but the latter refused permission on the ground that these were the security for a loan they had advanced and they were secured creditors. The Judge thereupon directed the bank to prove their claim and granted an interim injunction against selling the ornaments. It was held that the orders made were proper orders. Under the wide powers given by sec 4 of the Provincial Insolvency Act, the Judge had power to make the orders he did although there had been no enquiry.

that is "questions of title and priority" and such questions of title and priority could arise only after adjudication was made. That is to say, ordinarily where a debtor presents a petition the Insolvency Court will ask for proof as to his right to do so and is entitled to go into that question but it does not follow that it is a final decision on any question then arising and will act as *res judicata* under S 4 of the Act

Jurisdiction to enquire into Mesne Profits.

When on the insolvency of a person the transfer made by him in favour of a person has been annulled, the Insolvency Court has, under S 4 jurisdiction to enquire into the mesne profits payable by the transferee of the insolvent, *Kishanlal Sheokaran Marwadi v. Dinaji Zamaji Marathe*, 1938 A I R (N) 50

Jurisdiction to decide questions of title between Purchasers.

Where certain property is sold by the insolvent to a stranger more than three years prior to his insolvency, the purchaser gets an absolute title to the property against the Official Receiver and the sale is unimpeachable. If the Official Receiver subsequent to the insolvency sells the same property to another ignoring the prior sale and dismisses the claim of the prior purchaser, a question of title arises in insolvency as between the two purchasers, and the Insolvency Court, if it deems it expedient to decide it for the purpose of doing complete justice, has power to decide that question under s 4 of the Provincial Insolvency Act, *Kaliappa Nadalwar v. Ramaswami Chettiar*, 71 M L J 656 44 L W 650 1936 M W N. 1209. 1936 A I R (M) 955

Jurisdiction to decide questions as to partnership.

In *The Dinajpore Banking and Trading Co Ltd v. Prohash Chandra Sen*, 56 CLJ 440 142 IC 484 1933 A I R (C.) 151, the District Judge refused to adjudicate a person insolvent as a partner of a firm. In appeal the High Court held that section 4 of the Provincial Insolvency Act empowers the District Judge to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of making a complete justice or making a complete distribution of property. Section 4 of the Provincial Insolvency Act read with sec. 75 and Schedule 1 of the Act confers a right of appeal to the aggrieved party in a case in which an order dismissing the petition of a creditor to include certain persons as debtors has been made by the District Judge.

Jurisdiction to order refund.

In *Official Receiver, Jullunder v. Labhu Ram*, 14 Lah 724, the question arose as to whether the Official Receiver is entitled to the

assets realised by a creditor in execution of his decree against the insolvent and whether it arises in an insolvency case. It was held overruling *Din Mohammad v Tarachand* 1930 A I R (L) 39 that sec 4 of the Insolvency Act applies and the Insolvency Court has full power to decide the question and in fact should decide this question which arises directly out of the insolvency proceedings before it. Sec 52 applies to a state of affairs antecedent to what is contemplated by sec 51 (1) of the Act. It is laid down in sec 51 (1) that the Official Receiver is entitled to the assets in question. It is enacted in sec 4 that the Insolvency Court shall have full power to decide all questions of any nature whatsoever arising out of the insolvency. Surely this was one of them and it was the duty of the Insolvency Court to decide the questions and to direct the creditor to pay to the Official Receiver the money realised by him in execution of his decree against the insolvent and the order will have the force of a decree.

Rights of secured creditors how far affected by section 4

Section 16 (5) of the old Act which is section 28 (6) of the present Act provides that nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed. Therefore section 28 (6) leaves the secured creditor quite independent of the insolvency proceedings and free to choose his own remedy in realising or otherwise dealing with his security. Under section 4 however it is quite within the competence of the Insolvency Court to question the validity or otherwise of the security of the secured creditor and the order of the Insolvency Court regarding the validity of his security shall be binding on him and shall be final and *res judicata*. *Barra Begum v Babu Sheo Naram* 1923 A I R (All) 293. The secured creditor's freedom of choice under section 28 (6) therefore seems to have been affected by the present section. *Mou Ram v Roudell* 21 A L J 32 1923 A I R (All) 159. Under the Provincial Insolvency Act when a person claims to be the secured creditor of an insolvent he has to prove his claim and may be required to do so in the insolvency proceedings. For such an order to be made it is not imperative that the Receiver should file a regular petition in the nature of a plaint or that there must be at first an enquiry under secs 53 or 54. The Receiver of the estate of an insolvent wanted inspection of some ornaments deposited with a bank but the latter refused permission on the ground that these were the security for a loan they had advanced and they were secured creditors. The Judge thereupon directed the bank to prove their claim and granted an interim injunction against selling the ornaments. It was held that the orders made were proper orders. Under the wide powers given by sec 4 of the Provincial Insolvency Act the Judge had jurisdiction to make the orders he did although there had been an enquiry.

or proceeding under sec 53 or 54 and no formal petition by the Receiver. *The Luxmi Industrial Bank v Dinesh Chandra* 55 Cal 1053 32 CWN 427 1928 AIR (C) 609 It is quite clear that the Insolvency Court would have jurisdiction to dispose of a matter arising between an insolvent and a creditor even though the creditor was a secured creditor when the question related to the amount of the debt. *Sardari Lal v Shri Ram* 121 IC 181 Where a mortgagee in possession instead of keeping out of the insolvency proceedings of his mortgagor and realising his security by means of a suit or by other means agreed to have the property sold by Insolvency Court and purchased the same himself retaining his lien on the sale proceeds he must suffer any claimants to raise objections and to have them adjudicated upon under section 4 before the sale in his favour is confirmed. *Daulat Chand v Jugal Kishore* 32 PLR 254 130 IC 333 1931 AIR (Lah) 3

Extra territorial jurisdiction

Proceedings under sec 4 are not restricted to the decision of the title to property within the territorial jurisdiction of the Court. The question which arose for consideration in *Official Receiver v Jankibai* 114 IC 112 1929 AIR (S) 135 was whether an application under sec 4 by the Receiver for a declaration that a house at Amritsar was the property of the insolvent would lie in the Insolvency Court in Sind. It was contended that the Court had no jurisdiction to entertain the application inasmuch as under sec 5 the Insolvency Court having the same powers as under the Civil Procedure Code had no territorial jurisdiction at Amritsar. The only Court which would have jurisdiction under sec 16 (4) C P C would be the Amritsar Court. It was held that sec 5 is subject to the other provisions of the Provincial Insolvency Act and clearly the provisions as to the place of suing in the C P C do not apply to proceedings under the Provincial Insolvency Act as sec 11 which gives the Court its jurisdiction in insolvency matters is not at all in accordance with those provisions. Moreover the whole of the insolvent's property whether within or without the territorial jurisdiction of the Court vests under sec 28 (2) in the Court or its Receiver. Proceedings under sec 4 are therefore not restricted to the decision of the title and property within the territorial jurisdiction of the Court.

Jurisdiction is subject to the provisions of the Act

What exactly is meant by the expression subject to the provisions of the Act is illustrated in the case of *Chittammal v Ponnuswami* 49 Mad 762. In that case it was pointed out that one of the provisions to which sec 4 is subject is the proviso to sec 56 cl (3) and that therefore the Court cannot direct any person to deliver up property in his possession to an official Receiver unless

the insolvent is entitled on the date of the application under sec 56, to the immediate possession of the property and if a title, how ever flimsy is set up by the person in possession the Court cannot act under that section, but that it is open to the Court on a proper application being made under sec 4, to try the issue whether the insolvent is entitled to the property or not. The expression 'subject to the provisions of this Act with which the section opens restricts the power conferred by the section only to this extent that it may not be exercised in any such manner as would be in conflict with any provision of the Act." *Sree Sree Radha Krishna Thakur v The Official Receiver*, 59 C 1135 36 CWN 492 56 CLJ 446 1932 AIR (Cal) 642. The words 'subject to the provisions of this Act' in sec 4 mean excluding questions otherwise provided for by the provisions of this Act. *Alagirisubba Naik v Official Receiver, Tinnevely*, 54 Mad 989 61 MLJ 820 132 IC 641 1931 AIR (M) 745.

The provisions of sec 4 must be limited to the exercise of jurisdiction of the Court over the properties of the insolvent which vest in the Court or the Receiver under sec 28 (2) that is, the property which belongs to or is vested in the insolvent at the commencement of the bankruptcy proceedings or which is acquired by or devolves on him before his discharge. Where therefore, a gift made by the insolvent is valid the property gifted ceases to be the property of the insolvent and no order under sec 4 can therefore be passed against such property. *Radhika Kuer v Sushil Chandra Mitra*, 11 PLT 138 124 IC 639 1930 AIR (Pat) 305. Sec 4 expressly provides that it is subject to the other provisions of the Act and sec 68 of the Act provides that an application to set aside the order of the Official Receiver should be made within 21 days. *Jai Kishan Dass v Chiragh Din* 1935 AIR (Lah) 60.

Jurisdiction is not subject to the provisions of sec. 53.

Section 4 (1) provides 'subject to the provisions of this Act the Court shall have full power to decide all questions whether of title or priority. Mukherji J in interpreting this section 1113 in *Hari Chand v Moti Ram* 48 All 414 24 ALJ 495 94 IC 429 1926 AIR (A) 470 that an Insolvency Court has jurisdiction to entertain an application of the Receiver to declare an ostensible transfer void within the meaning of sec 53 of the Insolvency Act if the transaction took place more than two years before adjudication. He must seek his remedy by an ordinary civil suit under section 53 of the Transfer of Property Act. Sec 4 is subject to the provisions of section 53. So in *Prasad v Central Nagar Rai Banlie*, 1936 O.W.N. 977 it was held that transfer more than two years old can not be set aside under S 4 of the Provincial Insolvency Act. The question whether an Insolvency Court can try a question of title is not decided.

of a transfer which took place more than two years prior to the adjudication having regard to the provisions of sec 53 of the Provincial Insolvency Act was referred to a Full Bench in *Haji Anwar Khan v Mohamad Khan* 51 All 550 (FB) 27 A L J 155 113 IC 819 1929 AIR (All) 105 and it was decided that sec 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with jurisdiction of the Court. Sections 53 and 54 do not deal with the jurisdiction of the Insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections therefore do not control the provisions of sec 4 though section 56 does. An Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication. 'Sec 53 does not control or restrict the jurisdiction conferred upon the Court by sec 4 to decide all questions of title. *Ram Ditta Mal v The Official Receiver Lahore* 15 Lah 294 35 P L R 271 147 IC 1026 1934 AIR (L) 365. In *Syed Mahomed Routhier v Official Receiver Combatore* 1936 M W N 852 168 IC 87 1937 AIR (M) 32 it has been held that Ss 53 and 54 do not limit or restrict the jurisdiction conferred upon the Insolvency Court by s 4 to decide all questions of title which arise in case of insolvency. Accordingly the Insolvency Court has jurisdiction to decide the validity or otherwise of the registration of a deed of transfer executed by the insolvent.

In *Amjad Ali v Nand Lal Tandon* 123 IC 217 1930 AIR (O) 314 the transaction under consideration was a release by the insolvent made more than two years before the date of adjudication. In considering the transaction the learned Judges observed: 'We cannot accede to the argument of counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of the transferor but it is nonetheless a transfer. It was therefore on a finding that there had been a transfer that the learned Judges held that sec 53 applied and that it could not be avoided if made more than two years before the adjudication. They however distinguished the decision of the Calcutta High Court in *Fool Kumari Dassi v Khirad Chandra Das* 31 C W N 502

a case in which the
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This decision therefore is in favour of the view that in *benami* transactions the limitation of two years imposed by section 53 does not apply, and the Court can decide the question under section 4 even if the transaction took place more than two years before the presentation of the petition in insolvency. From this it follows (i) that sec 53 deals with a real transfer of property made by the insolvent whereby title has passed from the insolvent to the trans

ferree, (ii) that sec 4 is controlled by sec 53 only in respect of real transfers made by the insolvent, (iii) that where a transaction entered into by the insolvent is challenged as being *benami*, that is, no transaction at all in the eye of law, the Insolvency Court has complete jurisdiction to deal with the question and its jurisdiction is not controlled by the limitations imposed by sec 53 *Biseswar Choudhuri v Kanhai Singh*, 11 Pat 9 13 PLT 298 1932 AIR (Pat) 129, *Maida Ram v Jagan Nath*, 123 IC 539 1930 AIR (Lah) 180

It is improper to hold that section 4 supersedes sec 53 and that a Court can set aside a transfer which has been made more than two years before adjudication. This rule must however, be confined to cases where there has been a transfer and it has no application where the transfer was intended to be inoperative from the beginning and the insolvent had remained in possession of the property, *Abul Hasan Khan v Rajbir Prasad* 8 O W N 147 131 IC 433 1931 AIR (O) 124. The power given by sec 4 is expressly stated to be subject to the provisions of the Act. If the other provisions of the Act authorize the determination of any question raised, the power given by sec 3 is not invoked and no decision is given under that section *Ramchandra v Ramchandra* 27 NLR 179 134 IC 687 1931 AIR (Nag) 153 (FB). Sec 53 of the Provincial Insolvency Act only protects voluntary transfers made before and in consideration of marriage or made in good faith and for valuable considerations and other proper and valid transactions entered into more than two years before the presentation of a petition in bankruptcy. It has no application to fictitious transactions. Under sec 4 the Insolvency Court has jurisdiction to decide whether the transaction was valid or fictitious *Musst Sanjrat v Ram Chandar Gupta* 33 PLR 669 143 IC 630 1933 AIR (Lah) 197

Jurisdiction to annul transfers more than two years old.

Section 4 of the Provincial Insolvency Act 1920 does not for the first time confer a new power on the Insolvency Court. It is only declaratory of the pre existing law. By the enactment of section 4 the insolvency Court is not merely confined to consideration of any transaction within two years as provided in section 53 but to any transaction whether before or within two years from the date of adjudication which has the effect of putting the property *benami* and not available to creditors, *Kochu Mahomed Tharagon v Sankaralinga Mudaliar* 44 Mad 524 40 MLJ 219 1921 M W N 236 14 L W 508 62 Ind Cas 495

Sections 36 & 37 of the old Act, III of 1907, (now sections 53 & 54) are only rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent, and apart from the provisions of these sections the Court had power to enquire into the real existence of an alleged secured debt in favour

of a transfer which took place more than two years prior to the adjudication having regard to the provisions of sec 53 of the Provincial Insolvency Act was referred to a Full Bench in *Haji Anwar Khan v Mohamad Khan* 51 All 550 (FB) 27 A L J 155 113 IC 819 1929 AIR (All) 105 and it was decided that sec 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with jurisdiction of the Court. Sections 53 and 54 do not deal with the jurisdiction of the Insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections therefore do not control the provisions of sec 4 though section 56 does. An Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication. Sec 53 does not control or restrict the jurisdiction conferred upon the Court by sec 4 to decide all questions of title. *Ram Ditta Mal v The Official Receiver Lahore* 15 Lah 294 35 PLR 271 147 IC 1026 1934 AIR (L) 365. In *Syed Mohamed Roucher v Official Receiver Coimbatore* 1936 M W N 852 168 IC 87 1937 AIR (M) 32 it has been held that ss 53 and 54 do not limit or restrict the jurisdiction conferred upon the Insolvency Court by s 4 to decide all questions of title which arise in case of insolvency. Accordingly the Insolvency Court has jurisdiction to decide the validity or otherwise of the registration of a deed of transfer executed by the insolvent.

In *Amjad Ali v Nand Lal Tandon* 123 IC 217 1930 AIR (O) 314 the transaction under consideration was a release by the insolvent made more than two years before the date of adjudication. In considering the transaction the learned Judges observed. We cannot accede to the argument of counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of the transferor but it is nonetheless a transfer. It was therefore on a finding that there had been a transfer that the learned Judges held that sec 53 applied and that it could not

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ference (1) that sec. 4 is controlled by sec. 53 only in respect of real transfers made by the insolvent (2) that where a transaction entered into by the insolvent is challenged as being *benami*, that is, no transaction at all in the eye of law, the Insolvency Court has complete jurisdiction to deal with the question and its jurisdiction is not controlled by the limitations imposed by sec. 53. See *Choudhury v. Karim* S. 11 P. 9 15 P.L.T. 205 1932 A.I.R. (Pat.) 129 *Mada Ram v. Jagan Nath* 123 I.C. 539 1930 A.I.R. (Lah.) 180

It is improper to hold that section 4 supersedes sec. 53 and that a Court can set aside a transfer which has been made more than two years before adjudication. This rule must, however, be confined to cases where there has been a transfer and it has no application where the transfer was intended to be inoperative from the beginning and the insolvent had remained in possession of the property. *Abul Hasan Khan v. Rajar Prasad* 8 O.W.N. 147 131 I.C. 433 1931 A.I.R. (O.) 124. The power given by sec. 4 is expressly stated to be subject to the provisions of the Act. If the other provisions of the Act authorize the determination of any question raised, the power given by sec. 4 is not invoked and no decision is given under that section. *Ramkhand v. Ramkhand* 27 N.L.R. 179 134 I.C. 687 1931 A.I.R. (Nag.) 153 (F.B.). Sec. 53 of the Provincial Insolvency Act only protects voluntary transfers made before and in consideration of marriage or made in good faith and for valuable considerations and other proper and valid transactions entered into more than two years before the commencement of the proceedings in bankruptcy. It has no application. Under sec. 4 the Insolvency Court has jurisdiction to set aside a transaction which was valid or fictitious. *Stuss v. Ram Chandar Gupta* 33 P.L.R. 669 143 I.C. 630 1933 A.I.R. (Lah.) 197

Jurisdiction to annul transfers more than two years old

Section 4 of the Provincial Insolvency Act 1920 does not for the first time confer a new power on the Insolvency Court. It is only declaratory of the pre-existing law. By the enactment of section 4 the insolvency Court is not merely confined to consideration of any transaction within two years as provided in section 53 but to any transaction whether before or within two years from the date of adjudication which has the effect of putting the property *benami* and not available to creditors. *Kachu Mahomed Tharoon v. Sarkaralinga Mudaliar* 44 Mad. 524 40 M.L.J. 219 1921 M.W. 236 14 L.W. 508 62 Ind. Cas. 495

Sections 36 & 37 of the old Act III of 1907 (now sections 53 & 54) are only rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent and apart from the provisions of these sections the Court had power to enquire into the real existence of an alleged secured debt in favour

of a particular scheduled creditor of the insolvent. The preponderance of authority was in favour of holding that under Act III of 1907 the Court in the exercise of its insolvency jurisdiction could not decide questions relating to adverse claims by or against third parties. The law enunciated in secs 36 and 37 was not a part of the general law and was to be applied only in cases which came before the tribunal exercising powers conferred by the Insolvency Act. A comparison of the terms of section 53 of the T P Act with the terms of sections 36 and 37 of Act III of 1907 will make the point clear. A settlement made by a person whose solvency is beyond question but who, owing to unforeseen circumstances, becomes an insolvent within two years of the date of the settlement cannot be set aside under the general law which is contained in section 53 of the T P Act. But it can be annulled under section 36 of Act III of 1907. Sections 36 and 37 enact rules of substantive law for Insolvency Courts. Sections 36 and 37, now 53 and 54, do not deal with the jurisdiction of the Insolvency Courts and the jurisdiction which the Court possesses under other sections of the Act is not affected by anything contained in these sections. *Dronadula v Ponakurra* 45 MLJ 105 1923 MWN 306 82 Ind Cas 805 1923 AIR (Mad) 641. *The Official Receiver, West Godavery v Sagiraju Subbayya* 1933 MWN 206 37 LW 508.

Sections 53 and 54 of the Provincial Insolvency Act do not limit or control the jurisdiction conferred on the Insolvency Court by title which arise in cases of insolvency, *Recener Coimbatore* 1936 MWN 2 (M) 32. In *Official Receiver v Tirthdas Menaram* 97 IC 321 1927 AIR (S) 66, it was held that the fact that the application as one under sec 53 is time barred does not prevent the Official Receiver from having recourse to sec 4. The section is extremely wide and empowers the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or fact which may arise in any case of insolvency or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. It is doubtless true that section 53 prescribes a period of 2 years for the entertainment of an application to set aside certain transfer including those referred to above. But it cannot even for a moment be contended that the Legislature by enacting this section impliedly intended to deprive the debtor or the creditor, as the case may be, of their right to have such transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation prescribed by the Limitation Act. If that be so there is no reason why the same relief should not be afforded to them by the Insolvency Court under sec 4, *Atmaram v Dayaram*, 1929 AIR, (S) 94 115 IC 330.

The Insolvency Court now has full power to declare, even though it be at the instance of the Receiver, that certain property belongs to the insolvent and that any other person, who is putting forward a claim to it, is not really entitled to it. This by no means implies an annulment of a voidable transfer within the meaning of sec 53. The limitation of two years prescribed under sec 53, is applicable to all cases where the transfer when originally made, was a good transfer of property though it was subject to an option of avoiding it to be exercised by the Receiver. But such a transfer is only voidable and not void, and remains good so long as it is not annulled by the Court. On the other hand, a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled. All that the Court has to do in such a case is to decide that it is void which decision will bind the claimant to the property as if it were by the ordinary Civil Court. *Hari Chand v Moti Ram* 48 All 414 94 IC 429 1926 AIR (A) 470 24 ALJ 495. *Musht Basant Bai v Ram Rao*, 15 NLJ 85 141 IC 667 1934 AIR (N) 47. In the Full Bench case of *Haji Anwar Khan v Mohammad Khan* 51 All 550 (FB) 27 ALJ 155 113 IC 819 1929 AIR (All) 105 it was held that sec 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with jurisdiction of the Court. Sections 53 and 54 do not deal with the jurisdiction of the Insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections therefore do not control the provisions of sec 4 though sec 56 does. An Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication. See also *Sree Sree Radha Krishna Thakur v The Official Receiver* 59 Cal 1135 56 CLJ 446 36 CWN 492 1932 AIR (Cal) 642. When a transfer is made by a person more than two years before his adjudication as insolvent, it can be set aside under S 4 of the Act and not under S 53 and the Insolvency Court can deal with the question according to the same principles which would have governed a suit for avoidance of the transfer under the ordinary law. *Basharat Ali v Ram Rattan* 1938 AIR (L) 73. Sec 53 of the Provincial Insolvency Act cannot apply to transfers by insolvent more than two years before adjudication. But irrespective of S 53 the Insolvency Court has jurisdiction to annul sham and colourable transfers executed by the insolvent more than two years before the date of the presentation of the application. *Raoji Bapuji v Pandarkar Bauachekar*, 37 Bom LR. 478 157 IC 680 1935 AIR (B) 316.

Jurisdiction to avoid transfers from transferees of the insolvent

The Insolvency Court can not only set aside alienations by the insolvent but also alienations by the insolvent's transferee, if

invalidity was consequent upon invalidity of the insolvent's alienation and they did not raise independent considerations 35 L W 24 (notes). If the original alienation is challenged and the subsequent alienees are also made parties the subsequent transfers also should be set aside if not under sec 53 at least under sec 4 when the original transfer falls through. The subsequent transfers cannot have any greater validity than the original transfer *Dit Ram Mal v Hansraj* 1934 AIR (Lah) 101. If once a transfer made by an insolvent is declared void as against the Official Receiver a subsequent transfer by the transferee cannot stand and can be annulled under s 4 of the Provincial Insolvency Act if not technically under s 53. When it is found that the original transfer in favour of the transferee was fictitious and fraudulent and consequently void as against the Official Receiver the property vests in the Official Receiver by virtue of s 28 (7) from the date of the presentation of the petition for insolvency and therefore the original transferee cannot convey any saleable interest to a subsequent transferee *Ata Mohammad v Official Receiver Sargodha* 1 LR 16 L 1013 156 IC 1018 1935 AIR (L) 368. Where a transfer by an insolvent is declared void under s 4 of the Act by the Insolvency Court on the ground of fraud subsequent transfer made by the transferee of the insolvent is also void and cannot stand *Devi Das v Lala Manohar Lal* 1937 AIR (L) 323. In *Hla Gyaw U v U Tun Kyau* 1937 AIR (R) 369 certain property was transferred by the insolvent to his wife about one year before his adjudication. The wife subsequently transferred the same property to third person. Upon an application by the Receiver the Court set aside the transfer as fraudulent. Question having arisen whether the transferee of the wife who was not party to the proceeding was bound by the decision it was held that the decision of the Court was a decision *in rem* and the transferee of the wife is bound by it. But where property has been transferred by the transferee of an insolvent to a third party and the Receiver is aware of the transfer the dispute is really between the Receiver on the one hand and the subsequent transferee on the other and not between the Receiver and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under s 4 the application should therefore be by the Receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the Receiver chooses to proceed under s 4 against the first transferee who has no interest left in the property and obtains an order against him either *ex parte* or after contest he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title *Amir Ahmad v Syed Hasan* 1 LR 57 All 900 1935 ALJ 573 155 IC 684 1935 AIR (All) 671.

Jurisdiction to go behind the decision of a Civil Court

Under Or XXI r 58 C P C where any claim is preferred to or any objection is made to the attachment of any property in execution of a decree on the ground that such property is not liable to such attachment the Court shall proceed to investigate the claim or objection and under Or XXI r 63 C P C the party against whom an order is made by the executing court after the investigation of the claim may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit if any the order shall be conclusive. In *Seth Sheolal v Girdhar Lal* 1924 AIR (Nag) 361 it was contended that as the objection of a stranger to the attachment of the property in execution of a decree holder against the judgment debtor who was subsequently declared insolvent was upheld the order under Or XXI r 63 C P C was conclusive until it was set aside by a suit and that not having been done it was conclusive as against the attaching decree holder and it could not be asked in insolvency proceeding that the transfer by the insolvent was fraudulent. Baker J C observed as a matter of fact a suit was brought by the decree holder and has been decided not on the merits but on the ground that no such suit would lie when once the debtor has been declared insolvent as under sec 28 of the Act no such suit could be brought without the leave of the Insolvency Court. sec 53 of the Act may be which the creditor claims and dismiss the suit on the ground that the property was vested in an Insolvency Court and to prevent him from raising his plea in the Insolvency Court. The matter is not *res judicata*.

An order passed by the Insolvency Court on a petition under Order XXI r 58 C P C is not final under Order XXI r 63. A separate suit in respect of the property covered by the objection under Order XXI r 58 was maintainable. *Raj Ram v Jawahir Lal Madan Lal* 26 ALJ 41 1928 AIR (A) 158 108 IC 156. Sec 4 of the Act vests in the Insolvency Court the power to decide all questions which the Court deems expedient or necessary for the purpose of doing complete justice or making a complete distribution between the parties. Insolvency Courts both here and in England have invariably exercised jurisdiction of examining the proceedings leading up to the consent decree to satisfy themselves if such decree was the result of a *bonafide* contest between the parties or not. In *re Naraindas Sunderdas* 93 IC 351 1926 AIR (S) 133. The liquidator in a voluntary winding up of a company occupies the same position as the trustee in bankruptcy and is entitled to ask the court to go behind a judgment obtained against the company. It is not necessary that fraud or collusion should be shown. It is sufficient if it can be shown that there ought not to have been

judgment, *Alimahomed Gulam Hussein v The Deccan Match Manufacturing Co Ltd* 34 Bom L R 411

Limits to jurisdiction

Though it was intended to provide the Insolvency Court with extensive powers to decide all questions of title or priority, fact or law still they have not and they are not intended to have the jurisdiction of realising debts due to the insolvent. In *Gobinda v Gopal*, 9 N L R 182 it was held that the Court in the exercise of its insolvency jurisdiction has no summary power of realising debts due to the insolvent. The powers of the Court for this purpose are the same as those of the Receiver (section 23 now section 58). And the powers of the Receiver are defined in section 20 (now section 59). The power to order an alleged debtor of the insolvent to deposit the amount of the debt in Court or pay up is not one of those powers. The Court has no power to enquire and judicially determine the existence or the amount of the debt. It is in this respect merely managing the estate of the insolvent. It has power to enquire into claims against the estate and not into claims by the estate. See also *Wanzari v Amru* 44 Ind Cas 537. The District Judge of a district sitting as a Judge of the Insolvency Court has no jurisdiction to pass a money decree against a third person, *Ram Chandra Sahu v Sahik Ram Sahu* 52 All 217 121 I C 702 (1930) A I R (A) 628. When a third person who has been placed in a position to realise certain property of the insolvent is placed upon the

for the use of the insolvent's property to recoup the amount. The liability springs from a tortious breach of an obligation and cannot be treated as the property being in possession or custody of any property belonging to the insolvent. In such a case the Insolvency Court has no power to pass a decree against the third party. *Salig Ram v Lachmi Prasad* 1930 A L J 1048 1930 A I R (A) 622. It should be noted that S 4 gives the Insolvency Court no power to decide questions of the nature therein described after the adjudication has been annulled. After that stage has been reached the powers of the Insolvency Court are limited by S 37. *J N Mundara v Nemsu Rajpal*, 1935 A I R (N) 246.

Who can take action under sec 4

Under the Provincial Insolvency Act the property of the insolvent vests in the Receiver. The provision of sec 4 of the Act cannot therefore be taken to authorise a creditor to prosecute an enquiry in regard to a conveyance executed by the insolvent shortly before his adjudication. *Ram Sunder Ram v Ram Charit Bhakat* 51 C 663 79 Ind Cas 326. It is open to the Court in a proper application being made under sec 4 to try the issue whether the insolvent

is entitled to the property or not. No body other than the Official Receiver can move under sec 4, unless the Official Receiver is unwilling to act and the Court authorises a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver, *Chittamal v Ponnusami Naicker*, 1926 M W N 172 1926 A I R (M) 363 23 L W 94 50 M L J 180 92 I C 573. Vide sec 54A, *infra*. An application in insolvency made by a creditor under sec 4 asking for a declaration that a certain transaction was *benami* is not barred by the fact that leave of the Insolvency Court was not formally obtained under sec 28 (2) of the Act, as the fair inference from the circumstances is that the leave of the Court must be deemed to be given, *Narayanamma v Venkatasomayajulu* 67 M L J 616 40 L W 693 1934 M W N 1034 1935 A I R (Mad) 46.

Initiation of proceedings under sec 4.

Proceedings under section 4 need not be initiated by a plaint or a regular application. The section is so worded that it is open to the Court to take proceedings *suo motu*. In the absence of any plaint or regular application the proceedings are not invalid. *Ghulam Dastgir v Mohan Lal* 34 P L R 1063.

Receiver's power of enquiry under sec. 4.

An Official Receiver in insolvency has no power to make any order on a claim petition filed before him, as it is not a power, which has been delegated to him under sec 80 of the Act. If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent he should apply to the District Judge direct to take action under sec 4 of the Act. *Villayappa Chettiar v Ramanathan Chettiar*, 47 M 446 78 I C 1017 46 M L J 80 (1924) M W N 163 19 L W 251 (1924) A I R (M) 448. The Official Receiver has no jurisdiction to determine a claim preferred to the property alleged to be insolvent's. Consent of parties cannot give the Official Receiver a jurisdiction to adjudicate on the claim which jurisdiction he does not in law possess. The remedy against an order on a claim petition passed by the Official Receiver without jurisdiction is not by way of appeal under sec 68 but by moving under sec 4, *Bala Venkatarama Chetty v Angathayammal*, 38 L W 896 1933 A I R (Mad) 471. Where a matter has to be decided on trial the Court should hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings. It should not delegate its duty to a person whose interest and duty may conflict in the conduct of the proceedings. *Krishna Iyer v Official Receiver, Trichinopoly*, 75 I C 445 (1925) A I R (M) 381.

Law and procedure for enquiry under sec. 4.

Sec 4 does not confer any arbitrary powers on the Insolvent Court of deciding questions in any manner it thinks fit, and in

absence of any express provision in that behalf the Court is bound to decide disputes according to the same principles of law as an ordinary tribunal though its procedure may to a certain extent be summary *Atmaram v Dayaram* 1929 A I R (S) 94 A question of title under sec 4 (1) of the Provincial Insolvency Act V of 1920 must be tried like a regular suit after hearing all the parties before the Court taking their pleadings admitting their documents and hearing their evidence *Ghani Muhammad v Lala Dinanath Puri* 108 I C 602 1928 A I R (L) 556 An Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of the Insolvency Act where for example a trustee is given a higher title than the original debtor But the Insolvency Court also has to apply and to decide all questions of general law including such questions as are raised by section 53 of the T P Act In a case where it is alleged that the insolvent has sold his property before his insolvency merely with the intent to defraud and delay his creditors there ought to be full enquiry between the Receiver and the creditors on the one hand and the debtor and his family on the other as to the *bonafides* of the transaction and in the main the provisions of the C P C are applicable to such enquiry and there ought to be sworn testimony and the same care used with regard to documents and the admission and rejection of documentary evidence as in a suit *Shikri Prasad v Aziz Ali* 44 All 71 19 A L J 862 63 Ind Cas 601 Section 4 intends that the Court in matters of forcible realisation of property is to act with the procedure and no doubt with the judicial caution of a Civil Court and the claimants have a right to be heard judicially and to have from the Court a final decision before the property is wrested from their possession A thorough enquiry is all the more necessary under this section as an order passed under it is final and binding on the parties A Summary order passed without any reference to this section cannot under any circumstances be treated as a proper and valid order *Lachhi v Badri Parshad* 36 P L R 205 1934 A I R (L) 1006

A Hindu husband and his first wife arrived at an arrangement under which the husband paid her *palla* (dowry money) promised payment of her maintenance at a certain rate and gave her a house to live in and the first wife gave her consent to her husband contracting a second marriage which consent was necessary according to the rules of the caste to which the parties belonged The terms were reduced to a writing which was addressed to the headman of the caste and was signed by the parties and attested by witnesses The first wife took possession of the house and the husband contracted a second marriage Sometime afterwards the husband was adjudicated insolvent and the Receiver applied to the Court under sec 4 to recover possession of the house from the first wife It was held that (a) the agreement having been entered into for a valuable

consideration and performed by one party was a valid one (b) that even assuming that the writing required registration under sec 17 (b) or sec 17 (2) (5) of the Indian Registration Act, the arrangement in question was one which need not be in writing and would be proved by the oral evidence of the first wife, (c) that, therefore, the wife was entitled to possession of the house *Bai Bani v Maranlal* 34 Bom L R 1217

Onus

Certain property was attached as being the property of the insolvent by the Receiver. Thereupon the insolvent's wife filed an objection claiming the property to be hers. She produced some evidence to prove her title and no rebutting evidence was adduced by the Receiver. The Court considered the evidence to be vague and inconsistent and dismissed her claim. It was held on appeal, that the onus lay on the Receiver to show that the property was the property of the insolvent and as he had adduced no evidence in contradiction of the claim the Court had no alternative but to give effect to it. Such a claim differs from an ordinary suit by an alleged owner against somebody in possession and the maxim that the plaintiff must succeed on the strength of his own title and not on the weakness of his adversary is not applicable to such claim, *Khazano v Bunuarilal* 19 A L J 497. The burden of proving the fraudulent nature of an insolvent's transaction lies on the Official Receiver 35 L W 24 (notes). Where the sons of the insolvent object to the sale of the insolvent's property by the Official Receiver on the ground that they divided from the insolvent and their shares should not be sold the property should not be sold before deciding the question under sec 4. The Official Receiver has the power under the Act to sell the shares of the sons of the insolvent and it would be for the sons to make out that their shares are not bound to liquidate the debt contracted by their father *Ramasamaya Jullu v Official Receiver Godavan* 23 L W 80 1926 M W N 169 1926 A I R (M) 360 92 I C 249.

Sub sec (2), Jurisdiction is not exclusive

Section 4 does not confer exclusive jurisdiction on the Insolvency Court and it cannot be said that the only remedy open to an aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of that Court which can be pointed as amounting to a decision within the meaning of sub-cl (2) of sec 4 he is at perfect liberty to have recourse to the ordinary Civil Courts. Section 68 provides a speedy remedy to which a recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. If a person applies under section 68 he is subject to the time limit prescribed and if he wants to enforce his claim in the Civil Courts in the

way, his rights would be those of an ordinary person. It is open to a third person whose property has been taken possession of by the Receiver, and who does not claim title through the insolvent, to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act, other than that contained in section 4 which in any way takes away the jurisdiction of a Civil Court to try such a suit. Under section 4, if a question of title is actually raised by a Court of Insolvency and decided by the Insolvency Court the decision is final and the question cannot be re-opened in a Civil Court by a suit, *Maharana Kunwar v E V David* 46 All 16 21 ALJ 727 77 IC 57 (1924) AIR (All) 40. Following this case it has been held in *Brijmohan v Mahabir*, 63 Cal 194 40 CWN 808 166 IC 781, that even if the claim could have been made in the insolvency proceeding still the suit is not barred on the principle of *res judicata*, the jurisdiction of the Insolvency Court under sec 4 of the Act not being exclusive.

If a stranger who is not bound to go to the Insolvency Court at all, invites the decision of that Court upon the merits of a claim, he cannot afterwards turn round and question its jurisdiction. But where the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant, or the latter has not preferred any claim for the consideration of the Bankruptcy Court there is no decision by it which operates to oust the jurisdiction of the Civil Court to decide the matter, *Deorao v Vithal*, 1925 AIR (Nag) 363 87 IC 1000. It is true that the jurisdiction of the Insolvency Court is not exclusive and it is open to a person claiming the property attached by the Insolvency Court to bring a regular suit in order to obtain an adjudication of the merits of his claim. But, if he places the matter before the Insolvency Court and that Court decides to determine the question, its decision is final and binding on the estate on the one hand and on the other

hand. The only remedy open to the party aggrieved by the decision is to prefer an appeal under sec 75 against it but he cannot re-agitate the question by bringing a regular suit, *Shub Narain v Lachmi Narain* 30 PLR 533 1929 AIR (L) 761. A transferee who has neglected the opportunity fully given in the Insolvency Court has no right of separate suit in the ordinary Civil Court to set aside the order passed by the Insolvency Court. Where on an application by the Receiver under sec 53, notice was issued to the transferee who failed to appear and the case decided *ex parte* and after his attempt to get the *ex parte* order set aside failed, he instituted a suit in Civil Court for declaring his ownership to the property, it was held that the suit is barred by sec 4, *Mt Kaniz Fatima v Narain Singh*, 24 ALJ 897 98 IC 1001 1927 AIR (A) 66, following *Maharana Kunwar v E V David*, supra.

A suit by an insolvent for a declaration to the effect that his land is not saleable by the Official Receiver on account of his being agriculturist within the meaning of the Punjab Alienation of Land Act, is not competent. A stranger who claims the property taken possession of by the Official Receiver both against him and the insolvent can institute a suit to establish his right independently of sec 4. But the general scheme of the Act is such that the insolvent himself is amenable so far as the question of title to the property or its liability to be sold is concerned only to the jurisdiction of the Insolvency Court. He cannot invoke the aid of the ordinary Courts to establish his right against the Official Receiver. Indeed in the eyes of law he has no interest left in his assets which vests in the Official Receiver, *Ram Chand v Ahmad Yar*, 34 P L R 31 140 I C 808 1933 A I R (Lah) 65

Decision under sec. 4 is judgment *in rem* and *res judicata*.

Under section 41 of the Evidence Act I of 1872, 'a final Judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing is relevant. It is a judgment *in rem*.' Under this section of the Evidence Act the judgment, order or decree of an Insolvency Court shall be conclusive proof of the matters decided therein. The decision of the Insolvency Court amount to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely within the meaning of s 41 Evidence Act. In other words the decision is a decision *in rem* and is valid against all persons. In *Hla Gyu U v U Tun Kyaw* 1937 A I R. (R) 369, certain property was transferred by the insolvent to his wife about one year before his adjudication. The wife subsequently transferred the same property to third person. Upon an application by the Receiver the Court set aside the transfer as fraudulent. Question having arisen whether the transferee of the wife who was not a party to the proceeding was bound by this decision. It was held that the decision was a decision *in rem* and the transferee of the wife was bound by it. After the sale in execution of certain property the judgment debtor was declared insolvent on petition presented and admitted prior to sale. The Receiver took proceedings under S 4 of the Act alleging that the sale was attended with fraud. Some years later, the insolvent together with a creditor again applied under s 4 for a declaration that the execution sale was invalid and contended that the executing Court had no jurisdiction to sell by reason of s 52 of the Provincial Insolvency Act. The prior contention though raised in the prior proceedings by the Receiver was not dealt with by the Judges in insolvency. It was held that under s 41 of the Evidence Act, the prior decision, being a final

order or judgment of a competent Court in insolvency, had the effect of a judgment in rem and could not be disturbed by subsequent application, though, not between the same parties, that the Receiver not having taken any steps to appeal from the order made against him, and the execution purchaser having been left in possession for some years, it was not right that the purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by a fresh attempt to set aside the sale which took place long ago after a previous attempt had failed *Bansi Ram v Anandi Ram Mohan* 155 IC 734 1935 AIR (Pat) 273. The enactment of sub-section (2) does away with the questions of competency or jurisdiction of the Insolvency Courts and every question of title or priority, or fact or law, decided by the Insolvency Court must be held within its jurisdiction under sub-section (1), and other judgments or orders made must be held to be conclusive to question the validity or the finality of such judgments orders or decree. A decision under this section shall be deemed to be a decree, binding on the parties, *Sita Ram v Beni Prasad* 47 All 263 84 IC 790 1925 AIR (All) 221 (vide also sec 78 *infra*). It is true that there is no authority to the effect that insolvency proceedings can be the subject of *res judicata*, but there is ample authority for the position that section 11, C P C is not exhaustive and that as stated by the Privy Council in *Ram Kirpal Shukul v Mt Rup Kuari* 111 A 37 6 All 269 "the binding force of such a judgment (that is, a previous judgment) depends not upon sec 13 of Act X of 1877 (now section 11 of the C P C, 1908) but upon general principles of law. If it were not binding there would be no end of litigation." This is manifestly so and is especially applicable to insolvency proceedings. Were it otherwise it would be impossible for any one, whose possession of property received from an insolvent had been unsuccessfully impeached as a fraudulent transfer or preference, to be able to sell that property or even to enjoy its proceeds with any sense of security. This is a position which is clearly opposed to the principle '*Nemo bis vexari debet*'. The Privy Council have reaffirmed their statement of the law in *Hook v The Administrator General of Bengal* 48 IA 187 48 Cal 499, and *Ramachandra Rao v Ramachandra Rao*, 49 IA 129 45 Mad 320, the latter a case under the Land Acquisition Act. On the authority of the above cases it is held that the doctrine of *res judicata* is applicable to proceedings in insolvency. Accordingly the dismissal of a petition under sec 54 by the Official Receiver in respect of a sale by the insolvent on the ground that the sale did not amount to a fraudulent preference was a bar to a subsequent petition under the same section by a creditor of the estate of the insolvent in respect of the same sale, *Rangappa v Rangappa*, 56 Mad 395 63 MLJ 778.

If the jurisdiction of the Insolvency Court as to questions of title is invoked or is assumed by the Court and the question

determined, the decision is binding between the parties, provided it is not in conflict with any provision of the Act itself, *Sree Sree Radha Krishna Thakur v Official Receiver*, 59 Cal 1135 56 CLJ 446 35 CWN 492. A person whose property was seized by the Receiver as that of an insolvent, could either appeal to the Insolvency Court or bring a separate suit to declare his title, and if he elects to have the dispute settled by the Insolvency Court, the decision of the Insolvency Court would be *res judicata*, *Mistri Lal v Kanhya Lal*, 66 IC 863. The decision of the Insolvency Court against an objector claiming a property attached by the Receiver in insolvency is conclusive and no suit lies as it is precluded by sec 4 *Barra Begum v Babu Sheo Narain*, 1923 AIR (All) 293, though in *Harnam v Ganpat*, 73 Ind Cas 367 (Lahore) a different view has been taken.

But a judgment declining to adjudicate upon a matter will not operate as *res judicata* *Gaura v Nauab Mohammad*, 64 Ind Cas 523. The decision of the Insolvency Court that a property of the insolvent belongs to one or other of the two claimants to it does not operate as *res judicata* in respect of a suit on title by one claimant against the other for the recovery of such property, *Hukumat Rai v Padam Narain*, 39 All 353.

The scope of s 4 (2) is not limited to the insolvency proceedings only. According to it the decision of the Insolvency Court is final for all purposes. Hence a decretal debt which has been declared by the Insolvency Court to be fictitious in proceedings or an application by the judgment debtor for being declared insolvent to which the decreeholder was also a party can not be recovered by an execution of the decree. The decision of the Insolvency Court is tantamount to a declaration that the decree was non-existent and the finding is binding on the judgment debtor as well as on the creditor even though the insolvency proceedings have been dismissed *Sadhu Ram v Kishori Lal*, 11 LR (1938) L 535 1938 AIR (L) 490.

Decision under Sec. 4, when not *res judicata*.

An order of the Court rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditors. The other creditors having only the right to question the debtor as to his conduct, dealings and property, it cannot be said that the mere fact that notices are issued to them has the effect of making them parties to the proceedings for all purposes. A judgment rejecting an order of adjudication is not passed against a person on the ground that he was not proved to be a partner of the insolvent firm is a negative judgment and amounts to nothing more than holding that sufficient grounds have not been made out for adjudicating such person as insolvent. Such a judgment does not

original civil jurisdiction. The Legislature having invested the Insolvency Court with extensive powers under sec 4, it would be anomalous to hold that the Courts are powerless to give effect to their judgments. The terms of sections, 4, 5 and 56 do not suggest that any such limitation is intended." An order passed by the Court is under sec 36, C P C capable of execution as a decree, *Chandra Kumar v Kusum Kumari*, 40 CLJ 180 28 CWN 187 (notes) (1925) A I R (C) 57, followed in *Allen Brothers v Sheik Jooman*, 1925 A I R (R) 189.

On the other hand in *Venkata Raman v Chokkier*, 109 IC 516 27 LW 515 1928 A I R (M) 531, it has been held that a purchaser from the Receiver of property of the insolvent inclusive of the shares of the sons, is not entitled to get delivery of possession of the property purchased in so far as the sons shares are concerned under sec 4 of the Provincial Insolvency Act. His remedy is to institute regular suits for possession in the ordinary Courts. The purchaser may, however, be given joint possession along with the sons so far as the insolvent's share is concerned under sec 4 of the Act. Once the Official Receiver has sold the property to a stranger and converted the insolvent's estate into money his business is to distribute the proceeds of sale against the insolvent himself in respect of his share only or against rival purchaser of the insolvent's property itself the matter may be different. "The Receiver is an officer of the Court and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person. If the Insolvency Court owing to a mistaken view of the law does not pass such an order, the person aggrieved may appeal and the appellate Court should pass the order", *Nagoba v Zinzarde*, 1929 A I R (Nag) 338.

Sub-section (3) ; Discretionary jurisdiction.

Though the Court has power under sub section (1) to decide a question of title it has full discretion to follow the course laid down in sub section (3) i.e. to refuse to decide question of title and to direct sale of insolvent's right, title and interest, whatever that might be. Where the Court has reason to believe that the debtor has a saleable interest in any property it may, without further enquiry, sell such interest, *Juendra Nath v Fateh Singh Nahar* 26 CWN 921, 72 Ind Cas 320. It is also to be noted that a discretion is given to the Court to decide the question in insolvency proceedings and that it is not binding upon the Insolvency Court to decide under this section every claim which is brought up before it, *Ramaswami Chennar v Ramaswami Aringar*, 45 Mad 434 42 M L J 185 1922 M W N 110.

Section 4 reserves the powers to Insolvency Courts to decline to decide questions which it does not deem necessary or expedient to decide in those proceedings. *The Official Receiver, South Arcot v Perumal Pillai*, 79 IC 322 1924 AIR (Mad) 387 Under the provisions of the Act, though the Insolvency Courts have full power to decide all questions whether of title or priority, sub clause (3) leaves it entirely to the discretion of the Courts to decide any question of title or priority. *Whether the Court should or should not exercise the jurisdiction depends upon the question as to whether the decision would settle once for all the dispute or some other proceedings would have to be taken for final decision of the matter* Under sec 4 of the Provincial Insolvency Act the Court has power to decide questions of title raised by the claimants and if it did not deem it expedient or necessary to decide any such question it should under clause (3) hold that it has reason to believe that the debtor had saleable interest in the property. Where the Court does neither its order is bad in law and cannot be upheld. *Nayantara v Sambhunath*, 52 Cal 662 89 IC 761 1925 AIR (C) 932 Sec 4 is a very wide section and unless the Courts feel compelled by the facts of the case to embark upon such enquiry they are not bound to do so. *Muruga Konar & Co v Official Receiver of Madura*, (1930) MWN 470 126 IC 483 1930 AIR (Mad) 782 Whether the Insolvency Court would elect to try the questions of title which have been raised before it in the proceedings initiated by the application of the Official Receiver or relegate the parties to the ordinary tribunals is a matter for that Court to decide according to the circumstances of the case. *Ram Ditta Mal v Official Receiver Lahore* 15 Lah 294 35 PLR 271 147 IC 1026 1934 AIR (L) 365 The jurisdiction of the Insolvency Court as to questions of title is exclusive as to questions decision whereof is called for by any of the provisions of the Act. As to questions of title raised by different persons the questions may be decided by the Insolvency Court or if the Court thinks that it is not expedient that the Insolvency Court should decide them then it may proceed under sec 4 (3) of the Act. *Monomohan Roy Choudhury v Bhupal Chandra Roy Chowdhury*, 58 CLJ 118 1934 AIR (C) 122 It is clear that s 4 comes into play after the debtor has been adjudicated an insolvent, under s 4 the Court can then decide any question of title or priority arising between the debtor and one or more of his creditors if it considers this to be just and necessary as well as expedient. But it need not go into all of these questions as is shown by sub section (3) of section 4. Under that sub section the Court can sell the interest of the debtor, leaving the parties to fight out the extent of his interest in a regular suit before the ordinary Courts. Sub section (3) therefore

goes to show that section 4 applies after adjudication *Sadhu Ram v Kishori Lal*, 1 L R 1938 L 535 It is open to the Insolvency Court to try such questions, viz questions of title and priority which arise in the course of insolvency proceedings or leave them to be decided by an Ordinary Civil Court if it chooses to do so *Basharat Ali Shah v Ram Ratan* 1938 A I R (L) 73

Even if a judge for some reason or other, declines to decide the question of title under sec 4, on general principle, his successor cannot be precluded from going into the question of title and deciding it under that section, *Moti Ram v Official Receiver*, 1934 A I R (Lah) 936

Where the Court ought to exercise jurisdiction.

Ordinarily an Insolvency Court ought not to refer parties to a Civil Court for the determination of the question as it has sufficient jurisdiction to decide all questions of title under sec 4, *Surja v Girindra*, 79 I C 552 Where the trustee in bankruptcy has a higher and better title than the bankrupt, Bankruptcy Court ought to exercise jurisdiction, *Ex parte Broun*, (1879) 11 Ch D 148, and the Court may exercise jurisdiction in a proper case, *Ex parte Armistage*, 17 Ch D 13 A trustee in bankruptcy is said to have a higher title than the bankrupt when his claim arises out of bankruptcy, that is, his right to property is derived by virtue of the provision of the Bankruptcy Act, and which right he would never have had but for the actual bankruptcy, *Re Hauke*, (1885) 16 Q B D 503 As for example a voluntary settlement or a transfer by way of fraudulent preference is perfectly valid and the settlor cannot impeach it But if the settlor becomes bankrupt within two years from the date of the settlement the transaction is void as against the trustee who is entitled to have it set aside for the benefit of the settlor's creditors The trustee is clothed with his right only by virtue of the provisions of the Bankruptcy Act The proviso to 1914, also enacts that "the be exercised by the County upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court " An Insolvency Court in India would be right in assuming jurisdiction under sec 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under sec 102 of the English Bankruptcy Act of 1883, *Official Receiver v Tirath Das* 97 I C 321 1927 A I R (S) 66

Where the Court ought not to exercise jurisdiction.

The Official Assignee or the Receiver merely steps into the shoes of the insolvent for the purposes of his rights and liabilities. He is merely the legal representative of the debtor with such right

Section 4 reserves the powers to Insolvency Courts to decline to decide questions which it does not deem necessary or expedient to decide in those proceedings. *The Official Receiver, South Arcot v. Perumal Pillai*, 79 I.C. 322 1924 AIR (Mad) 387. Under the provisions of the Act, though the Insolvency Courts have full power to decide all questions whether of title or priority, sub-clause (3) leaves it entirely to the discretion of the Courts to decide any question of title or priority. *Whether the Court should or should not exercise the jurisdiction depends upon the question as to whether the decision would settle once for all the dispute or some other proceedings would have to be taken for final decision of the matter.* "Under sec. 4 of the Provincial Insolvency Act the Court has power to decide questions of title raised by the claimants, and if it did not deem it expedient or necessary to decide any such question it should under clause (3) hold that it has reason to believe that the debtor had saleable interest in the property. Where the Court does neither, its order is bad in law and cannot be upheld," *Nayantara v. Sambhunath*, 52 Cal. 662 89 IC 761 1925 AIR (C.) 932. Sec 4 is a very wide section and unless the Courts feel compelled by the facts of the case to embark upon such enquiry they are not bound to do so, *Muruga Konar & Co. v. Official Receiver of Madura*, (1930) M.W.N. 470 126 IC 483. 1930 AIR. (Mad) 782. Whether, the Insolvency Court would elect to try the questions of the proceedings initiated by the parties or relegate the parties to the Court to decide according to the circumstances of the case, *Ram Ditta Mal v. Official Receiver, Lahore*, 15 Lah 294 35 P.L.R. 271 147 I.C. 1026 1934 AIR. (L) 365. The jurisdiction of the Insolvency Court as to questions of title is exclusive as to questions decision whereof is called for by any of the provisions of the Act. As to questions other than such it is discretionary, *Sree Sree Radha Krishna Thakur v. The Official Receiver*, 59 Cal 1135. 36 C.W.N. 492. 56 C.L.J. 446 (455). When questions of title are raised and conflicting claims are put in by different persons the questions may be decided by the Insolvency Court or if the Court thinks that it is not expedient that the Insolvency Court should decide them then it may proceed under sec. 4 (3) of the Act, *Monomohan Roy Choudhury v. Bhupal Chandra Roy Choudhury*, 58 C.L.J. 118. 1934 AIR. (C) 122. It is clear that s. 4 comes into play after the debtor has been adjudicated an insolvent, under s. 4 the Court can then decide any question of title or priority arising between the debtor and one or more of his creditors if it considers this to be just and necessary as well as expedient. But it need not go into all of these questions as is shown by sub-section (3) of section 4. Under that sub-section the Court can sell the interest of the debtor, leaving the parties to fight out the extent of his interest in a regular suit before the ordinary Courts. Sub-section (3) therefore

goes to show that section 4 applies after adjudication *Sadhu Ram v. Kishori Lal* 11 L R 1938 L 535. It is open to the Insolvency Court to try such questions viz questions of title and priority which arise in the course of insolvency proceedings or leave them to be decided by an Ordinary Civil Court if it chooses to do so. *Basharat Ali Shah v. Ram Ratan*, 1938 AIR (L) 73.

Even if a judge for some reason or other, declines to decide the question of title under sec 4 on general principle, his successor cannot be precluded from going into the question of title and deciding it under that section. *Mon Ram v. Official Receiver*, 1934 AIR (Lah) 936.

Where the Court ought to exercise jurisdiction.

Ordinarily an Insolvency Court ought not to refer parties to a Civil Court for the determination of the question as it has sufficient jurisdiction to decide all questions of title under sec 4. *Surjit v. Girindra*, 79 IC 552. Where the trustee in bankruptcy has a higher and better title than the bankrupt Bankruptcy Court ought to exercise jurisdiction, *Ex parte Brown* (1879) 11 Ch D 148 and the Court may exercise jurisdiction in a proper case. *Ex parte Armitage*, 17 Ch D 13. A trustee in bankruptcy is said to have a higher title than the bankrupt when his claim arises out of bankruptcy, that is his right to property is derived by virtue of the provision of the Bankruptcy Act, and which right he would never have had but for the actual bankruptcy. *Re Hauke* (1885) 16 QBD 503. As for example, a voluntary settlement or a transfer by way of fraudulent preference is perfectly valid and the settlor cannot impeach it. But if the settlor becomes bankrupt within two years from the date of the settlement the transaction is void as against the trustee who is entitled to have it set aside for the benefit of the settlor's creditors. The trustee is clothed with his right only by virtue of the provisions of the Bankruptcy Act. The proviso to sec 105 (1) of the Bankruptcy Act 1914 also enacts that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court. An Insolvency Court in India would be right in assuming jurisdiction under sec 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under sec 102 of the English Bankruptcy Act of 1883. *Official Receiver v. Tirth Das* 97 IC 321 1927 AIR (S) 66.

Where the Court ought not to exercise jurisdiction

The Official Assignee or the Receiver merely steps into the shoes of the insolvent for the purposes of his rights and liabilities. He is merely the legal representative of the debtor with su

as he would have had if not bankrupt In *Re Mapleblack* (1876) 4 Ch D 150 Where a trustee claims only the same right as the insolvent would have had the Insolvency Court ought not as a rule to exercise jurisdiction *Ex parte Dickinson* (1878) 8 Ch D 377 *Ex parte Price* (1882) 21 Ch D 553 A trustee is said to have the same right as the bankrupt or no higher title than the bankrupt had when the claim to property does not arise out of the bankruptcy e.g. a claim against third persons In case of such claims the bankrupt could sue for the recovery of his money and the effect of adjudication being merely to transmit the right of the bankrupt to the trustee the trustee has no higher title than the bankrupt himself would have had In such cases the Bankruptcy Court will as a general rule refuse to exercise the jurisdiction to try such claims and will leave the matter to be determined by the ordinary Civil Courts The jurisdiction under sec 4 is of a discretionary character and in cases which involve difficult questions of title the Insolvency Court will be well advised in asking the Official Assignee to institute proceedings in an ordinary Civil Court *The Official Assignee of Madras v Narasimha Mudaliar* 52 Mad 717 (FB) 57 MLJ 145 *Palaniappan Odayar v The Official Receiver West Tanjore* 61 MLJ 763 1932 AIR (M) 66 Exercise of jurisdiction under this section is discretionary with the Court and should be avoided in cases of momentous consequences *Hasankar v Banamal Gul* 144 IC 678 1933 AIR (S) 185

The Court will not exercise jurisdiction to decide personal claims or claims to property as between third persons although it has a *locus standi* to determine which of such insolvent's estate *Ex parte Smith* QBD 238 In *Hukumat Rai v* there were two rival claimants claimed a property seized by the Receiver and the judge in insolvency awarded it to one of them and the other brought a suit in the Civil Court against the successful party it was held that all that the Court having seisin of the insolvency matter was called upon to decide was whether or not the attachment by the Receiver should be maintained It was quite immaterial for the Insolvency Court to decide as to which of the claimants the property belonged

Where the Insolvency Court even if it adjudicated upon the title of the insolvent as against third parties would have no power to recover the property free of obstruction it would be mere waste of time to adjudicate upon questions of title and therefore it would certainly be expedient to have these questions decided in a regular suit and sec 4 reserves the power to Insolvency Courts to decline those proceedings *The Official* 1924 AIR (Mad) 387 In there was an application by

the Official Receiver for a declaration that certain properties belonged to the insolvents. The case of the opponents was that the properties belonged to them by inheritance to the exclusion of the insolvents by reason of the latter's father having predeceased their father. They further contended that the claim of the insolvents, if any, was to a share in the properties and the remedy of the Official Receiver was by a suit for partition against all the descendants of the father of the opponents. The Court observed: "Looking to the nature of the disputes I am not prepared to hold that it is a fit case in which I should enter upon an enquiry which might in the end result in my rejecting the application as not being one for partition or being bad for want of proper parties and after a further delay of a couple of years referring the Official Receiver to a regular suit. Before an Insolvency Court exercises its discretion to entertain an application under sec 4 it should be satisfied that it is expedient to withdraw the case from the jurisdiction of the ordinary tribunals and to decide it in a summary way. *In Re Pollard, Exp Dicken*, (1878) 8 Ch D 377."

Where the dispute is of a difficult character and involves large sums of money and that the result of assuming jurisdiction would have been to deprive the unsuccessful party of first appeal to the High Court and perhaps an appeal to the Privy Council, in a case of this nature the better course would be to refuse to exercise jurisdiction. In *Kanaksahapathy Chettiar v Comathi Meenakshi Ammal*, 1935 M W N 586 156 IC 677 1935 AIR (M) 720, properties worth over Rs 12000 which admittedly belonged to the insolvent at one time were sold by the Official Receiver and purchased by certain persons who in their turn subsequently sold them to the wife of the insolvent. One of the creditors alleged that the wife was only a namelender and that the properties really belonged to the insolvent as they were purchased with his own money which he had secreted with his wife. The Insolvency Court declined jurisdiction under s 4 and referred the party to a separate suit. It was held that the case was eminently one in which it was not desirable that the Insolvency Court should have exercised jurisdiction under s 4 as the dispute was of a difficult character and involved a very large sum of money and as the result of assuming jurisdiction would have been to deprive the unsuccessful party of a right of first appeal to the High Court and perhaps an appeal to the Privy Council.

Where there is a dispute as to title of the insolvent sec 56 can not be invoked. In order that this section may be resorted to, the insolvent must have an immediate right to remove from possession. Where the person in possession claims adversely to the insolvent or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under sec 56. *Chittammal v Ponnuswami Naicker*, 1926 M W N 172, *Roulard*

Hudson v John Pierpont Morgan 13 C W N 654 9 CLJ 563
 Again where concurrent proceedings for similar relief are taken in two different and independent Courts no order should be passed which may lead to friction or conflict of jurisdiction *Sridhar Chowdhury v Mugni Ram Bangar* 3 Patna 357 78 Ind Cas 620

When suit lies

If the existence of a transfer or if the property is sold unencumbered the lien on the proceeds of the sale is denied by the Receiver the claimant can ask the Court to adjudicate upon his rights under section 4. In case the claimant is prevented from obtaining final decision on the matter he can obtain it by institution of a civil suit *Maida Ram v Jagan Nath* 123 IC 539 1930 AIR (Lah) 180

No leave necessary for suit by a third party

Where there is a decision after full enquiry by a Bankruptcy Court the same matter cannot be enquired into by the Civil Court because the idea is to give such decision the force of *res judicata*. Where therefore the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant or the latter has not preferred any claim for the consideration of the Bankruptcy Court there is no decision by it which would operate to oust the jurisdiction of the Civil Court to decide the matter. Therefore where the property is sold by the Receiver as the property of the insolvent and a third party challenges the title of the insolvent to the property and seeks a declaration of title against the purchaser there is no need to implead the Receiver as a co-defendant and it is unnecessary also to obtain the leave of the Insolvency Court to proceed against the purchaser. Where the plaintiff's application is rejected summarily or on the ground that it is barred by time and not on the merits the permission of the Insolvency Court is not necessary for the plaintiff's suit for a declaration of his right *Deorao v Vuthal* 1925 AIR (N) 363 87 IC 1000

Limitation for suits

Where the Insolvency Court passed an order under sub sec (3) of sec 4 for the sale of certain properties leaving the question of title to those properties to be decided by a competent Civil Court and the plaintiff brought a suit for the declaration of his title to those properties it was held that Art 13 of the Limitation Act (i.e. 1 year) did not apply *Abdul Majid v Abdul Huq* 36 C W N 621 1933 AIR (Cal) 263

Appeal

Section 4 enables an Insolvency Court to decide question of title affecting third parties when such questions are raised before it and when a decision is given under that section an appeal lies to

the District Judge under section 75 of the Act, irrespective of the valuation of the property involved, and a second appeal lies to the High Court, *Fool Kumari v Khurod Chandra*, 31 CWN 502 102 IC 115 1927 AIR (C) 474. When a question is decided under sec 4 which is in very wide terms, not only an appeal lies under sch I, sec 75 (2) but a second appeal would also lie under sec 75, only on a point of law as provided in sub-section (1) of sec 100, C P Code, *Seth Sheolal v Girdharilal*, 1924 AIR (Nag) 361 78 IC 140. Where no question of title or priority arises, no second appeal lies to the High Court, *Ghulam Rasul v Kidar Nath*, 36 PLR 5 150 IC 305 1934 AIR (L) 807. A decision in a question whether an insolvent 3 years before the insolvency sold his property merely with intent to defraud and delay his creditors, is a decision on a question of title within the meaning of section 4 of the Provincial Insolvency Act and is appealable under section 75 (2) of the Act, *Shikri Prosad v Aziz Ali* 44 All 71 19 ALJ 862 63 Ind Cas 601. If a decision by a Court is open to appeal, presumably its refusal to pass a decision is also appealable *Nyantara v Shambhunath*, 52 Cal 662 89 IC 761 1925 AIR (C) 932. The dismissal of the claim under sec 4 really tantamounts to a decision under sec 4 and entitles the appellant to an appeal under sec 75 read with Sch I of the Act *Monomohan Roy Choudhury v Bhupal Chandra Roy Choudhury*, 58 CLJ 118 1934 AIR (C) 122.

An order made by the Insolvency Court rejecting a claim preferred by a third party to property seized by a Receiver in insolvency and deciding that the properties are assets of the insolvent is appealable without the leave of the Court *Allapichai v Kupparichai*, 40 Mad 752 32 MLJ 449 39 IC 429 *Ghani Muhammad v Lala Dinanath Puri* 108 IC 602 1928 AIR (L) 556.

Appeal to Privy Council

When a right of appeal is given to one of the ordinary Courts of the country the procedure, orders and decrees of that Court will be governed by the ordinary rules of the C P C. An appeal to Privy Council is therefore maintainable from the decision of the High Court under sec 75 from the order of the District Judge, under sec 4 (2) *Maung Ba Thau v Ma Pin* 61 LA 158 12 Rang 194 (PC) 39 LW 418 38 CWN 449 66 MLJ 404 36 Bom LR 427 1934 A WN 284 11 O WN 418 148 IC 1 1934 AIR (PC) 81.

5. (1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

General powers of Courts

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits

Review

This section corresponds to section 47 of Act III of 1907 and should be read with section 75 corresponding to section 46 of Act III of 1907. The first sub-section provides for the powers and procedure of the Insolvency Courts in original matters. Sub-section (2) prescribes the powers and procedure of the Appellate Courts in appeals and revisions in Insolvency matters.

Status of Insolvency Courts

Under sec 3 ordinarily the District Courts are the Courts having jurisdiction under the Act unless the Local Government by notification in the local official Gazette invest any Court subordinate to the District Court with jurisdiction over such class of cases. Sec 3 of the Bengal Agra and Assam Civil Courts Act XII of 1887 and s 18 of the Punjab Courts Act run as follows — 'There shall be the following classes of Civil Courts, namely —(1) the Court of the District Judge, (2) the Court of the Additional Judge, (3) the Court of the Subordinate Judge (4) the Court of the Munsiff (not in the Punjab Act)'. It therefore follows that Civil Courts include the Court of the District Judge, the Court of the Additional District Judge, the Court of the Subordinate Judge the Court of the munsiff and any other Court established under any other enactment for the time being in force. Accordingly an Insolvency Court is a Civil Court. In sec 2 (1) (b) of the Provincial Insolvency Act 'District Court' means the principal Judge while under the proviso to section 3 (1) of the same Act a Subordinate Court may be invested with jurisdiction as a District Court under the said Act. By reason of section 5 of the Act the Insolvency Court i.e., the District Court shall have the same powers and shall follow the same procedure as it has and follows in the exercise of Insolvency Courts. Committee, Sargodha a Debt Conciliation Indebtedness Act other proceeding for debt for the settlement of which application has been made to the Board shall be suspended until the Board has dismissed the application or an agreement had been made under sec 17." The application of the creditor in the Insolvency Court to have the

debtor adjudicated an insolvent is obviously a proceeding before a Civil Court in respect of a debt for the settlement of which application has been made to the Board. It follows therefore that Insolvency Courts as Civil Courts are bound to stay proceedings, *Murad v. Official Receiver Jhang* 11 R 1938 (L) 120

Procedure of the Insolvency Courts.

The Provincial Insolvency Act does not provide any special procedure to be followed in insolvency proceedings except in certain cases. It simply lays down that subject to certain provisions of the Act the Court in regard to proceedings under the Act shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Section 141 of the Civil Procedure Code provides that "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction." The Insolvency Courts are by section 4 invested with very extensive powers and are in fact, in no way inferior to Civil Courts. How then should the enquiries be held by the Insolvency Courts in order that the judgments, orders and decrees may have the effect they are intended to have under section 4 (2)? In *Bansidhar v. Kharagjit* 37 All 65, the Insolvency Court held an enquiry under section 47 of Act III of 1907 and found that a particular property was the property of the insolvent and ordered its delivery to the Receiver. The High Court held that in making such enquiry the Court should follow the procedure of a Civil Court in a civil suit should require the Receiver and the parties in possession to state their case in writing should fix issues and should give the parties an opportunity of producing evidence. And where a matter has to be decided on trial the Court should hold the trial itself. It should not delegate its duty to a Receiver or to any other Court subordinate to it. *Krishna Iyer v. Official Receiver Trichinopoly* 75 IC 445 1925 AIR (M) 381

C. P. C. applies subject to the provisions of this Act

Though the provisions of the C. P. C. have been made applicable to Insolvency Act, they have not entirely. The provisions of the C. P. C. cases for which special provisions. In *Heerji Jura v. Firm of Vala-* 1 IC 815 1932 AIR (Sind) 39, it has been held that in the absence of rules framed under sec 79, the provisions of the Civil Procedure Code will apply to insolvency proceedings in view of sec 5

Objection to jurisdiction.

In *Madho Pershad v. Walton* 18 CWN 1050, it was held that "section 47 (1) does not directly or by implication make section 2

of the C P Code 1908 appl cable to proceedings under the Provin
cial Insolvency Act and consequently the doctrine that no objection
as to the place of suing shall be all wed by an appellate Court
unless such objection was taken in the Court of the first instance
at the earliest possible opportunity could not be applied to provi
sions under the Insolvency Act T cure the above defect in Act
III of 1907 sec 11 was enacted in Act V of 1920 with the proviso
that no objection as to the place of presentment shall be allowed
by any Court in the exercise of appellate or revisional jurisdiction
unless such object on was taken in the Court by which the petition
was heard at the earliest possible opportunity and unless there
has been a consequent failure of justice It appears that this
proviso has been taken almost verbatim from sec 21 C P C and
in view of this express provision in the Act sec 21 C P C does
not apply to insolvency proceed ngs

Substitution

Where on the death of an insolvent after the order of adjudi
cation the proceedings in insolvency are directed to be continued
under old section 10 (new section 17) of the Provincial Insolvency
insolvent
contained
provision
is incur
e insolvent
to be present so as to give them an opportunity of cross examining
the claimants creditors and their witnesses and to offer rebutting
evidence in support of their plea that their claims have either been
satisfied or are barred *Sripat Singh v Maharajah Sir Prodyat Kumar
Tagore* 57 Ind Cas 810 Under the provis ons of section 5 (1) the
Court has power to bring on the record of the insolvency procee
dings the name of the legal representatives of the deceased insolvent
Ramjas v Katha Singh 9 P L R 192 14 P W R 1921 59 Ind
Cas 51

Power to set aside *exparte* order of dismissal for default

Where an application made by a debtor for Insolvency was
rejected as also the appl cation made by one of the creditors for the
adjudication is insolvent of the debtor whereupon another creditor
made similar application it was held that the dismissal of the
previous application did not operate as *res judicata* in the later
proceeding though the second applicant was a party to the first
or 9
alica
116
The dismissal for default of an application for adjudication as
insolvent does not bar a fresh appl cation for the same relief *Yerra*

Venkatagiri v Maddipatta (1927) M W N 176 39 M L J 118 101 I C 349 1927 A I R (M) 579 The dismissal of an application for restoration of an application for adjudication in insolvency dismissed under Or IX r 2 C P Code is no bar to the presentation of a fresh petition for insolvency Order IX r 4 C P Code does not say that if an applicant avails himself of the second alternative mentioned in the rule he is precluded from instituting a fresh application *Abdul Aziz v Habib Mistry* 49 Ind Cas 229 In *Bhaguan Das v Chuni Lal* 121 I C 303 it was held by the lower Court that Or IX C P C was not applicable to insolvency proceedings and that the proper remedy was to apply for annulment of the order of adjudication under sec 35 The High Court in revision held that provisions of the Civil Procedure Code including those contained in Or IX are made applicable to the proceedings under the Act except where they are in conflict with any of its provisions The provisions relating to dismissal of appeals in default and for restoration given in Or 41 C P Code apply to insolvency appeals by virtue of sec 5 of the Provincial Insolvency Act *Bir Singh v Humphrey* 120 I C 791

In *Venugopalachariar v Chinnula Lal* 49 Mad 935 51 M L J 209 1926 M W N 674 97 I C 706 1926 A I R (M) 942 it was held Under sec 5 of the Act the provisions of the C P Code are to be applied subject to the provisions of the Act Sec 10 cl (2) provides a definite remedy for a debtor in respect of whom an order of adjudication has been annulled under sec 43 and it is not open to the Insolvency Court to set aside its order by virtue of the provisions of Or 9 of the C P Code But this view was not accepted as good law in *Ayyasami Chetty v The Official Receiver Coimbatore* 61 M L J 719 1932 A I R (M) 63 where it was pointed out that the case of *Venugopalachariar v Chinnula* was a case of the insolvent himself applying to the Court for fresh orders But in the present case it is not the case of an insolvent but the case of an Official Receiver who represents the creditors of the insolvent There is substantial difference between the two classes of persons who seek the assistance of the Court Therefore where an *ex parte* order is made annulling adjudication on the application of an alienee from an insolvent and where an application is filed under sec 5 Provincial Insolvency Act and Or 9 r 13 and Or 47 r 1 C P C for setting aside the *ex parte* order it is competent to the Court to entertain the application

An order passed by the Insolvency Court without notice is void In *Ramaraju Nadar v Chidambara Nadar* 1933 M W N 75 37 L W 720 143 I C 613 1933 A I R (M) 345 on the adjudication of a Hindu father the Receiver obtained an *ex parte* order that his debts were binding on his minor sons The family property was sold and the purchaser obtained an *ex parte* order for delivery Then the minors applied to set aside the order but the application was styled as one for review of the previous order The application was

sed and an appeal therefrom was also dismissed by the District Judge on the ground that it was not competent under Or 47, r 7, C P Code. It was held that the application though purporting to be under Or 47, r 1 must be deemed to be under sec 151, C P C, that the order for delivery passed without notice to the sons was void, the order dismissing the application by the minor sons was appealable under sec 75 of the Provincial Insolvency Act.

Inherent power of Insolvency Court.

The Insolvency Court possesses the same inherent power which other Civil Courts have to make orders which may be necessary in the interests of justice and to correct its own errors committed inadvertently or by oversight—sections 141 and 151 C P C may be invoked for the exercise of such jurisdiction. No hard and fast rule can be laid down as to when and under what circumstances this should be exercised, that has to be decided according to the peculiar facts of each case. *Ishar Das v Must Fatima Bibi*, 15 Lah 698 1934 A I R (L) 468. The inherent power of the Court cannot legally be exercised where the application made by the insolvent is barred both by time and by the principle of *res judicata*, *Jai Kishan Das v Chiragh Din*, 1935 A I R (Lah) 60.

Inherent power of dismissal for abuse of the process of Court.

In England, under both the Bankruptcy Acts of 1869 and 1883, an insolvency petition whether presented by a debtor or creditor may be dismissed if it has been presented not with the *bona fide* intention of obtaining an adjudication but for an inequitable or collateral purpose, e g, for the purpose of extorting money from the debtor or to put unfair pressure upon him or where the action amounts to an abuse of the process of the Court. In England this power to dismiss such petitions is regarded as inherent in the Court. Indian Courts have similar authorities under section 47 of Act III (now sec 5) read with section 151, C P C, *Giruadhari v Joy Narain* 32 All 645, *Samiruddin v Kadumoyee*, 15 C W N 244 12 CLJ 445, *Dropadi v Hiralal* 34 All 496 10 A L J 3, *Hasmat Bibi v Bhagwan Das*, 36 All 65.

Inherent power of Court to grant interim protection

In *Abdul Razah v Basiruddin* 14 C W N 586 11 CLJ 435, the question arose as to whether the High Court can make any order of *ad interim* protection and appointment of an *ad interim* Receiver. It was held that "sec 47 (now s 5) provides that subject to the provisions of the Act the Court in regard to proceedings under the Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. As the term 'Court' is defined in the Act to mean the

Court exercising jurisdiction under the Act this makes ample provision for the Court of the first instance to order *ad interim* protection. The second sub-section of section 47 then provides that subject to as aforesaid High Courts and District Courts shall have the same powers and shall follow the same procedure as they respectively have and follow in civil suits—this provision authorises the High Court as a Court of Appeal to exercise all the powers which it may exercise in the case of a civil suit pending in appeal before it. The provision read with section 151, C P C does adequately meet the case." This view of the Calcutta High Court was not, however, accepted by the other High Courts as a correct proposition of law. Hence there was a considerable difference of opinion as to whether an Insolvency Court has jurisdiction to grant an *ad interim* order of protection before adjudication. Though the above view had been expressly and impliedly dissented from in many cases the principle of it has been accepted as correct by the Madras High Court in *Nallagati Goundan v Ramana Goundan* 47 MLJ 783 1925 AIR (Mad) 170. In that case the appellant who had filed an application for adjudication as an insolvent applied for interim protection and his application was rejected by the District Judge. There was an appeal against the order of the District Judge and in appeal the High Court held following *Abdul Razak v Basiruddin* supra that the District Judge has inherent powers under section 5 to grant the appellant the protection he claimed.

In *Jeuraj Kharewall v Lalbhai Kalyanbhai* 30 CWN 834 96 IC 131 1926 AIR (C) 1011 however, the Calcutta High Court without discussing whether or not a Court has in its inherent powers the power to grant *ad interim* protection held that the Provincial Insolvency Act specifically lays down provision for protection in sec 23 and the petitioner having failed to comply with the provisions of sec 23 protection was refused. Following the above decision there have been cases in which it has been held that the Court has no power to issue protection order before adjudication except as provided by sec 23 that is unless the debtor is under arrest or imprisonment. In *Chandra Sen v Blackwood and Blackwood* 36 CWN 345 34 AIR 101 1932 AIR 51 1931 AIR (Lah) 121.

Power of Court to extend time under section 148, C P C

There is considerable divergence of judicial opinion as to the Insolvency Court has jurisdiction to extend the time under section 43 of the Insolvency Act. In *Ex parte Ramkrishna* Patna 51, the Patna High Court held that the provisions of section 43 are mandatory, there being no discretion in the Court to extend the time after the expiry of the period fixed by the application for an order of discharge. The word "shall" of the Act imposes a duty upon the insolvent the

tion 43 is absolutely peremptory in its terms and I am of opinion that directly the Court was informed of the insolvent's omission to apply within the time fixed the only course open to it was to annul the adjudication. That being so it follows that no application for extension of the period can lie after it has expired. No doubt section 148 of the C P Code allows extension of this description.

So far as it does not conflict with the Insolvency Act and they are opposed by *Krishnan* on the other hand in the *Naran v Sheo Koar* 17 I A 1 17 *Bagla v Haji Abu Ahmed* 16 Bom District Court from extending the time after the period fixed originally had expired under section 43. That being my view it seems to me that sec 148 CP Code which now expressly enacts that time may be extended even after the expiry of the original period fixed can be applied to these proceedings by virtue of section 5 (1) of the Insolvency Act. After the decision in the case of *Jethaji Peraji v Krishnayya* 52 Mad 648 1930 AIR (M) 278 the question was referred to a Full Bench of the Madras High Court in *Palani Gounden v The Official Receiver Coimbatore* 58 MLJ 369 1930 AIR (M) 389 and it was held that a Court has jurisdiction to extend the time originally fixed under sec 27 of the Provincial Insolvency Act for an application by the debtor for discharge after the expiry of that time but before an order of annulment is passed under sec 43 of the Act. For fuller treatment of the subject vide Notes to sec 43 *infra* under the heading Courts Power to extend the period of discharge.

Power of Court to grant temporary injunction

Under the provisions of section 5 of the Provincial Insolvency Act the Insolvency Court has the same powers as a Civil Court and so it would be justified in granting a temporary injunction preventing a creditor from selling the debtor's property over which he claims a lien which is disputed by other creditors pending the decision of such dispute. *Hajee Ally Mohamed v M M Bham* 6 Rang 352 111 IC 908 (1928) AIR (R) 241. The Receiver of the estate of an insolvent wanted inspection of some ornaments deposited with a bank but the latter refused permission on the ground that these were the security for a loan they had advanced and they were secured creditors. The judge thereupon directed the bank to prove their claim and granted an interim injunction against selling the ornaments. It was held that the orders made were proper orders. Under the wide powers given by sec 4 of the Provincial Insolvency Act the judge had jurisdiction

to make the order he did although there had been no enquiry or proceeding under sec 53 or 54 and no formal petition by the Receiver *The Laxmi Industrial Bank v Dinesh Chandra* 32 C W N 427

Power of Court to stay proceedings

The Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in Order XXXIX r 6, C P Code, or any of them is proved to exist. It has no jurisdiction to issue an injunction upon a person who is not a party before it, *Ramsundar Rai v Ram Dhyani Ram*, 3 PLJ 456 C W N Pat (1918) 303 5 PLW 215 46 Ind Cas 224. Though the Provincial Insolvency Act does not expressly empower the Court to pass an order staying the insolvency proceedings still the Court is competent to pass such an order in the exercise of its inherent jurisdiction on the analogy of somewhat similar provision contained in sec 94 of the Presidency Towns Insolvency Act *Dayaram Menghraj v Sakhi Bai*, 130 IC 559 1930 AIR (Sind) 65

Power of Court to review.

Though there is no express provision in the Provincial Insolvency Act, like that in sec 8 of the Presidency Towns Insolvency Act which provides that the Court may review, rescind or vary any order made by it under insolvency jurisdiction, still it has been held that under sec 5 the District Judge is quite competent to alter his own order in review after it had been passed, *Official Receiver, Tanjore v Nataraja Sastrigal* 46 Mad 405 72 IC 225 1923 AIR (M) 355. A person who had been adjudicated insolvent under the Provincial Insolvency Act failed to apply for discharge within the time fixed and thereupon the adjudication was annulled. Two of his creditors who had rendered proof of their debts applied to the Insolvency Court to review the order of annulment but the Court held, it had no power to review its order and dismissed the application. It was held in appeal that under sec 5 of the Act, the Insolvency Court has the same powers and had to follow the same procedure as in the exercise of ordinary civil jurisdiction and hence it had power to review its order, *Abbi Reddi v Venkata Reddi* 51 MLJ 60 1926 M W N 256 94 IC 351 1927 AIR (M) 175. The mofussil Courts in the exercise of insolvency jurisdiction have by virtue of sec 5, the right of review and the right to entertain an application under Or 9, CPC to set aside for sufficient cause orders passed *ex parte*, *Ayyasami Chetty v The Official Receiver, Coimbatore* 61 MLJ 719 135 IC 750 1932 AIR (Mad) 63. There is nothing in the Act itself which authorises the District Judge and the petition for review must be filed with the District Judge is empowered to

entertain under S 5 of the Act *Firm Nanak Ram Mani Lal v Jugal Kishore Maruani*, 1935 A I R (P) 177

Under section 80 of the Act the Court has no jurisdiction to delegate all the powers which it possesses to the Official Receiver. The powers of review which the Court possesses under section 5 could not be delegated to the Official Receiver. Sec 50 expressly enacts that if the Receiver thinks that a debt has been improperly entered in the schedule he may apply to the Court to expunge such entry or reduce the amount of the debt. These provisions exclude by implication the power of the Receiver to expunge such entries or reduce the amount of a debt on review, *Ahmed Haji Doosad Moosa v Mackenzie Stuart & Co*, 105 I C 366. Sec 5 corresponds to sec 90 of the Presidency Towns Insolvency Act. It prescribes for the Court the same rules of procedure in insolvency as in the exercise of ordinary original civil jurisdiction. Applications for review under the ordinary original civil jurisdiction have to conform to the provisions of Order 47, r. 1, C P C under which a review would not lie unless there was discovery of a new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the person applying for review or which could not be produced by him at the time when the decree was passed or order made on account of some mistake or error apparent on the face of the record or some other sufficient reason. Sec 8 (1) of the Presidency Towns Insolvency Act provides that the Court may review, rescind or vary any order made by it under its insolvency jurisdiction. The terms of the section are more general than that of Order 47, r 1, C P C. Larger powers are conferred on the Insolvency Courts in reviewing, rescinding or varying its orders than in proceedings which fall exclusively under Or 47, r 1, C P C, *In re Morari Jiram*, 34 Bom L R 1175, *Radha Vallab v Raja Ram*, 28 N L R 295, 141 I C 48.

In *Venkatappayya v Punnayya*, 38 L W 257, the only question before the District Judge in appeal was whether or not the Official Receiver's order dismissing the petitioner's proof was correct. In dismissing the appeal the District Judge annulled the adjudication. It was held that his annulling the adjudication which nobody had prayed the Court to do was an error apparent on the face of the record. *Or 47, r 1, C P C* does not therefore apply. *Muthu Pillay v Court* has passed an order of annulment owing to a misapprehension of the actual state of facts borne out by the record, it has inherent power to set right the mistake, *Narasimhulu Setty v Seshayya*, 1933 M W N 1309 39 L W 87 1934 A I R (Mad) 31.

Power of Court of restitution.

By virtue of sec 5 the Insolvency Court has all the powers of a Civil Court. Where the Receiver had in pursuance of an order of

Court paid off some of the assets to the creditors, the Court has the power under sec 144, CPC, on the reversal of that order by the High Court, to direct the creditors to refund the amount, *Panna Lal v Abdulla*, 1932 A L J 1095 143 IC 330 1933 A I R (All) 117

Power of Court of execution of decrees and orders.

Section 5 makes provision *inter alia* for effect being given to the orders and decrees passed by the Insolvency Court. A question arose as to whether a purchaser from the Receiver has the right to apply to the Court for being put in possession of the property purchased by him. The District Judge disallowed the application on the ground that the Court cannot issue a delivery warrant on the application of a stranger to the proceedings. It was held that the execution of any order made by the Court under section 56 (now section 4) will be regulated by the terms of section 5. For instance, if an order for a warrant of possession is made in favour of the Receiver or of a purchaser from him the method of executing the warrant under section 5 will be the same as that prescribed for the execution of a warrant issued by the Court in the exercise of original civil jurisdiction. The Legislature having invested the Insolvency Court with extensive powers under section 5 it would be anomalous to hold that the Courts are powerless to give effect to their judgments. The terms of sections 4, 5 and 56 do not suggest that any such limitation is intended. The auction-purchaser can therefore under the provisions of the Insolvency Act of 1920 apply to the Insolvency Court for a warrant of possession, *Ramaswami Chettiar v Ramaswami Aiyangar*, 45 Mad 434 42 M L J 185. An order passed by the Court is, under sec 36, CPC capable of execution as a decree, *Chandra Kumar v Kusum Kumari*, 40 C L J 180 28 C W N 187 (notes) 1925 A I R (Cal) 57, *Allen Brothers v Sheikh Jooman*, 1925 A I R (Rang) 189. Though the Insolvency Court has powers of execution under secs 4 and 5 the procedure is only analogous to and not identical with that under Or 21, CPC. *Nachimuthu Chettiar v Ramakkal*, 1933 A I R (M) 475

Powers of the High Court in its original jurisdiction.

Before the incorporation of sec 18A in the Presidency Towns Insolvency Act, there was no provision which empowered the High Court in its original jurisdiction to exercise powers over District Court in insolvency matters. In *In re Manickchand v Virchand*, 47 Bom 275, it was held that 'Sec 18 of the Presidency Towns Insolvency Act, 1909, does not confer power on the Commissioner in insolvency to stay insolvency proceedings pending against the insolvent in any other Court. The other insolvency is neither a 'suit' nor 'other proceeding' pending against the insolvent within the meaning of the section. The 'other proceeding' should be e,

generis with or analogous to a suit. The District Court in its insolvency jurisdiction is subject to the superintendence of the High Court on its appellate side and not to the Commissioner in insolvency." The powers conferred by sec 5 which are made subject to the provisions of the Act cannot be exercised in such a way as to give the original side of the High Court jurisdiction from which it is expressly excluded by the terms of secs 2 and 3 whether sec 5 is read with sec 24 of the C P C or clause (11) of the Letters Patent. The Original Side of the High Court has no jurisdiction to transfer an insolvency case from a Court exercising jurisdiction under the Provincial Insolvency Act to another such Court or to itself. This power can be exercised by the High Court on its appellate side only. In the matter of the Estate of Omer Ahmed Brothers 100 IC 265 1927 AIR (Ran) 105. In the case of M A Sasson & Sons v Gosto Behari De, 31 CWN 841 it was held that a District Court exercising insolvency jurisdiction is a Court of concurrent jurisdiction with the Insolvency Court of the High Court and the latter has no power to interfere with the proceedings before the District Court, and neither sec 18 of the Presidency Towns Insolvency Act nor sec 107 of the Government of India Act warranted the order made by the insolvency Judge of the High Court and the District Judge was not bound by the order of stay and was right in disregarding it and completing his proceedings.

In *Sasti Kinkar* (P C) the Privy Judication as in power to make a further adjudication under the Presidency Towns Insolvency Act. Sec 22 of that Act gives any party who may so desire an opportunity of satisfying the High Court that the proceedings before it should be stayed or the adjudication by it annulled in view of the other proceedings before the District Court. But the High Court has discretion either to exercise its jurisdiction or to be dealt with by the High Court as a debtor, it has been passed the Judicial Committee agreeing with the Appellate Bench declined to interfere. In *Barlow & Co*, 33 CWN that sec 18 of the Presidency empower a judge of the High Court proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act. Insolvency proceedings are not included under sec 18 of the Presidency Towns Insolvency Act. The expression other proceedings therein refers only to proceedings in the nature of suits execution or other legal process.

Enactment of sec. 184 in the Presidency Towns Insolvency Act In view of the above decisions and with the object of investing the Original Side of the High Court with powers over District Courts in insolvency matters a Bill was introduced in the Legislative Assembly to amend the law relating to insolvency. The Bill was passed into law as Act X of 1930 and received the assent of the Governor General on the 20th March 1930. By section 3 of the said Act it was enacted that after section 18 of the Presidency Towns Insolvency Act 1909 the following section shall be inserted viz. —

18A (1) The Court may at any time after the presentation of Control over insol in insolvency petition stay any proceedings vency proceedings in pending against the debtor in any Court subordinate courts subject to the superintendence of the Court, and may at any time after the making of an order of adjudication annul an adjudication against the debtor made by any such Court

(2) Where an adjudication is annulled under sub section (1) all sales and dispositions of property and payments duly made and all acts done by Court whose order is annulled or by the receiver appointed by it or other persons acting under his authority shall be valid but the property vested in such Court or receiver shall vest in the Official Assignee and the Court may make such direction in regard to the custody of such property as it thinks fit

(3) Notice of the order annulling an adjudication under sub see (1) shall be published in the local official gazette and in such other manner as may be prescribed

The reason for the above amendment has been explained in clause (3) of the Statement of Objects and Reasons to the Bill in the following terms. It has been held by some of the High Courts that section 18 (1) of the Presidency Towns Insolvency Act does not empower a judge of the High Court sitting in insolvency to stay proceedings pending in respect of the same debtor in a Court subject to the superintendence of the High Court under the Provincial Insolvency Act. The need for such a power has been felt particularly in Calcutta where a common practice prevails whereby debtors who have carried on business in Calcutta retire to some part of the province and then apply to a District Court for an order of adjudication. The creditor to present Court This is de

creditors from prosecuting their claims or securing a searching investigation of the debtor's conduct and affairs. This clause gives power to the judge of a High Court sitting in insolvency to stay or annul insolvency proceedings pending under the Provincial Insolvency Act in any Court subject to its superintendence in respect the same debtor. It also empowers him to give necessary directions for the administration of the debtor's estate in the High Court.

Powers of the High Court in its Extraordinary jurisdiction.

In *Harkishan Lal v Official Liquidator Peoples Bank of Northern India*, 11 R 17 L 582 38 PLR 235 160 IC 972 1936 AIR (L) 608, it was contended that the High Court has no jurisdiction to transfer an insolvency petition for hearing on its own file from an Insolvency Court it was held that the word "suit" in clause 9 of the Letters Patent of the Lahore High Court should be interpreted widely, and includes a proceeding of the Insolvency Court and that the High Court under that clause has power to transfer such a proceeding from the lower Court to its own file and to try and determine the same as a 'Court of extraordinary original jurisdiction' Section 3 (1) of the Provincial Insolvency Act merely enacts that the ordinary jurisdiction in insolvency shall be in the District Courts It does not exclude the extraordinary civil jurisdiction of the High Court

Powers of the High Court in its appellate jurisdiction.

In *Srinivas Ayyangar v Official Assignee, Madras* 38 M 472 25 MLJ 299 21 IC 77 1914 M W N 45, the question arose whether a transfer of an insolvency petition from the High Court to the District Court could be ordered, and it was held, that it could not, for the reason that the two jurisdictions were distinct This case, while deciding that the District Courts cannot administer the Presidency Towns Insolvency Act, does not settle the question whether the High Court in the exercise of its original insolvency jurisdiction can apply the Provincial Insolvency Act, but it is clear that so far as the C P C and the two Acts are concerned no such power exists

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and the provisions of the Provincial Insolvency Act the High Court, if the case is transferred is not competent to administer the Provincial Insolvency Act, *Gowdas Jumnadas v Sadasaier*, 52 M 57 28 MLW 369 114 IC 352 (1928) AIR (M) 1091

Powers of the High Court in its revisional Jurisdiction.

An application in revision was made to the High Court under s 75 of the Provincial Insolvency Act, 1920 against an order made by the Assistant Judge. Pending the revisional application, the applicant (original opponent) applied for security for costs against the original petitioner on the allegation that the petitioning creditor was not residing in British India and had not any immovable property in British India. A preliminary objection was taken that the application was incompetent as there was no provision in the Civil Procedure Code 1908, under which security for costs could be asked or granted against the petitioners in a revisional application. It was held, overruling the preliminary objection that although there was no provision in the Civil Procedure code, which specially empowered the High Court in revisional application to exercise the same powers as the Court of original civil jurisdiction under Or XXV r 1, or as an appellate Court under Or XLI, r 10 it was competent for the High Court to make an order of the nature provided in Or XXV, r 1, in the exercise of its inherent jurisdiction under s 151 of the Civil Procedure Code. *Hiralal Ramsukh v Mongibai Chimanji*, 1 L R (1938) B 743.

Power of the appellate Courts in interlocutory matter.

In *Abdual Razah v Basiruddin Ahmed* 14 CWN 586 11 CLJ 435 it was contended that inasmuch as the Provincial Insolvency Act makes no express provision for an *ad interim* order during the pendency of an appeal it is not competent to the Court to make such order. It was held that there is no foundation for this contention. The second sub section of sec 47 (now sec 5) provides that, subject as aforesaid, High Courts and District Courts in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and follow the same procedure as they respectively have and follow in regard to civil suits. This provision is of a very comprehensive character and authorises this Court as a Court of appeal to exercise all the powers which it may exercise in the case of a civil suit pending in appeal before it. The power to exercise the powers of the Court as the inferior Court. The provisions of section 5 (2) of Act V of 1920 are subject to the provisions of that Act, but there is no provision which states that an interlocutory order is final. The High Court has power to set aside an interlocutory order passed in a civil suit, it has therefore power to set aside an interlocutory order passed in an insolvency proceeding." *Gangadhar v Sridhar*, 61 Ind Cas 589. In an appeal from a sentence of imprisonment under old section 43 (new section 69), the High Court has power under Or XLI, r. 5 of the C P C, read with clause 2 of the present section to

suspend the sentence until the appeal is disposed of, *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, 57 Ind Cas 449

Power to grant leave for appeal to the Privy Council.

In *Chatrapat Singh Dugar v. Kharag Singh Luchmiram*, 40 Cal. 685 : 17 C.W.N 752, it was said that the High Court had no power to grant leave, because no provision for appeal to the Privy Council was contained in the Insolvency Act, and it was urged that secs. 46 and 47 of Act III of 1907 (now secs 75 and 5) if anything, negatived this right of appeal. Jenkins C J, held "I do not so read the Insolvency Act. In my opinion, by that Act, there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist". See also *N C Gallara v Murugappa Chetty*, 12 Rang. 355.

PART II.

Proceedings from Act of Insolvency to Discharge.

Analysis : This is the most important part of the Provincial Insolvency Act, V of 1920. It consists of sections 6-44, and deals with, (1) Acts of insolvency (section 6), (2) petitions for insolvency, their contents and verification, procedure on their admission, interim proceedings, duties of debtors and their releases (sections 7-23), (3) procedure at hearing (sections 24-26), order of adjudication and effect of the order, (sections 27-30), (4) proceedings subsequent to order of adjudication (section 31), power to arrest after adjudication (section 32), framing of the schedule (section 33), debts provable under the Act (section 34), (5) annulment of adjudication and its proceedings (sections 35-37), (6) composition and schemes of arrangement (sections 38-40), (7) discharge, failure to apply for discharge, and effect of discharge (sections 41-44)

Acts of Insolvency

6. A debtor commits an act of insolvency in each of the following cases, namely —

Acts of Insolvency

- (a) if, in British India or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally,
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors,
- (c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent,
- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

- (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ,
- (e) if any of his property has been sold in execution of the decree of any Court for the payment of money ,
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act ,
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts , or
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation—For the purposes of this section the act of an agent may be the act of the principal

Review.

This is section 1 (1) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, and is substantially the same as section 4 of Act III of 1907, and corresponds to sec 9 of the Presidency Towns Insolvency Act with this difference that the clause (e) in the said sec 9 runs as follows 'if any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money'

Acts of Insolvency.

The questions that naturally arise are Who is insolvent, and when can he be declared insolvent under the Act, what is meant by insolvency, and what are the acts of insolvency? The word 'insolvent' is not defined in the Act. It has been defined by section 2 (8) of the Indian Sale of Goods Act, III of 1930 in the following terms "a person is said to be insolvent who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, *whether he has committed an act of insolvency or not*". Solvency means ability to pay just debts. Insolvency means inability to pay or settle just debts. The insolvency or inability to pay or settle one's just debts may arise from various reasons over which a debtor has no control, e.g., loss in his trade on account of fall in prices, want of circumspection or foresight, natural calamities, such as fire, robbery, etc., or it may be due to the fraudulent intention of the debtor, i.e., to defeat or delay his creditors. An honest debtor when he finds his position insecure, places his properties'

if any at the disposal of a creditor or a trustee for distribution amongst his creditors or does some other thing for payment of the dues of his creditors. A dishonest debtor makes a transfer of his property with or without consideration and either misappropriates the sale proceeds or keeps the property *benami*. What a man does when he could not or would not pay his debts are called his acts of insolvency and section 6 enumerates some of the acts which constitute acts of insolvency. Acts of insolvency is defined in section 6 of the Provincial Insolvency Act 1920 or in section 6 of the earlier Act of 1907 are acts—things done or suffered to be done creating *personal liability*. The explanation to the section provides that the act of an agent may be the act of the principal. *Mahabir Prasad Poddar v Ram Tahal Mandar* 1 L R 16 P 724. On the commission of any of those acts the debtor or the creditor as the case may be has a right to present an application to the Court for an order of adjudication, protection and administration of the debtor's estate.

Sec 9 of the Presidency Towns Insolvency Act (corresponding to sec 6 of this Act) deals with acts of insolvency and it will be observed that everything in that section with the exception of clauses (e) and (h) refers to the act of the man or his agent. Nobody is to be adjudicated an insolvent unless there is something in his conduct or in his agent's conduct imputed to him amounting to an act of insolvency so as to attract this form of jurisdiction. But there are in this section two clauses (e) and (h) which are intended to enable a creditor to procure an act of insolvency in other words to compel the debtor to commit an act of insolvency in order that the creditor may get if he wants them the advantages of insolvency jurisdiction. One is cl (e) viz to have a man's property sold in execution of a decree for the payment of a sum of money. Another way in which a man may be forced into Insolvency Court is under cl (h) if he is imprisoned in execution of a decree of any Court for the payment of money. A debtor who is not willing to commit any of the other acts of insolvency mentioned in sec 9 (sec 6 of this Act) may in either of these two ways be compelled to commit an act of insolvency. *Lahmchand Jhauar v Bepin Behary Ghosh* 32 C W N 716. A person cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities. *Ma Kyin Myaing v Muthaya Chettyar* 127 IC 477 1930 AIR (Rang) 147. An act of insolvency must be strictly proved. *In re Adamali Mahomedali Nuhala* 34 Bom LR 1162.

Classification of acts of insolvency

The acts of insolvency enumerated in this section are not exhaustive. Acts of insolvency or bankruptcy can be divided into 3 classes viz (1) those which arise from dealings by the debtor with his property [section 6 (a)] (2) those which consist of personal acts or defaults by the debtor [section 6 (b) (c), (d)] and (3) those which

arise from the condition of his affairs showing him to be insolvent [sec 6 (e), (f) (g) and (h)]

Adjudication follows acts of Insolvency.

Adjudicating a person an insolvent is a matter of serious consequences and Courts of law should take particular care to see that the provisions of law in the matter are observed strictly and carefully considered *Veerayya Chetty v Doraiswami Reddiar*, 110 I C 737 (1928) A I R (M) 393 Acts of bankruptcy have to be regarded critically and carefully and there is no such act except that which the statute declares to be one *Anupama Devi v Gurudas Chatterji*, 57 Cal 1274 131 I C 590 1931 A I R (Cal) 246 Concealing property to defeat creditors is not an act of insolvency *Harbans Lal v Bute Khan*, 34 P L R 987 146 I C 628 1933 A I R (Lah) 725 No one is to be adjudged an insolvent unless he is proved to have committed one or other of the acts of insolvency as defined in the section An act of insolvency defined in section 6 must not only be set out in the petition for adjudication but proved If an act of insolvency as defined in section 6 is not so set out in the petition, the petition is incompetent It is not correct for a creditor to make various allegations of acts which are not acts of insolvency as defined in the section, and then endeavour to prove by evidence that as a matter of fact an act of insolvency as defined in sec 6, had

28 Bom L R 680 necessary that an creditor, on the n committed must insolvency were sufficient to make en endeavour by means of evidence to prove that certain available acts of insolvency have been committed The act of insolvency alleged to have been icusely described in meet the charges bring his conduct ould stay its hands pointment of an interim receiver *Harkishan Lal v Peoples Bank of Northern India* 14 Lah 117

A person cannot be adjudicated as an insolvent at the instance of his creditors on an act of insolvency not relied on in the application against him Where the act of insolvency alleged in the creditor's application for adjudication was the sale of property to a person who was not the creditor but the Court found that an act of insolvency had been committed because the alleged insolvent had preferred some of his creditors by paying them off out of the proceeds of the sale, it was held that the order of adjudication was

unsustainable, *Pedda Kondappa v Gannu Pillappa*, 119 1C 46 1929 A1R (M) 910 In *Ma Kyin Myaing v Muthaya Chettyar*, 1930 A1R (R) 147, the learned Judge of the District Court adjudicated the appellant an insolvent on the ground that her property was not sufficient to cover the amount of her debts. The High Court held "It would seem that the learned Judge has not taken the trouble to read sec 6, which sets out the various acts which amount to acts of insolvency. That section does not provide that the mere fact that a person's assets are less than his debts is an act of insolvency." As has been held in *Mahomed Yar Khan v Puran Prasad*, 1935 A LJ 487 1935 AWR 505 157 1C 47 1935 A1R (All) 416 that no order of adjudication could be passed in the absence of a finding that the debtor committed an act of insolvency.

Clause (a), Transfer.

In sec 5 of the Transfer of Property Act, IV of 1882, 'transfer of property' has been defined to mean an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and to 'transfer property' is to perform such act. It was held by the Court of Appeal in the case of *Re Spackman* (1890) 24 QBD 728, that 'transfer of property' is a deed and not a mere declaration of transfer. The property. But the same Court after 'conveyance or assignment' in the paragraph must be construed as extending to and including the various methods of dealing with property to which conveyances usually have recourse, having regard to the nature of the subject matter although such methods may not be conveyances or assignments in the strict sense of the words and therefore the execution of a deed whereby the debtor granted and assigned all his property, except lease hold, to trustees for his creditors, and declared that he would stand possessed of all lease holds in trust for, and to convey and assign the same as the trustees should direct, was held to be an act of bankruptcy *Re Hughes* (1893) 1 QB 595. A deed may be given in evidence for the purpose of proving an act of bankruptcy, although not stamped or registered, *Re Hollinshead*, 6 Mor 66. If the deed has been registered, the production of an office copy is sufficient *prima facie* proof of the act of bankruptcy, *Re Slater*, 4 Mans 118.

Classes of fraudulent transfers

For the purposes of insolvency there are broadly speaking two classes of fraudulent assignments (1) assignment under section 53 of the T P Act and (2) assignments fraudulent under the Insolvency Act. Any assignment which would be fraudulent under section 53 of the T P Act is an act of insolvency under the Insolvency Act, for to render an assignment void under the T P Act it

necessary to prove or infer an actual intention to defraud creditors, whether such assignment is voluntary or for valuable consideration. See *Twyne's case*, (1601) 1 Smith's Leading Cases, 11th Ed., page 1. Assignments of the second class may conveniently be divided into 2 kinds (1) assignments of the whole or substantially the whole and (2) assignments of part of the debtor's property. The creation of a document by a debtor purporting to transfer his property to another with the intention of putting the property nominally in the name of the other whilst retaining the beneficial interest in himself is an "act of insolvency," *Secretary of State v Dabī Reddī Nagiah*, 25 M L T 12 36 M L J 180 50 Ind C 593.

Transfer of all or substantially all his property.

The Bankruptcy Act, 1914 like its predecessors does not say *all* his property, but the Court of Appeal has held that to be an act of bankruptcy under sub sec (a) the conveyance must be of *all or substantially all* the property. It will be observed that sub sec (b) contains the words "property or any part thereof" and that the latter words do not appear in this sub sec (a). The assignment of the whole of the debtor's property even though meant for the benefit of the creditors generally has always been held to be an act of bankruptcy, *Kettle v Hammond* Cook's Bankruptcy Law, 106. The question whether or not the whole or substantially the whole of a debtor's property has been assigned is important. An assignment of part only of a debtor's property in consideration of a pre existing debt is not necessarily an act of bankruptcy, but if the effect of the assignment is to place the whole or substantially the whole of the property out of the reach of the creditors it is held to be an act of bankruptcy, *Atley Ltd*, (1901) 85 L T 491, *Ex parte D* 106n *Ex parte Bland de Margatroyd* (1857) 6 DeG M & G 757. In estimating whether or not the assignment comprises the whole of the debtor's property the value of the part excepted must be taken into account and in considering the nature of the exception the necessary effect of the assignment must be considered. Where its effect will be to delay creditors or in the case of a trader will render him incapable of carrying on his business and practically produce insolvency, then the assignment, notwithstanding the exception will be an act of bankruptcy, *Re Raiment Ex parte Parkes*, (1899) 6 Mins 288, *Young v Fletcher*, (1865) 3 H & C 732.

In British India.

Subject to certain exceptions and qualifications any man or woman who is within the jurisdiction of a Court having bankruptcy jurisdiction, and who owes a debt or debts, the payment of which can be enforced against him or her personally, can be made a bankrupt—*Halsbury*, Vol 11, p 8. Considerations of convenience exclude

the itinerant foreigner from the operation of the bankruptcy law. In the case of a foreigner the conditions of section 4 of the Bankruptcy Act (corresponding to section 11 of the Provincial Insolvency Act) must be strictly complied with, and if he does not come within any of those conditions the fact that he was personally present in England at the time when the act of bankruptcy was committed does not give the Court jurisdiction to make him a bankrupt unless possibly on his own petition—*Ringuood*

Or elsewhere.

The words "or elsewhere" were first introduced into the statute 6 Geo IV, c 16—a statute which also first introduced the act of bankruptcy of remaining abroad. Prior to the passing of that statute the question had been raised as to whether an act of bankruptcy could be committed abroad. The cases of *Alexander v Vaughan* Cowp 398, *Norden v James*, Dickens, 533, *Ingliss v Grant*, 5 TR 530, are all authorities to show that under these old statutes, prior to the introduction of the above words, it was considered that an act of bankruptcy could not be committed out of England, but the introduction of the words "or elsewhere" and the act of bankruptcy of remaining abroad have placed it beyond doubt that in some instances an act of bankruptcy can be committed abroad by persons subject to the English law, *Ex parte Blain*, (1879) 12 Ch D 522. The "conveyance of assignment," although it may be executed out of England, is one which must be intended to operate according to English law, e.g., a conveyance executed by a domiciled Englishman, although out of England, may be an act of bankruptcy, but a conveyance executed by a domiciled foreigner in his own country, which must necessarily operate according to the foreign law, cannot, *Ex parte Crispin* LR (1873) 8 Ch App 374, *Cooke v Charles A Vogeler Co* (1901) AC 102—*Williams* Page 3 13th Ed. A foreigner may be a debtor for the purposes of the English law in bankruptcy under the Act of 1914 when he is not domiciled in England and in some cases when he is not even present in England as for example, when he carries on business in this country by means of a partner or an agent. It seems also that he can commit an act of bankruptcy without ever setting foot in England, as where goods are seized and held for 21 days by the Sheriff, or he gives notice to his creditors that he has suspended payment. As a debtor he comes within the jurisdiction of the Court immediately on the commission of an act of bankruptcy—*Ringuood*

Transfer for benefit of creditors.

In section (1) (a) of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 it is stated that "a debtor commits an act of bankruptcy if in England or elsewhere he makes

necessary to prove or infer an actual intention to defraud creditors, whether such assignment is voluntary or for valuable consideration. See *Twyne's case*, (1601) 1 Smith's Leading Cases, 11th Ed., page 1. Assignments of the second class may conveniently be divided into 2 kinds: (1) assignments of the whole or substantially the whole and (2) assignments of part of the debtor's property. The creation of a document by a debtor purporting to transfer his property to another with the intention of putting the property nominally in the name of the other whilst retaining the beneficial interest in himself is an "act of insolvency," *Secretary of State v Dabī Reddī Nagiah*, 25 M.L.T. 12. 36 M.L.J. 180 50 Ind Cas 593

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In section (1) (a) of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 it is stated that "a debtor commits an act of bankruptcy if in England or elsewhere he makes

favour of some creditors only, or of someone who is not a creditor at all, and it must be fraudulent. In *Khookat Siew v Woon Tak Hwat*, 191 A 15 · 19 C 223 (P C) it was held that "the well-known rule of law was, if a trader assigns all his property except on some substantial contemporaneous payment or some substantial undertaking to make payments in future that is an act of insolvency, and is void against the creditors." In *In the matter of Ambrose Summers*, 23 C. 592, it was held that an assignment of stock in-trade by a letter of hypothecation amounted to an act of bankruptcy, and created no equity available as against the Official Assignee.

Transfer of all property is an act of insolvency.

Lord Mansfield, C.J., in *Worseley et al' v Demattos and Slander*, (1758) 1 Burrow, 467, has said "there is a great difference between the conveyance of *all* and a *part*. A conveyance of a *part* may be public, fair and honest, as a trader may sell, so he may openly transfer many kinds of property, by way of security, but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." A transfer by the debtor of his property may be an act of insolvency (a) when the necessary consequence of the transfer is to produce insolvency, as for instance, when the debtor transfers the whole of his property or the greater portion of it with a colourable or trifling exception in which case the intent to defeat or defraud the creditors is implied, or (b) when the debtor transfers a *portion* only of his property but is shown to have done so with the intention of defeating and delaying his creditors. A sale or mortgage by the debtor of the whole or substantially the whole of his property in consideration of a past debt, that is a

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proved. It may even be inferred from surrounding circumstances. The portion, however, which is excepted must be real and substantial; it must not be a mere colourable exception of a part of the debtor's property. The burden of proving that the transfer is calculated to defeat or delay creditors of an insolvent lies upon the person who sets up the transfer as an act of insolvency. A sale or mortgage by the debtor of the whole or substantially the whole of his property in consideration of a past debt, i.e., a debt already incurred, is an act of insolvency, whatever the motives of the parties may have been. Such a transfer has the effect of withdrawing all the debtor's property from the legal process which the creditors have a right to enforce against him. It necessarily defeats or delays the other creditors of the debtor by preventing them from issuing execution. It has always, therefore, been considered to be frau-

duent act in bankruptcy, because as was said by Pollock J. in *re Cranston Ex parte Cranston*, (1892) 9 Morrell's Bankruptcy Cases 160 (168), a bankrupt by so doing takes away from his creditors the potentiality of carrying on his business or paying his debts by the shutting of shop in the fullest sense, and it is a giving up of the business in truth belong to the creditors and that to which they have a right to look for payment of their debts. It was held in *Re Bannister* (1872) L.R. 7 Ch App 302 that an assignment of the whole of the debtor's property is an act of bankruptcy even though the assignment "defeat or delay creditors" are omitted from sec 6 of the Bankruptcy Act of 1869 and also in the subsequent Act of 1883. In a case the evidence of intention in the mind of the debtor to defeat or delay his creditors is necessary, because the intent to defeat or delay the law. See also *Smith v Cannon*, (1853) 2 El & Bl 35. In this case the property that was conveyed in the bill of sale was of such security exceeded the value of the debtor's liability, and there was a trust for the surplus for the benefit of the creditors. It was still held that the execution of the bill of sale was an act of bankruptcy.

Transfer of part of property *per se* is not an act of interposition

If a debtor transfers only a part of his property by way of security for a past debt the transfer does not by itself amount to an act of bankruptcy, unless it is made with the intent to defraud the creditors, and that intent must be proved. It may be inferred from surrounding circumstances. Such a transfer does not constitute an act of insolvency by itself in the absence of evidence of fraudulent intention, because it is competent to a trader to transfer a specific portion of his property in payment of or as security for particular debts. It has also been held that a transfer of only of a debtor's property in consideration of the transfer of a debt is not by itself an act of insolvency. In *Young v Wood* (1852) 8 L J 221 there was an assignment by way of mortgage of a portion of his effects as security for an existing debt, and it was held that the assignment was not *per se* an act of bankruptcy in the absence of fraud though the effect of putting the property in the force would be to stop the trader's business. If the assignment in assignment is void if not it cannot be questioned. See *Reynolds* (1861) 11 CB NS 709 (721) and *Ex parte Ash*, (1872) LR 7 Ch App 636 (643). In *re Adami Mahomed*

The property transferred must be in British India.

It is only property in British India that can be conveyed so as to constitute an act of bankruptcy under the law, because since an attachment can only be levied on British India, a conveyance of property abroad will not in any way defraud the creditors, but if the property is in British India, it can be made

difference that the fraudulent conveyance is made elsewhere In *Exparte Crispin*, (1873) L R 8 Ch App 374 Mellish, L J says "referring to the words or elsewhere, the section clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and therefore cannot properly apply to a conveyance which is executed in and is to operate according to the law of a foreign country" Sec 18 of the Punjab Colonisation of Government Land Act (V of 1912) protects an interest in colony land from attachment and sale by a Civil Court or in insolvency proceedings Where the transfer of interest in certain colony land took place within three months of a petition to adjudicate the transferor as insolvent and the transfer was effected by him for not being required by the colonisation authorities to take up his residence in the colony, the transfer cannot be said to be with intent to defeat or delay his creditors and no act of insolvency can be said to be committed, *Firm Manak Chand Ralia Ram Jaini v Lakhmi Das*, 148 IC 832 1934 AIR (L) 507

Transfer with intent to defeat or delay creditors.

A mere finding that the effect of a transfer would be to defeat one creditor is really quite immaterial The transfer has got to be made with intent to defeat the creditors as a whole, *Ko Po Yin v Daw Hnin Thet*, 1934 AIR (Rang) 242 Whether a document was executed for the purpose of defeating or delaying creditors is to be gathered from the nature of the document and the circumstances of the case "To render an assignment fraudulent under the bankruptcy laws there must be fraudulent intention on the part of the debtor," *Re Spackman, Exparte Foley*, (1890) 24 QBD 728 Moral fraud is not necessary, but there must be fraud upon creditors, *Re Wood*, (1872) 7 Ch App 302, that is to say, a design to prevent distribution of the insolvent's property in accordance with the bankruptcy laws, *Dutton v Morrison*, (1810) 17 Ves 194, *Exparte Chatin, Re Scales* (1884) 26 Ch D 210.

no present advantage by transferring the larger portion of his property in favour of the transferee Consideration was Rs 48,000 and the present advance was only Rs 439, the rest was all to be paid to creditors This was executed on the 25th October, 1921 and the petition for adjudication was filed on the 24th January, 1922 The transferee is a near relation of the debtor The debtor was in embarrassed circumstances at the time A jury is entitled to come to the conclusion on the evidence that the transfer was fraudulent one an bankruptcy See 50 Mad 948 1'

mortgage in favour of his son-in law at a time when he is involved heavily in debt, the presumption that the mortgage was to defraud

his creditors is very naturally raised against him especially when the evidence of the consideration is open to suspicion *Amir Chand v The Official Receiver* 134 IC 1108 1931 AIR (Lah) 667 Voluntary partition of the joint family estate by a father governed by the Mitakshara law who is a debtor between himself and his settlement of his to delay and insolvency which would entitle his creditor to present an insolvency petition against him *Bajirao v Daulatrao* 1930 AIR (Nag) 215 S 6 (b) applies only when a debtor transfers his property with a view to defeat or delay his creditors Where therefore a debtor transfers his property not to a creditor of his and pays out of the sale proceeds some of his creditors the transfer not being one with intent to defeat or delay all the creditors the transfer does not amount to an act of insolvency on the part of the debtor within the meaning of S 6 (b) of the Act *Peoples Bank of Northern India v Yusuf Ali* 1937 AIR (L) 495

Relinquishment or surrender in fraud of creditors

As has been observed the transfer of property in this case is not limited to a conveyance or assignment only It includes any act of the debtor which has the effect of putting the property out of the reach of the creditors The separate property of a married woman as for instance a life estate settled upon her for her separate use without any restraint on anticipation will pass on her bankruptcy to the trustee *Re Armstrong* (1888) 21 QBD 264 And even when there is a restraint on anticipation the property vests subject to the restraint and upon the death of her husband in her life time becomes available for her creditors the restraint on anticipation being in the nature of an encumbrance which is removed by the husband's death *Re Wheeler's Settlement Trust* (1899) 2 Ch 717 Surrender is a means of conveyance according to English law *Co Litt* 337 b 338 a 2 *Black Comm* 326 A life tenant in possession might surrender or give up his estate to a person entitled immediately after his death to the free hold in fee without making formal livery At common law an exchange of lands in the same country or a surrender of a free hold estate might well have been made by word of mouth—*Williams on Real Property* p 225 (24th Ed)

The power of a Hindu widow or daughter to surrender or relinquish her interests in her husband's or father's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Privy Council in *Rangasami Gounden v Nachiappa Gounden* 46 IA 72 42 Mad 523 23 CWN 777 As pointed out in that case it is settled by long practice and confirmed by a series of decisions that a Hindu widow or daughter can renounce the estate in favour of the nearest reversioner and by a voluntary act efface herself from the succession as effectively as if

difference that the fraudulent conveyance is made elsewhere. In *Ex parte Crispin* (1873) L R 8 Ch App 374 Mellish LJ says referring to the words or elsewhere the section clearly means and has always been interpreted as meaning fraudulent by the law of England and therefore cannot properly apply to a conveyance which is executed in and is to operate according to the law of a foreign country. Sec 18 of the Punjab Colonisation of Government Land Act (V of 1912) protects an interest in colony land from attachment and sale by a Civil Court or in insolvency proceedings. Where the transfer of interest in certain colony land took place within three months of a petition to adjudicate the transferor as insolvent and the transfer was effected by him for not being required by the colonisation authorities to take up his residence in the colony the transfer cannot be said to be with intent to defeat or delay his creditors and no act of insolvency can be said to be committed. *Firm Manak Chand Ralia Ram Jaini v Lakhmi Das* 148 IC 832 1934 AIR (L) 507

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she had then died. This voluntary self effacement is sometimes referred to as surrender sometimes as relinquishment or abandonment of her rights, and it may be effected by any process having that effect provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. *Bhagat Koer v Dhanokdhari Prasad Singh*, 47 Cal 466 (P C). In *Chaudhury Sureshwar Misser v Musst Moheshram Misram* 41 C L J 433 (P C), their Lordships of the Judicial Committee emphasised that "to make a surrender by a Hindu widow valid two conditions must be fulfilled. The first is that the surrender must be total, not partial. The second is that the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioners." A surrender for valuable consideration such as payment to a particular creditor is a transfer to defraud the other creditors and therefore, void in law. It was said that "it would be unfair to defraud the creditors of their just debts by a release which would be absolutely voluntary," *Chintamani v Mohesh Chandra*, 23 Cal 34. It has been observed in *Sm Prafulla Kumari v Bhabani* 30 C W N 1011 (1037), that the question has to be decided upon the circumstances of each case whether the surrender was not a mere device for dividing the property or for transferring it for valuable consideration. And in consideration of the facts of the case their Lordships held that "it was not a deed of surrender such as is contemplated by Hindu law to be effected by the reversioner. There are circumstances in which the estate of the deceased husband to his next heir at that death. Having regard to facts and circumstances mentioned above, the deed appears to be really a transfer of the interest of the widow for valuable consideration."

Assignment for past debts.

An assignment by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy, *Worsley v De Mattos*, (1758) 1 Bur 467, *Re Phillips Ex parte Barton*, (1900) 2 Q B 329. This is not so however when the

(1876) 2 Ch D 256. A transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy as well under the English law as under the Indian law. A transfer, however, made in pursuance of an antecedent *bona fide* agreement come to at the time of making the loans that security should be given for the loan may be valid. But the onus of proving the existence and *bona fides* of such a prior agreement is upon the person who sets it up, *Ex parte Kilner Re Barker*, (1879) 13 Ch D, 245. See also *Kalamalai v South Indian Export Co*, 33 Mad 334 20 M L J 211. Neither the sale nor the mortgage of the

whole of his property is it self an act of bankruptcy if it is made bona fide and for a present equivalent paid or rendered to him *Ross v Hawk* (1834) 1 Ad & El 460 *Marclt v Peterson* (1868) L.R. 4 Exch 104 In *In the Matter of M V R Velusamy Thetar* 13 R 192 it has been held that there must be no suspicion that of a collusive bargain or understanding that the transfer should be delayed till insolvency has intervened and the creditor must have taken sufficient steps to obtain the security or assignment agreed to be given before the insolvency has intervened

A collusive suit by a debtor and its subsequent withdrawal or compromise to put another party in possession of the immoveable property may amount to a transfer of property within the meaning of this section *Puran v Atuargir* 13 A.L.J 434 29 Ind Cas 217 An assignment of the whole of the debtor's property partly to secure an existing debt and also in consideration of a further advance of money is not necessarily an act of bankruptcy *Allen v Bonnet* (1870) 5 Ch App 577 *Ex parte Wilkinson Re Barry* (1822) 22 Ch D 788 To save such an assignment from being an act of bankruptcy the advance must be made to enable the debtor to continue the business and the lender must have reasonable grounds of knowing this where the assignment is for the real purpose of securing an existing debt and the advance is a device for concealing this fact the assignment is an act of insolvency *Ex parte Johnson v Lasceles* 1894 App Cas 135 There is this distinction however between the assignment of the whole and the assignment of a part of the debtor's property for a past consideration while in neither of such cases is the intention of the grantee material in the former the fraudulent intention of the grantor is assumed as a matter of law whereas in the latter the fraudulent intention of the grantor must be proved as a matter of fact This appears to be the reason why pressure on the debtor by the grantee negates fraud in the debtor in the case of an assignment of part of the property but has no such effect in the case of assignment of the whole and this would seem not to be a mere technical reason for a debtor who assigns all his properties would seem not really to be acting under pressure for it is evident he cannot by such an assignment place himself in any better position than if the threat of which the pressure consists were carried out
—Williams Page 14 (13th Ed)

Proof of fraudulent intention

In the Bankruptcy Acts prior to that of 1859 the words with intent to defeat or delay his creditors appeared in the definition of this act of bankruptcy but the omission of these words has not altered the law It was stated in the judgment in *Re Wood* (1872) L.R. 7 Ch App 302 that the words with intent etc were omitted in the sub-section of the Act of 1869 corresponding to sub-secs (a) and (b) of the Act of 1914 as being superfluous and misleading

and that the fraudulent conveyance gift delivery or transfer by a debtor means a conveyance etc fraudulent as against his creditors or some of them and therefore these words as against his creditors must be inserted by construction in the section after the words fraudulent and if these words are inserted the intention is not a matter of fact but something to be inferred as a matter of law and the Court and jury are relieved from having to find an intent which is often contrary to the actual fact It is unnecessary that either the intent or actual fraud should be found as matters of fact Proof of an intention to defeat or delay his creditors was never required to establish this act of bankruptcy because the necessary effect of the conveyance or assignment is to defeat or delay his creditors and to prevent his property from being administered in the manner contemplated by the provisions of the Bankruptcy Act *Re Wood* (1872) 7 Ch App 302 *Dutton v Morrison* (1810) 17 Ves 104 *Ponsford v Walton* (1868) LR 3 CP 167 *ex parte Wenly* (1862) 1 De GJ & S 273 In the last case the principal part of the property was assigned and it was assumed that this would be sufficient to satisfy the words of the section his property A fraudulent intention to defeat or delay creditors is generally inferred from surrounding circumstances and need not be specially proved *Re Wood* supra *Taramati Krishnappa v Chandra Papayya* 20 Mad 326 The intent to defeat or delay creditors may be inferred from surrounding circumstances The burden of proving that the transfer is calculated to defeat or delay the creditors of an insolvent lies upon the person who sets up the transfer as an act of insolvency In *Re Adamali Mahomedali Nuhala* 34 Bom LR 1162

Transfer when not an act of insolvency

An ineffective alienation is not an act of insolvency within the meaning of sec 6 Provincial Insolvency Act justifying the adjudication of the alienor as insolvent In *Kidar Nath v Muhammad Ibrahim* 35 PLR 522 150 IC 74 1934 AIR (L) 394 the alienation was made by a person after the annulment of his adjudication order when his entire property vested in an officer appointed by the Court under sec. 37 of the Act The alienation was made on ground for presentation of a second petition by a creditor to adjudicate the alienor an insolvent It was held that the alienation being ineffective no order for adjudication could be made on such a petition

Clause (c) , Fraudulent preference

This corresponds to sec 1 (1) (c) of the Bankruptcy Act 1914 which runs as follows If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof or creates any charge thereon which would under this or any other Act be void as fraudulent preference if he were adjudged bankrupt A

fraudulent preference includes transactions whereby an insolvent debtor in contemplation of bankruptcy seeks to confer an advantage on a favoured creditor over his other creditors. In clause (1) of sec 54 of the Provincial Insolvency Act it is laid down. Every transfer of property, every payment made every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors shall if such person is adjudged insolvent on a petition presented within three months after the date thereof be deemed fraudulent and void as against the Receiver and shall be annulled by the Court. The word preference as used in sec 54 does not connote priority in respect of a debt. That no doubt is one meaning of the word but it means in the context the favouring of one creditor to the detriment of others. The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference but also on the state of mind of the person who made it. In other words the test is did the debtor execute the deed with a view to protect himself or with a

in favour of a creditor constituted a fraudulent preference within the meaning of sec 54 the Court must be satisfied that the dominant or substantial motive of the debtor in making the transfer was to prefer the particular creditor and not to secure some particular advantage for himself. *Daulat Ram v Deoki Nan lan* 75 I C 861 1924 AIR (L) 686. *The Official Assignee of Madras v T B Mehta and Sons* 42 Mad 510. If the Court after enquiry finds that the insolvent's dominant motive in making the transfer was to prefer the particular creditor over others then the transaction amounts to a fraudulent preference. *Kasi Iyer v The Official Receiver Tanjore* 1929 AIR (M) 821. Mere transfer of one's property to a creditor is *per se* not an act of insolvency. In *Mahomed Yar Khan v Puran Prasad* 1935 A L J 487 1935 A W R 505 157 I C 47 1935 AIR (All) 416 a creditor presented an application for the adjudication of his debtor on the latter executing a sale deed in favour of his wife in lieu of her dower debt and the lower Court adjudicated the debtor an insolvent remarking that Transfer of one's tangible property to wife in lieu of dower is always suspect. It was held in appeal that the order of adjudication was not justified in the absence of a definite finding that the sale in question amounted to a fraudulent preference. In order to make sec 6 (b) applicable it has only to be shown that the debtor transferred his properties with intent to defeat or delay his creditors and in order to make s 6 (c) applicable it must be shown that (1) there was a transfer by the debtor to a creditor or creditors (2) the debtor was unable to pay his debts at the time of the transfer (3) the transfer was with a view to give the creditor or

creditors preference and (4) the transfer has taken place within three months of the date of the presentation of the petition. What has to be considered by the Court is whether at the time of the transfer complained of the debtor was or was not in a position to pay his debts and whether the transfers were with a view to give preference to the creditors concerned. Intent to defeat or delay the creditors or to give a preference to a creditor is a mental act and can only be determined if one looks to the surrounding circumstances. A transfer of a considerable portion of his properties by a person in serious pecuniary difficulties his debts surpassing his assets in favour of one or some of his creditors without making any provision for the payment of debts due to others may be presumed to have been made with intent to defeat or delay creditors or with a view to give preference to a particular creditor. *Firm Baijnath Rameshwar Lall v Atal Prasad Kumar* 17 P L T 857 168 I C 140 1937 A I R (P) 134. Where a debtor sold his house to two of his creditors for an ostensible consideration of a small amount as compared with all his debts and no evidence was given to show that any pressure was brought to bear on him and the debtor was so heavily indebted that he obtained no advantage from the sale it has held that the dominant motive of the debtor in effecting the sale was to prefer certain creditors and therefore the sale was an act of insolvency. *Sitaram Bajirao Bhalerao v Amrutrao Ganpatrao Kunbi* 1937 A I R (N) 226.

When preference is not fraudulent

Preference implies an act of free will and there can be no preference where the act is the result of pressure. *Nripendranath Sahu v Ashutosh Ghose* 19 C W N 157. *Moula Baksh v Tejmal* 20 Ind Cas 395 11 A L J 545. A preference to a creditor must be shown to have been fraudulent with reference to the state of the mind of the debtor. *Nripendranath Sahu v Ashutosh Ghose* 20 C W N 421. *Official Assignee Bombay v Bryk shore* 3 A L J 614 (1916) A W N 250. In *Butcher v Stead* 7 Eng & Ir App 849 Lord Hatherly says "I think the Legislature intended to say that if you the debtor for the purpose of evading the operation of the Bankruptcy laws and in order to give a fraudulent preference make this payment or this charge it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and without notice of any intention on your part to favour one creditor above another." See also *Dadapa v Bishnudas* 12 Bom 424. *Brown v Ferguson* 16 Mad 499. *Chudambaram Chettiar v Srinuasa Sastryal* 30 Mad 6 and also in appeal in 37 Mad 227 P C 20 C L J 571 23 I C 714 18 C W N 841. *Lala Hakim Lal v Mooshahar Sahoo* 34 Cal 999 11 C W N 889 6 C L J 410 and *Gopal v Bank of Madras* 16 Mad 397. Where the proper inference to draw from the fact was that

the dominant motive actuating the debtor was that in making the transfer to his creditor he (the debtor) was only doing what he felt himself bound or compelled to do, and where it must have appeared to him that the alternative to handing over was a prosecution for criminal breach of trust the case is not of 'fraudulent preference' within the statute, *Sime Darby & Co v The Official Assignee of the State of Lee Pang Singh*, 47 C L J 339 (P C) For fuller treatment of what is and what is not fraudulent preference see notes under section 54, *infra*

Clause (d) , Intent to defeat or delay creditors.

This is section 1 (1) (d) of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 which runs as follows "If with intent to defeat or delay his creditors he does any of the following things namely, departs out of England, or being out of England remains out of England, or departs from his dwelling house, or otherwise absents himself, or begins to keep house The words 'intent to defeat or delay' over ride the whole section and cover all the enumerated acts of bankruptcy including fraudulent conveyance etc It has been said in *re Wood*, L R 7 Ch App 302 that 'intent to defeat or delay' is in respect to the acts of bankruptcy in this clause a matter of fact and must be proved as such and that the meaning of the omission of these words in the definition of other acts of bankruptcy is not a matter of fact requiring proof but a matter of law resulting from the act of the debtor When a debtor knew that the necessary consequence of his going abroad would be to defeat or delay certain creditors, he was held to have gone abroad with intent to defeat or delay his creditors *Exp Goater* 30 L T 610, *Re Bryant* 3 M & A 722 and this even though his going abroad had nothing to do with his debts *Holroyd v Writehead* 3 Camp 530

The doctrine has been somewhat limited in that the debtor must distinctly allege that the debtor has used or otherwise absented himself, with intent to defeat or delay his creditors and the petitioning creditor must prove the intent *Ex parte Coates* (1877) 5 Ch D 979, *In the matter of William Watson* 31 Cal 767 *Abu Haji Sullaiman v Haji Jan Muhammad* 8 Bom L R 648 An omission of an allegation can be rectified by amendment before adjudication *Re Fiddian Ex parte Fiddian* (1892) 9 Mor 65 Where any of the above acts is done with intent to defeat or delay creditors the fact that no creditor was actually delayed is immaterial, *Williams v Nunn* 1 Taunt 270, *Fouler v Padget*, 7 T R 509, *Rouch v G W R Co*, 1 Q B 51 As to these acts of bankruptcy, an intent to defeat or delay creditors must be shown and such intent is often a matter of inference Thus, if a man quits India and remains out of India and does not provide to meet bills becoming due, it may generally be assumed

that his intention is to defray his creditors *Brandon Exparte, Trench, in re*, (1884) 25 Ch D 500 Again a married woman trader who leaves her places of business without paying her creditors, or notifying her change of address commits an act of insolvency though at her husband's request she goes to live with him elsewhere, *Worsely, In re*, (1901) 1 K B 309

The debtor's intention can be inferred from surrounding circumstances and therefore a debtor who withdraws to a retired part of the house to avoid personal application for payment or a banker who closes his bank against customers or a trader who shuts his shop and leaves home without directions or an address to which communications may be made commits an act of bankruptcy This inference can however be rebutted by evidence of the fact that the creditor called at an unreasonable hour or by other evidence satisfying the court that the debtor was apparently avoiding a creditor *Ex parte* (1893) 9 T L R 387
1 Cal 26

Under s 6 (d) of the Act it is an essential feature of an act of insolvency that the act should be done with intent to defeat or delay the creditors generally of the debtor It is insufficient to allege or to prove that the act was done with intent to defeat or delay any particular creditor An attempt by a debtor to deprive any one creditor of the fruits of a decree against him is not an act of insolvency *Maung Nym Tin v Sau Eu Hoke* 158 I C 610
1935 A I R (R) 281

Clause (d) (i), Departure from British India

A debtor commits an act of bankruptcy if with the intent to delay or defeat his creditors he does any of the following things viz, departs out of British India or being out of British India remains out of British India or begins to keep house The act of bankruptcy is complete at the moment of the departure and is therefore not affected by subsequent circumstances *Ex parte Gardener*, (1812) 1 Ves & B 45 Usually the material facts on which this act of bankruptcy is established are that debts have matured or are maturing and that the debtor departs and remains away without making provisions to meet them *Ex parte Coates Re Skelton* (1877) 5 Ch D 979 The debtor's intention is material and therefore he must have departed from his business without committing fraud with an honest intention and *Warner v Barber*, 1816 Holt

N P 175

Clause (d) (ii); Departure from dwelling house, etc.

The absence of the debtor must be an absence from his dwelling house or place of business or from some particular creditor and must be brought about with the intention to defeat or delay cre-

ditors, *Fisher v. Bucher*, (1930) 10 B & C, 705. The mere failure of the debtor to keep an appointment with the creditor is not in itself an act of bankruptcy in the absence of any such intent, *Ex parte Meyer, Re Stepheney*, (1871) 7 Ch App 188. The debtor may commit an act of bankruptcy without physical absence if he adopts an assu-

In *Re Alderson, Ex parte Harkishendas*, 23 A L J

has been held that mere absence of the debtor from his village for two or three hours, when a munim of his creditor's shop went to him for collecting the debt, or the fact that the debtor was purchasing cloth from a creditor and using the proceeds to pay off the other creditors or the fact that he was not keeping up his accounts for about a month and that he had ceased to do his business with vigour would not constitute acts of insolvency within the meaning of the Act. It was further held that the mere fact that the debtor was unable to pay his debts was not itself sufficient. "The fact of the debtor having departed from his dwelling house or place of business in itself connotes nothing. The essential ingredient of the act of insolvency is that the act was committed by the debtor with intent to defeat or delay his creditors," *A M M Murugappa Chettyar v. N C Gallara*, 12 Rang 150.

Clause (d) (iii), Seclusion to deprive creditors of the means of communication

Secluding is equivalent to the English phrase "beginning to keep house." It imports a refusal or denial on the part of a debtor to see creditors with the object of defeating or delaying them. The intention of the debtor must be clear and accordingly a denial to a creditor not specifically ordered by him [*Ex parte Foster* 1810) 7 Ves 414] or denial by a debtor sick in bed is thus not an act of insolvency. The intention with which a debtor actually departs from his place of business is material, though he might have altered his intention and come back. In the *Application of Dholan Das to declare the firm of Wa'b'lis Ho'aram insolvent* 56 Ind C 158, *Sardarmal v. Arantayal* 21 Bom 205 (213). For a trader to withdraw from that part of the house where he usually sits to a more retired part is beginning to keep house, *Key v. Shaw*, 8 Bing 320. A trader may, however without committing an act of bankruptcy order himself to be denied to creditors at unreasonable hours, *Smith v. Currie*, (1813) 3 Camp 349. Where a warrant has been issued for the arrest of a judgment debtor in execution of a decree obtained by a creditor and the debtor conceals himself in order to avoid arrest, his case comes under sec 6 (d) (iii) and his conduct amounts to an act of insolvency, *Ram Labhaya Mal v. Firm Chancha' Singh Jaswant Singh* 133 I C 633 1932 A I R (Lah) 28. Where two debtors began to keep house to avoid service of a writ, with the object of gaining time, and so obtaining in advance to pay off their creditors, it

held that they had kept house with intent to delay, and committed an act of bankruptcy, *Richardson v Pratt* 52 LT 614

Clause (e) ; Sale of property in execution of decree.

This is section 1 (1) of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 and sec 9 (e) of the Presidency Towns Insolvency Act. It should be noted that both under the English Act and the Presidency Towns Insolvency Act attachment of the debtor's properties in execution of the decree of any Court for the payment of money is an act of insolvency while under the Provincial Insolvency Act it is an act of insolvency if any of his properties has been sold in execution of the decree of any Court for the payment of money. A creditor's petition, therefore, under the Provincial Insolvency Act for adjudication of the debtor insolvent would not lie on the attachment of the latter's property while it would be maintainable both under the English Act and the Presidency Towns Act. But the attachment would entitle the debtor to present a petition for adjudication even if the debts do not amount to five hundred rupees. The clauses (e) and (h) in this section are intended to enable a creditor to procure an act of insolvency, in other words, to compel the debtor to commit an act of insolvency, in order that the creditor may get if he wants them, the advantage of insolvency jurisdiction. One is clause (e) viz to have a man's property sold in execution of a decree for payment of money. Another way in which a man may be forced into Insolvency Court is under cl (h) if he is imprisoned in execution of a decree of any Court for payment of money. It should be noted that clause (e) does not apply to a person against whom an adjudication order was taking operation. Cl (e) is intended to apply to a person who is responsible for the payment of his own debt. It is he who may be compelled by the creditor to commit an act of insolvency. The clause has no application to person who has been adjudicated and to the acts of the Official Assignee in the process of insolvency administration, *Luchmichand v Bepin Behari* 32 CWN 716

Decree must be a Civil Court Decree.

A debtor commits an act of insolvency if execution against him has been levied by seizure of his goods under process in any action in Court, and the goods have been sold in execution of the decree. In execution of a decree against a partnership the separate property of one of the partners was attached and sold. The lower Court held that this amounted to an act of bankruptcy on the part of the other partners. It was held that the lower Court was wrong. It cannot be said that the property of one partner becomes the property of the other partners by reason of their being partners. Only in case where the partnership assets are not sufficient to satisfy the creditor's claim that the separate property of a partner is liable, *Ramsankar Aiyar v Firm of V K R Krishna Aiyar*, 1926 MWN

977 Every decree by virtue of which money is payable is to that extent a decree for money *Hart v Taraprasanna Mukherji* 11 Cal 718 *Vidanathasami v Samasundaram* 28 Mad 473 The words in execution of the decree of any Court for payment of money can not be extended by analogy They must be extended by legislature if at all and it cannot be held that there has been an act of insolvency when the definition given by the legislature has not been complied with *Ramsahai Mull Mare v Joylal* 32 C W N 608 The word decree in sec 6 of the Provincial Insolvency Act 1920 has the same meaning as in sec 2 of the Civil Procedure Code 1908 A certificate under the Public Demands Recovery Act 1913 is not a decree within the meaning of that word as used in the Civil Procedure Code Therefore a sale of the property of a person in execution of a certificate under the Public Demands Recovery Act 1913 is not an act of insolvency as contemplated by sec 6 of the Act *Debi Prosad Singha v Krishna Kumar Sarkar* 41 C W N 800

* Decree must be for Payment of money

The expression decree of any Court for the payment of money in cl (e) of S 6 of the P I Act must be construed to have the same meaning as in cl (h) It means a decree personally against the person concerned It does not include a decree for sale on a mortgage *Baij Nath v Gajadhar Prasad* 1935 O W N 374 154 I C 908 1935 A I R (O) 406 The Provincial Insolvency Act makes no distinction between a decree on mortgage and a decree on a charge when such charge is antecedent to the suit i e the charge created by will and not a charge created for the first time by the decree The procedure that is followed for a decree on charge is the same as in the case of a decree on mortgage But a decree on the footing of a mortgage or charge would not be decree for the payment of money within the meaning of s 6 (e)&(h) of the Provincial Ins Act There is a distinction between a decree based purely on personal claim and a decree based on mortgage or charge antecedent to the suit In the one case the essential relief claimed in the suit would be a personal relief and in the other the essential relief would be sale of property So that what is contemplated by the expression in execution of decree for payment of money is a decree capable of execution by the arrest of the person or against the general estate of the person against whom the decree is made Where a particular property is hypothecated for a debt either by mortgage or charge the relief can only be against that particular

In such a case the money and a sale in
 eny *Venkata Rama*
 36 45 L W 260 170

1 C 65 1937 A I R (M) 433 In *Kamla Bai v Chatra Prasad* 1 L R 1938 (All) 84 1937 A W R 1111 1937 A L J 1221 it has been held that the sale of property in execution of a decree passed

against the judgment debtor in his capacity as legal representative of the deceased original debtor and not imposing any personal liability on the judgment debtor does no amount to an act of insolvency within the meaning of section 6 (e) of the Provincial Insolvency Act. The phrase decree for payment of money in section 6 (e) means a decree for money such that the judgment debtor is personally liable for the decretal amount.

Starting point of limitation. According to sec 6 clause (e) an act of insolvency occurs when the property is sold which means the date of sale and not the date of confirmation of sale and when the petition is beyond three months from the date of sale it is barred. *Kanai Lal Nandy v Tinkari De* 57 CLJ 148 37 CWN 535 145 1C 429 1933 AIR (C) 564. As has been observed in *Lal Chand Choudhri v Bogha Ram* 40 PLR 841 1938 AIR (L) 819 execution sale is complete when the property is knocked down to the highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. Therefore an act of insolvency in sec 6 (e) occurs when the property is sold and not when the sale is confirmed. Hence a petition by a creditor must be made within three months from the date of sale and not that of confirmation.

Clause (f), Petition to be adjudged insolvent

This corresponds to sec 1 (f) of the Bankruptcy Act of 1914 as amended by the Bankruptcy (Amendment) Act 1926 which runs as follows. If he files in the Court a declaration of his inability to pay the debts or presents a bankruptcy petition against himself. The explanation to section 7 of the Provincial Insolvency Act lays down. The presentation of petition by the debtor shall be deemed an act of insolvency within the meaning of this section (sec 7) and

of adjudication. A

put by the debtor

Das v Gopikrishna

6) provides that the presentation by the debtor of a petition to be adjudged an insolvent is in itself an act of bankruptcy and *prima facie* the debtor is entitled to an adjudication. See also *Udaichand Mattu v Ram Kumar Khara* 15 CWN 213 12 CLJ 400 *Ponnu Chetti v Narayanaswami Chetti* 14 MLT 304 25 MLJ 445 21 Ind Cas 293. The mere fact of the presentation of a petition for

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for insolvency after annulment of a previous adjudication constitutes a fresh act of insolvency entitling a creditor to present an application for adjudication of the debtor as an insolvent. *Jamaldin v Bishambar Dial* 109 1C 587 1929 AIR (L) 72.

When a person makes an application to be adjudicated an insolvent, it is the filing of that application which is an act of insolvency and not the fact of the application remaining on the file of the Court, *Kanai Lal Nandy v. Tinkari De*, 57 CLJ 148 37 CWN 535 145 IC 429 1933 AIR. (C) 564

Clause (g) ; Notice of suspension of payment.

This corresponds to section 1 (h) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts" The condition precedent to a debtor being adjudicated an insolvent on the petition of a creditor is that the debtor should be alleged and proved to have committed one or the other acts of insolvency set out in section 6 of the Act. The mere fact that a person admits that he owes money to a creditor, and also admits that he is unable, there and then, to pay the amount cannot possibly be regarded as the commission of an act of insolvency as defined by the various clauses in sec 6, *Veeraya Chetty v. Doraiswamy Reddiar* (1928) AIR (M) 393. It is clear from sec 6, cl (g) that it is not the suspension of payment but the act of giving notice of suspension of payment that affords a cause of action, and provides the starting point from which limitation for presenting petition for adjudicating a person insolvent is to be computed, *Re Alice Alderson Exp Jackson*, (1895) 1 QB 183, *Mulomal Veriomal v. Sumarkhan*, (1928) AIR (S) 177. A debtor does not commit an act of insolvency by merely suspending payment of his debts, under sec 6 (g) a debtor commits an act of insolvency only if he gives notice to any of his creditors that he has suspended payment or that he is about to suspend payment of his debts due to his creditors generally and the time place and particulars of the notice should be accurately specified, *A M M Murugappa Chettyar v. N C Gallara*, 12 Rang 150 1934 AIR (R) 87.

A notice by a debtor to his creditors that he had suspended payment of debts will be a sufficient act of insolvency to justify a petition under sec 6 (g) provided the act occurred within 3 months of the presentation of the petition *Banarassi Dass v. Baldeo Das*, 82 Ind. Cas 742 (1925) AIR (O) 222. Though a mere intimation to a creditor that the debtor is insolvent is not an act of insolvency, the giving of notice to a creditor of an intention to suspend payment is an act of insolvency, *Mercantile Bank v. Official Assignee, Madras*, 39 Mad 250 39 IC 942. Although a bare declaration of inability to pay debts does not amount to an act of insolvency, it was held on the authority of the cases of *Clough v. Samuel*, (1905) AC 442 and *Crook v. Morley*, (1891) AC 316, that where the declaration is accompanied by such circumstances and is in such a context that the impression produced upon the mind of the creditor receiving it is such as to amount to a statement that the debtor is going

against the judgment-debtor in his capacity as legal representative of the deceased original debtor and not imposing any personal liability on the judgment-debtor does not amount to an act of insolvency within the meaning of section 6 (e) of the Provincial Insolvency Act. The phrase "decree for payment of money" in section 6 (e) means a decree for money such that the judgment-debtor is personally liable for the decretal amount.

Starting point of limitation According to sec 6, clause (e) an act of insolvency occurs when the property is sold which means the date of sale and not the date of confirmation of sale, and when the petition is beyond three months from the date of sale it is barred, *Kanai Lal Nandy v Tinkari De*, 57 CLJ 148 37 CWN 535. 145 IC 429; 1933 AIR (C) 564 As has been observed in *Lal Chand Choudhri v Bogha Ram*, 40 PLR 841 1938 A.L.R. (L) 819, execution sale is complete when the property is knocked down to the highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. Therefore an act of insolvency in sec. 6 (e) occurs when the property is sold and not when the sale is confirmed. Hence a petition by a creditor must be made within three months from the date of sale and not that of confirmation.

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of adjudication" A put by the debtor - *Das v Gopikrishna* the Act (now sec of a petition to be ruptcy, and prima facie the debtor is entitled to an adjudication" See also *Udaichand Maiti v Ram Kumar Khara*, 15 CWN 213 12 CLJ 400, *Ponnu Chetti v Narayanaswami Chetti*, 14 M.L.T 304 25 MLJ 445-21 Ind. Cas. 293. The mere fact of the presentation of a petition for adjudication is enough on which to make an order for adjudication, *Das v Gopikrishna*, 15 CWN 213 12 CLJ 400, 12 CWN 177. A debtor commits an act of insolvent. It does not of a fresh petition for insolvency after annulment of a previous adjudication constitutes a fresh act of insolvency entitling a creditor to present an application for adjudication of the debtor as an insolvent, *Jamaldin v. Bishambar Dial*, 109 IC 587 1929 A.I.R. (L.) 72.

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suspend the payment of his debts it amounts to an act of insolvency. Where a debtor in reply to demands of certain of his creditors, stated that he had placed all his title deeds in the hands of a third person for the sale of his properties and for the discharge of all his debts it was held that there was in act of insolvency justifying the adjudication of the debtor as insolvent, *Ramaswami Chettiar v Muthualuswami Chettiar* 109 IC 83 1928 AIR (M) 903

What constitutes notice of Suspension of payment.

The notice contemplated by clause (g) is a notice to be intentionally given by the debtor but the intention of the debtor can best be gathered from the circumstances under which the communication is made, In the matter of *David Sassoon & Co Ltd*, 95 IC 453 1926 AIR (S) 246 What is required under sec 6 (g) is that a communication proceeding from the debtor made seriously, should give the creditor or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment, merely suspending payment is not an act of insolvency, *Maung Sein Nyun v Dawson Bank Ltd* 1931 AIR (Rang) 317 Where a debtor sent a registered post card bearing signature to one of his creditors stating that there were so many debts that he was not able to make payment and it was useless for the creditor addressed to continue to make demands and that he might do whatever he liked in the matter, it was held that the post card amounted to an act of insolvency within the meaning of s 6 (g) of the Act. *L Pearey Lal v Mohammad Salamat Ullah Khan* 1LR 1937 (All) 616 1937 ALJ 491 1937 AWR 413 170 IC 535 1937 AIR (All) 435

The Provincial Insolvency Act does not prescribe any form of words for the notice and it is sufficient if, having regard to all the surrounding circumstances the words used are such as convey to an ordinary businessman the impression that the debtor has no intention to pay his debts and has suspended or is about to suspend payment. Where a statement by the debtor that he is unable to pay his debts is accompanied by an expression of an intention on his part to deal with his creditors collectively and not individually, it amounts to a notice to suspend payment. In re *Scott Ex parte Scott*, (1896) 1 QB 619 65 SLJ & B 465 74 LT 555 44 WR 587 *Gurmukh Singh v Ram Ditta Mal*, 112 IC 132, *Banarsi Das Kapur Chand v Man Chand Radha Kishan*, 34 PLR 43 141 IC 62 1933 AIR (L) 113 When during the temporary absence of the proprietor of a firm, the manager, for the time being closed the business and put up a notice under the signature of his pleaders requiring the creditors to communicate with the pleaders, it was held that these acts are sufficient to constitute an act of bankruptcy within cl (d) (ii) and (iii) and cl (g) of sec 6

of the Act *In re Hiralal Shrinaram* 97 IC 446 (1927) AIR (S) 18 In *Veerabrahmam v Jagannadhacharyulu* 42 LW 427 69 MLJ 184 1935 MWN 551 158 IC 966 1935 AIR (M) 589 the debtors who had become involved in debts sold their property in order to meet their creditors and offered to make a rateable distribution among their unsecured creditors of the balance of the sale proceeds after satisfying a mortgage debt charged on the property. The intimation given to one creditor was to the effect that they would not pay anything to him unless he agrees to accept in full settlement the small amount which they offered. It was held that the intimation in question amounted to a notice that the debtors had suspended or about to suspend payment of their debts and that it amounted to an act of insolvency within the meaning of s 6 (g) of the Provincial Insolvency Act.

The notice may be oral and need not be in writing *Ex parte Nicholl* 13 QBD 469 *Gurmukh Singh v Ram Ditta Mal* 112 IC 132 1929 AIR (L) 136 A letter written without prejudice by a debtor to a creditor giving notice of suspension is admissible in evidence to prove the act of bankruptcy *Re Dainty Ex parte Holt* 2 QBD 116 When a judgment debtor brought before the Court at the instance of the judgment creditor under section 55 C P C intimates to the Court through his counsel that he intends to apply for adjudication as an insolvent within one month and asks for an order of release under sub section (4) he gives notice to that creditor although the latter may not be present in person and be only represented by counsel that he is about to suspend payment of his debts. As such he commits an act of insolvency on which a petition in insolvency can be filed against him by another creditor *Maharaj Kishore Khanna v The Netherlands Trading Society* 33 CWN 401

Notice must be of suspension of entire debt

All oral notice under sub-section (g) is sufficient but it must be a notice in an unambiguous decisive form made in a definite form of words to a particular creditor at a definite time that the debtor has suspended payment of his debts. Suspended payment of his debts in this connection means entire suspension of his whole indebtedness or as is colloquially said of a bank notice to stop payment is notice of general intention to stop payment to every body *Narayan Das v Chumman Lal* 25 ALJ 219 (1927) AIR (A) 266 In order to bring a case within sec 6 clause (g) it is necessary to establish such facts as indicate that the debtors are not merely refusing to pay particular creditors but that they have declined to pay any creditor or deal with their creditors as a body *Firm Hardayan Dass Johar Mall v Jagannath Marwari* 15 Pat LT 461 152 IC 655 1934 AIR (Pat) 576 Accord it has been held in *Nagar Mirdah v Gokuleshuar Biswas* 41 CW 349 that the suspension of the payment of debt mentioned

sec 6 cl (g) of the Act contemplates the suspension of the payment of the entire debts of a person and not a refusal to pay a particular debt due to a particular person

Whether notice given by a debtor is sufficient or not must depend on the facts of each case. A request by the debtor to his creditors that they should not press for payment till such time as the market improved and in the alternative an offer to settle at a certain percentage is sufficient notice under sec 6 (g). In the matter of *David Sassoon & Co Ltd* 95 IC 453 1926 AIR (S) 246. If the word used do not fairly bear a meaning which would bring them within this paragraph the effect produced on the mind of the hearer will not alter the case. Thus it was held no act of bankruptcy where the debtor said to the petitioning creditor "If you do not continue to supply me with bricks I shall not be able to carry on my contracts and shall have to stop payment." *Re Phillips* 76 LT 531.

The test for determining whether a debtor gave a notice that he ds used by him debtor intended re minds of the nd unconditional ould understand for a settlement the debtor had no other alternative but to suspend payment. Each case has to be decided on its particular facts and it is for the Court to decide what is the natural meaning of the words used. The Court is not concerned as to what the debtor's intention was but what effect the communication had on the minds of the persons to whom it was addressed. The fact that the hearer jumped to illogical conclusion is not enough. *Duarkadas Jasher Mall v David Sassoon & Co Ltd* 121 IC 865.

To comply with sec 6 (g) of the Act notice may be oral or in writing but it must be notice deliberately given and must amount to an intimation to the creditors that the debtor intends to suspend the payment of his debts due to all his creditors. Mere intimation of inability to pay his debts does not ordinarily amount to such a notice though taking with other circumstances it may do so. The notice must be such that the creditors may be led naturally to infer that the debtor intends to suspend the payment of his debts. *Harkishan Lal v Peoples Bank of Northern India* 14 Lah 117. The proof of the commission of an act of insolvency must be strict and precise. Where it is alleged that a debtor has given notice that

specified and deliberate act on the part of the debtor and the suspension actual or intimated must apply to all the creditors. It is something different from a notice of inability to pay his debts. In

M S M M Chettyar Firm v P Mudaliar, 11 Rang 96, the petitioning creditor demanded from the debtor the immediate payment of a mortgage debt. In reply, the debtor admitted the debt, but prayed for time to pay the debt when better trade conditions prevailed and invited the creditor's assistance to enable him to carry on his business in the meantime. It was held that the letter was not a notice of suspension of the payment of debt within sec 9 of the Presidency Towns Insolvency Act.

What is not notice.

Mere suspension of payment without giving notice to creditors that payment is suspended is not an act of insolvency. "A man may suspend payment, but if he does not give notice to his creditors then that is not an act of insolvency. Again, a man may declare his inability to meet his creditors, but, unless he declares his inability to one of his creditors, that is not a notice that he has suspended, or is about to suspend, repayment of his debts," *Vasanji Mulji v Mulji Ranchhod Ved* 28 Bom L R 677. The fact that the debtor has called a meeting of the creditors and offered a composition is not sufficient notice, *Re Walsh Ex parte the Trustee*, (1885) 2 Mor 112. Nor does a statement by his solicitor that receiving order will be applied for immediately constitute a sufficient notice, *Trustees of Lord Hill v Roulunds* (1886) 2 Q B 124. Nor does a communication to a creditor by a solicitor that he had received instructions from the debtor to issue circular letters to creditors amount to a notice of suspension. *Re Morgan Ex parte Turner* (1915) 2 Mans 508. A speech by the debtor in a creditor's meeting proposing appropriation of the insolvent estate in satisfaction of the creditors' debts is not necessarily an act of insolvency, *Ladha Ram v Lurind* 34 P L R 682 144 1 C 276 1933 A 1 R (Lah) 319.

Estoppel by Agreement.

A debtor had agreed with his creditor to treat the failure to pay any instalment due under a mortgage as a suspension of payment within the meaning of sec 9 of the Presidency town Insolvency Act (corresponding to s 6 of the Pro Ins Act). On default, a petition for adjudication was presented stating *inter alia* that the debtor had committed an act of insolvency under s 9 (6) in that he had suspended payment as per the terms of the above agreement. On the question whether the debtor was estopped from raising any contention to the contrary it was held that (i) the law of estoppel does not operate and cannot operate to prevent the provisions of the Insolvency Act having effect (ii) it is an act of insolvency if the debtor give notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts generally, it is not enough if the notice is with respect to a particular debt (iii) what the Court has to consider is whether an act of insolvency as defined

by the Act has been committed and in deciding the question it can only look to the provisions of the Act. The agreement between the parties cannot be deemed to constitute the non-payment an act of insolvency. *Munusami Naidu v Rangachari*, 1 L R 1938 (M) 123

Clause (h) ; Imprisonment in execution of decree

The arrest or the imprisonment of the judgment debtor is an act of insolvency on which a debtor can be adjudged insolvent, *Vide* sec 10 (1) (b), *Infra*. The clauses (e) and (h) in this section are intended to enable a creditor to procure an act of insolvency, in order to compel the debtor to commit an act of insolvency, if he wants them, the advantages

clause (e) viz to have a man's decree for the payment of money. Another way in which a man may be forced into the Insolvency Court is under cl (h) if he is imprisoned in execution of the decree of any Court for the payment of money, *Luchmichand v Bepin Behari*, 32 C W N 716. The act of insolvency of a person commencing in his being arrested and imprisoned in execution of a decree continues throughout the period during which he remains in prison, *Karam v Jhanda*, 131 I C 112 1931 A I R (Lah) 112. Under sec 55 C P C, where the judgment debtor is arrested in execution of a money decree for payment of money and the judgment debtor expresses his intention to apply to be declared an insolvent within one month, the Court may release him from arrest.

Explanation ; Act of an agent.

As regards the jurisdiction of the Courts to adjudicate persons insolvent upon acts of insolvency committed by their agents there stands in England and in 522 it was held that an or default and could not be committed through an agent which the debtor had not authorized or of which he had no cognisance. This principle was followed in *Cooke v Vogeler*, (1901) A C 102, a case of a foreigner domiciled and resident abroad having business in England. But in both of these decisions it was conceded that if the law had been different the Courts would have had to take a different view. In India it has been expressly enacted as an explanation to section 9 of the Presidency Towns Insolvency Act and sec 6 of the Provincial Insolvency Act that for the purposes of those sections which deal with acts of insolvency committed by a debtor the act of the agent may be the act of the principal even though the agent have no specific authority to commit the act, *Kalianji v The Bank of Madras*, 39 Mad 693.

It was held in *In the matter of Brij Mohan Dobay*, 2 C W N 306,

that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal. 'The acts of insolvency of an agent are the acts of insolvency of a principal. A trader residing out of the jurisdiction of the High Court but carrying on business at Calcutta by a gomasta can be adjudged an insolvent if his gomasta stops payment and leaves his usual place of business or does any act which if done by the trader himself would have rendered him liable to be adjudicated insolvent,' In *Re Horukchand Golicha* 5 Cal 605 6 CLR 282. The Privy Council in *Kasturchand v Dhanpat Singh* 23 Cal 26 (P.C) which was an appeal from *In re Dhanpat Singh* 20 Cal 771, observed 'the Statute should be interpreted with reference to the facts of Indian life. And it is a question in each case whether the gomasta occupied such a position that the owner must stand or fall by his act so that his fraud or his flight shall by imputation be the purpose of bringing the case within the statute of insolvency. Their Lordships agree with the Judges who held that the statute admits of application to such cases and that to exclude it may lead to confusion and injustice in many cases. They are by no means prepared to say that *Horuk's Case* 5 Cal 605 was wrongly decided though the position of the gomasta there is not stated so fully as they would think desirable if the case was before them for decision'. See also *In the matter of William Watson* 31 Cal 761 8 CWN 553 where the agent was deemed to occupy such a capacity.

Act of insolvency of a firm

Section 26 of the Indian Partnership Act IX of 1932 lays down 'Where by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm or with the authority of his partners loss or injury is caused to any third party, and a penalty is incurred the firm is liable therefor to the same extent as the partner. It therefore follows that a notice suspension of debt by one partner is an act of insolvency.' In *Debendra Chandra Sikdar v Purusottam Das*, 55 Ind 1, a firm can be adjudicated insolvent if the partner committed an act of insolvency. The criterion is whether the partner committed the act of insolvency in his capacity as a partner of the firm for its behalf or in his private capacity, whether or not the act of insolvency is in point of fact the act of the firm as such. In the former the act of insolvency is of the firm—Partnership, page 432.

Where the debt is due by the partners or by a partner and the creditor may obtain an adjudication against all or any of them, and any one or more of the partners obtain an adjudication of insolvency. It is clear that whether nominal or dormant and even a person who is out as a partner, but is not a partner in fact,

insolvent. The reason is that all of them are personally liable—*Mayne* 442 *Ghanshamdas v E D Sassoon & Co* 93 IC 448 1926 AIR (S) 90. Sections 249 and 250 of the Indian Contract Act 1872 provided that each partner is liable for all the liabilities of the firm but does not say that the partners are liable jointly and severally. Section 43 of the Indian Contract Act made joint promisors generally liable jointly and severally and this principle has been given effect to in section 25 of the Indian Partnership Act IX of 1932 which runs as follows: Every partner is liable jointly with all the other partners and also severally for all acts of the firm done while he is a partner.

In order to sustain a joint adjudication of insolvency against two or more persons it is necessary that some act of insolvency should have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit. The act of a partner who gives notice that his firm has suspended or is about to suspend business is *prima facie* a joint act on behalf of all persons who are liable as partners in the firm unless they can show that they are solvent and able to pay the debts of the firm for which they are liable. In such a case a petitioning creditor is not required to prove the express authority of the partner on behalf of the other partners to give notice of suspension. In the matter of *David Sassoon & Co* 100 IC 389. The presumption always is that a partnership continues so long as the business continues but it is possible for a partner to separate himself from his co partner by an unequivocal expression of intention to dissolve at once just as a coparcener can separate from his family. A person who is precluded by reason of the provisions of section 264 of the Contract Act (now sec 45 of the Indian Partnership Act) from contending that he was not a partner in a firm can not plead that the other partner had no authority to bind him by an act of insolvency committed by him. *Dwarkanadas Jaiher Mall v David Sassoon & Co Ltd* 121 IC 865.

Two persons were partners in a trade. A decree was obtained against the partnership and the separate property of one of the partners was attached and brought to sale and an application was made for adjudication of the firm as insolvent. It was held that sub-section (e) refers only to the property of the person against whom an application for adjudication is made and it cannot be said that the separate property of one partner becomes the property of the other by reason of their being partners. So the application for adjudication of the firm was dismissed. *Ram Sankara Aiyar v Firm of V K R Krishna Aiyar* 51 MLJ 326 24 LW 390 1926 MWN 977 97 IC 393 1926 AIR (M) 976. A debt owing by one partner only will not support a joint adjudication against

him and his co partners *Exparte Clarke* 1 Der & Ch 544 But a debt owing by all the partners of a firm is sufficient to support an application *Exparte Battams* (1900) 2 Q B 698

When the members of a joint Hindu family trade together and are partners in a joint firm they are all personally liable for the debts of the firm and are liable to be adjudicated insolvents in respect thereof. Where acts of insolvency are established against a person and decrees are obtained against his share of the family property it is open to the Court to adjudicate him insolvent although he cannot be arrested in execution of the decree *Somasundaram Chettiar v Raja Kannoo Chettiar* 118 IC 494 In order to show that certain persons are partners of a firm it must be proved by evidence that the persons alleged to be partners have agreed to combine their property labour and skill in the business and to share the profits and losses in the same. From the mere fact that a person carrying on business is a coparcener in a joint Hindu family it does not necessarily follow that all his coparceners are his partners in that business *Vadilal v Shah Khushal* 27 Bom 157 *Dinajpur Trading and Banking Co Ltd v Probash Chandra Sen* 56 CLJ 440 In *Chanahalu Sita Reddi v Official Receiver Bellary* 1936 MWN 1040 44 LW 651 71 MLJ 730 166 IC 80 1937 AIR (M) 13 three brothers formed a partnership firm. The eldest brother was in complete charge of and had the full and exclusive control over the business of the firm. The eldest brother was adjudicated insolvent and subsequently along with him the remaining two brothers were also adjudged insolvents. It was held that the eldest brother became the agent of his two brothers who became his principals within the meaning of s 6 Expl. The acts of insolvency committed by the eldest brother (agent) must therefore be deemed to be the acts of insolvency of the two remaining brothers (principals) and they are rightly adjudged insolvents along with him.

It is fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed or which has been committed by his agent under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorised by the principal against whom an order of adjudication is sought. Whether the act of the agent can be so treated depends upon the circumstances of the case. In *Abdul Sattar v V E A R M Chettyar Firm* 10 Rang 215 138 IC 189 1932 AIR (Rang) 101 one of the partners who had been adjudged an insolvent sent a notice that the firm had suspended payment of its debts. It was held that as there was no evidence that the other partner had either expressly or impliedly authorised the insolvent partner to send such a notice it could not be treated as an act of insolvency by that partner. But under sec 34 of the Indian Partnership Act IX

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1932 a partner in a firm who is adjudicated insolvent ceases to be a partner on the date on which the order of adjudication is made and he has no authority to bind the other partners by this act. So henceforward no act of insolvency of an insolvent partner can bind the other partners. Where all the partners of a firm but one have been adjudicated insolvents the firm is dissolved and an agent of the firm ceases to be the agent of the firm and has no authority after the date of adjudication to commit any act of insolvency as agent of the partners. *A M M Murugappa Chettyar v N C Gallara* 12 Rang 150

Acts of Insolvency of Manager or Karta of Joint Hindu Family

The explanation to s 6 provides that the act of an agent may be the act of the principal. Although the manager of a joint Hindu family can act on behalf of the family the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family speaking generally as an act committed by other members of the family also. It follows that the joint Hindu family as such cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one creditor's petition in case the joint act of insolvency can be brought home to them. Minors must however be excluded in any case from insolvency. *Tahal Mandar* ILR 16 P 724 172 IC 24 1937 AIR (P) 665

Effect of acts of insolvency

Under sec 37 of the Bankruptcy Act 1914 as amended by the B A Act 1926 the bankruptcy of a debtor whether it takes place on the debtor's own petition or upon that of a creditor or creditors shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. In India under the Provincial Insolvency Act the effect of sub-secs (2) and (7) of sec 28 is that while no vesting of the property in the Receiver takes place until the order of adjudication is made and it is the order of adjudication which vests the property nevertheless by a legal fiction the vesting of the property of the insolvent in the Receiver must be

deemed to have taken place when once an order of adjudication has been made at the date of the presentation of the petition. In other words the commencement of the insolvency *Rakhal Chandra Purkait v Sudhindra Nath Bose* 46 Cal 991 24 CWN 172. The effect of an act of bankruptcy besides enabling a creditor to present a petition grounded on it is to prevent all persons who have notice that the act has been committed from entering with the debtor into transactions that will be binding as against the creditors in the event of the debtor's bankruptcy—*Ringuood*

Petition

7 Subject to the conditions specified in this Act, if a debtor commits an act of insolvency an insolvency petition may be presented either by a creditor or by the debtor and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent

Petition and
adjudication

Explanation—The presentation of petition by the debtor shall be deemed an act of insolvency within the meaning of this section and on such petition the Court may make an order of adjudication

Review

This is section 5 of Act III of 1907 and section 3 of the Bankruptcy Act 1914 which runs as follows. Subject to the conditions hereinafter specified if a debtor commits an act of bankruptcy the Court may on a Bankruptcy petition being presented either by a creditor or by a debtor make an order in this Act called receiving order for the protection of the estate

How bankruptcy proceedings are begun in England

In England under sec 2 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act of 1926 a bankruptcy notice in the prescribed form requiring the debtor to pay the judgment-debt and stating the consequence of non compliance with the notice is first served upon the debtor. Proceedings are generally commenced by the issue of a bankruptcy notice and making the debtor by not complying with the terms commit an act of bankruptcy, and when that or any other act of bankruptcy has been committed, it remains for the prescribed period for some creditor or creditors to take the necessary steps by founding a petition for a receiving order on the act of bankruptcy committed by the debtor

How insolvency proceedings are begun in India

The petition for insolvency of a debtor may be presented either by a debtor or by a creditor (sec 7) under certain circumstances (secs 9 and 10) and the petition must be presented in the District Court (sec 11) within the jurisdiction of which the debtor ordinarily resides or carries on business or personally works for gain and if the petition is in proper form (secs 12 and 13) the Court shall pass a vesting order by which from the date of the presentation of the petition all the properties of the insolvent would vest in the Receiver (sec 20) and thereafter fix a date for hearing (sec 19) and issue notices and advertisements and on the date fixed for hearing the Court on being satisfied that the debtor is unable to pay his debts (sec 24) shall make an order of adjudication (sec 27) or shall dismiss the application (sec 25) if it is not satisfied of his right to present the petition. Therefore the first step which has to be taken by a person whether a creditor or a debtor himself who seeks to have the debtor's estate administered for the benefit of the creditors according to the bankruptcy laws is a petition to the Court which has bankruptcy jurisdiction over the debtor.

Receiving order

In Act III of 1907 the Legislature departed from the provisions of the English Bankruptcy Act under which in the first instance a receiving order is made which is subsequently followed by an order of adjudication. In the Indian Act the law is brought in a line with the Presidency Towns Insolvent Act, 1872, in that the Court when making an order admitting the petition may and where the debtor is the petitioner ordinarily shall appoint an interim Receiver of the property of the debtor or any part thereof.

Petition for adjudication must be subject to the conditions specified in the Act

The conditions referred to are the conditions which must be fulfilled before a debtor or a creditor as the case may be is entitled to present the application. The conditions on which a creditor may petition are set out in section 9 and those on which a debtor may petition are set out in section 10 of the Act. A debtor or a creditor is not entitled to present an application for adjudication without the fulfilment of those conditions even assuming an act of insolvency has been committed by a debtor.

Petition must allege acts of insolvency

No one is to be adjudged an insolvent unless he is proved to act as insolvent as defined in the Act.

Prasad 1935 A. L. J. 487 1935
AIR (All) 416 An act of

insolvency, as defined in that section, must not only be set out in the petition for adjudication but strictly proved. If an act of insolvency, as defined in sec 6, is not so set out in the petition, the petition is incompetent. It is not correct for a creditor to make various allegations of acts which are not acts of insolvency as defined in the section, and then endeavour to prove by evidence that as a matter of fact, an act of insolvency as defined in sec. 6 had been committed. In *Muthu Chettiar v Nagindas*, 28 Bom L R 680, Macleod, C J, says "In my opinion, it is absolutely necessary, that in application for adjudication of a debtor by a creditor, on the ground that an available act of insolvency had been committed, that available act or acts of insolvency be set out in that section. It is not sufficient to allege that such an act has been committed, and then endeavour by means of evidence to prove that certain available acts of insolvency have been committed." In *Debendra Chandra Sikdar v Pirusottam Das*, 55 Ind Cas 186 the available act of insolvency was a transfer with intent to delay or defeat creditors. Another act of insolvency was proved during the hearing namely that a senior partner of the firm, had given notice that the firm, had suspended or was about to suspend payments. That was not set out in the petition as an act of insolvency. It was held that it could not be used for the purpose of getting the order but it could be used for showing whether or not these transfers made so shortly before the petition for insolvency were made for the purpose of defeating or delaying the creditors. For other conditions, vide secs 9, 10 and 13 and Notes thereunder.

Petition by a creditor.

Generally speaking any person entitled to take proceedings at law or in equity for the recovery of a debt may be a petitioning creditor. The debt due to a petitioning creditor must be payable either immediately or at some future time that is, it must be in existence at the time when the application is made. It must be legally recoverable. A petition for adjudication cannot be founded on a debt already barred by limitation, *Gopalkrishna Ayyar v The Official Receiver of South Malabar at Calicut* 1930 M W N 837 128 I C 879 1930 A I R (M) 998.

The following is an enumeration of some of those who may be petitioning creditors.

(1) *Individual creditors*—Generally speaking, any person who has a right to claim immediate payment of a sum of money and is capable of giving a valid discharge to the debtor may, if other prescribed conditions are satisfied, maintain a bankruptcy petition against a debtor, but there are some cases in which a creditor can present a petition against a debtor, notwithstanding that if the debtor were solvent, the creditor could not demand immediate payment, *Re Raatz, Ex parte Raatz*, (1897) 2 Q B 80.

(2) *Joint creditors*—One of two joint obligees under a bond is not by himself a good petitioning creditor *Brikband v Newsome* (1835) 2 Mont & A 283. But when one of three joint creditors had died, a petition may be presented by two survivors *Re W Tucker, Ex parte J W Tucker*, (1895) 2 Mans 358. One of several persons who is not alone entitled to the benefit of a decree is not entitled to utilize the decretal debt so as to found upon it a petition for adjudication against the judgment debtor. The fact that a suit has been commenced to enforce the bond is not necessarily a bar to an insolvency petition based on the bond *Ananta Kumar v Sadhu charan* 87 I C 751 (1926) A I R (C) 234.

(3) *Sole creditor*—If the debtor has only one creditor that is a point to be considered by the registrar on hearing the petition, but it cannot be laid down as a matter of principle that if there is only one creditor the registrar ought to dismiss the petition. The trustee in bankruptcy may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of bankruptcy. The mere fact that a man has only one creditor is not a sufficient ground for saying that bankruptcy proceeding cannot be maintained against him *Re Hecquard* (1889) 24 Q B D 71.

(4) *Secured creditor*—A creditor who has obtained a decree on the basis of his mortgage charge or lien on the property of the judgment debtor is not thereby precluded from making an application under sections 7 and 9 *Sarbhu Lal v Mahesh Das* 1931 A L J 192 129 I C 557 1931 A I R (All) 224. A mortgagee creditor can bring a petition for adjudication of the mortgagor by valuing his security and deducting its value from the total amount of the debt due to him by the mortgagor *Ko Shue So v R M V E R Chettyar Firm*, 170 I C 942 1937 A I R (R) 189.

(5) *Partners*—In the case of partners one of them may sign the petition on behalf of him self and his co partners even where the firm has been dissolved before the petition is presented *Re Hill* (1921) 2 K B 831. Since the Judicature Acts a partner could present a petition against his co partner for amount ascertained to be due from one partner to another in an action for dissolution of partnership or for an account.

(6) *Incorporated company*—An incorporated company or a corporate body may be a petitioning creditor *Ex parte Dan Raylands* *Re Collier*, (1891) 64 LT 742. The petition must be in the name of the company, and may be signed and verified in the manner as laid down by rules framed under the Act. If it is in liquidation the petition must be in the name of the company and not of the liquidator *Re Winter Bottom* *Ex parte Winter Bottom* (1886) 18 Q B D 446.

(7) *Unincorporated company*—A petition by an unincorporated

company or co partnership duly authorised to sue may be presented in the name of the company by any one of the partners or members of the company (Order XXX, r 1, CPC), and it may be signed by one partner on behalf of the firm, *Bolisetti v Kolla Kottayya*, 44 Mad 810, *Satischandra Addy v Firm of Rajnarain Pakhira & Rasiklal Pakhira* 72 Ind Cas 60 Vide also sec 79 (2) (c) and the New Rules framed thereunder

(8) *Executors*—One of several executors may present a petition in respect of a debt due to the executors *Ex parte Brown*, (1832) 1 Deac & Ch 118

(9) *Trustees*—A person to whom a debt is due as trustee may present a petition in certain cases, for example, when the beneficial owner is under disability *Ex parte Quelley, Re Adams* (1878) 9 Ch D 307

(10) *Bankrupts*—An undischarged insolvent can present a bankruptcy petition in respect of debts due to him which his trustee either does not or cannot claim e.g. salaries due to him *Kisson v Hardwick* (1872) L R Ch Prac 473

(11) *Husband*—A husband cannot petition alone in respect of a debt partly due to him in his own right and partly due to his wife *dum sola Rumsey v George* 1 M & S 176, or in respect of a debt due to her as executrix *Ex parte Mogg* 2 Gl & J 397

(12) *Married woman*—A married woman can in certain cases sue in her own name and it would seem that in all cases where she can do so she can be a petitioning creditor *Married Women's Property Act 1882* sec 1 corresponding to *Married Women's Property Act III of 1874* sec 7

(13) *Infant*—It has been decided in *Ex parte Broklebank* 6 Ch D 358 that an infant is entitled to enforce the payment of a debt due to him by means of proceedings in bankruptcy

(14) *Surety*—A surety cannot petition against a co surety for an amount claimed as contribution until he has himself paid more than his proportion of the debt due to the principal creditor, provided that the co surety has not been released by the creditor, *Ex parte Snaddon* (1881) 17 Ch D 44

(15) *Aliens*—Aliens and denizens can be petitioning creditors whenever they can sue for the debt, *Ex parte Pascal* (1876) 1 Ch D 509

(16) *Assignees*—An absolute assignment by writing under the hand of the assignor not purporting to be by way of charge only of any debt or other legal chose in action gives the assignee after express notice in writing given to the debtor, all the legal and other remedies for debt etc without the concurrence of the assignor. An assignee who comes within this provision can clearly present petition *Re Steel Wire Co Ltd*, (1921) 1 Ch. 349

Creditors precluded from making petitions.

They are (1) creditors privy to the act of bankruptcy, (2) parties to a composition deed, (3) creditors whose object is to put pressure on a debtor for some collateral or inequitable purpose. A creditor who is a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors cannot rely on the deed as an act of insolvency and apply for adjudication on the basis of the same, *Rukmani v. Rajagopal* 47 M.L.J. 495 1924 M.W.N. 813 : 84 I.C. 281. The question of law argued in this case was that there was a difference between the law in England and in India on the question of the disability of a creditor who assented to a deed of arrangement. The contention was that when sec. 9 now in force (Act V of 1920) was enacted the Indian Legislature had before it the English Act of 1914, but did not choose to enact the clause relating to deeds of arrangements towards the end of sub-section (1) of sec. 4. *Ramesam J.*, in delivering the judgment, held: "we do not see how the addition of a clause in sec. 4 (1) (d) in the English Act of 1914 the effect of which seems to extend the disability to a non-assenting creditor also 'in case where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement' (see sec. 24 of the Deeds of Arrangement Act, 1914 according to which any creditor is prohibited from applying, after the expiration of one month from the receipt of a notice from the trustee under the deed) can affect the law in India. This extension to non-assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected either in England or in India, as to assenting creditors, see also *Kheta Mal v. Chuni Lal*, 2 All. 173 (180)." A consenting party to a deed of arrangement or composition is estopped from filing an application for an order of adjudication, *Bhagwanji v. Raja Sampanji*, 9 Mys. L.J. 1.

Debtors liable to bankruptcy proceedings.

Section 2 of the Bankruptcy Act, 1914 enacted that the expression "debtor" includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him (a) was personally present in England; or (b) ordinarily resided or had a place of residence in England; (c) was carrying on business in England, personally, or by means of an agent or manager; or (d) was a member of a firm or partnership which carried on business in England. Before the enactment of this section it had been held in many cases, e.g., *Ex parte Crispin*, (1873) L.R. 8 Ch. 374; *Ex parte Blain*, (1879) 12 Ch. D. 522 and *Cook v. Charles A. Vogelaar*, (1901) A.C. 102, that the word "debtor" had a limited construction and would only include persons properly subject to the laws of England. Sec. 2 will, therefore, be observed, to have

extended the class of persons who are liable to bankruptcy proceedings

The following are some of those against whom an insolvency petition can be presented

(1) *Aliens and foreigners*—In the case of aliens it was held that a foreigner could only be made subject to the English Bankruptcy law if he committed an act of bankruptcy during his personal residence in England but this limitation has been done away with in cases where any of the conditions named in clauses (b), (c) or (d) of section 2 of the Bankruptcy Act, exists—*Williams*, (13th Ed.), p 36 It would, therefore, appear that under section 11 of the Provincial Insolvency Act, V of 1920, an insolvency petition can be presented against a foreigner to a Court having jurisdiction under the Act in any local area in which the foreigner ordinarily resides or carries on business or personally works for gain

(2) *Minor*—An infant as a rule, is not liable to be made bankrupt either on his own petition or a creditor's, *Jones, ex parte*, (1881) 1 Ch D 109 in respect of a debt even if he carries on a trade and for it obtains goods on credit, *Leslie v Thiel*, (1924) 3 K B 607, nor does it make any difference if he fraudulently makes a representation that he is of full age If one member of a firm is an infant, a receiving order cannot be made against the firm simply, but it may be made

as 607 Ex parte Lovell & Christmas

Beauchamp (1894) 1

Act it has been held that no insolvency petition can be presented against a minor partner, as a minor cannot be adjudicated insolvent, as he is not personally liable, *Sannyasi Charan Mondol v Ashutosh Ghose* 42 Cal 225 22 1 C 836, *Janki Prasad v Girdhari Lal*, 19 1 C 704 16 O C 68, so also in *Jagmohan Narain v Ginish Babu*, 42 All 515 18 A L J 611 58 1 C 557, it has been held that in view of the terms of sec 247 of the Contract Act the adjudication of a minor is illegal, *Re Sital Prasad*, 43 Cal 1157 20 C W N 1065 A person under the age of majority cannot be adjudicated insolvent for failure to pay the debts of a trading firm though he has a right to participate in its property after its obligations are discharged It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which business was carried on *In re Hiralal Sibnaram* 97 1 C 446 1927 A I R (S) 18, *Mahabir Prasad Poddar v Ram Tahal Mander*, 16 P 724

(3) *Lunatic*—Whether a lunatic can be made a bankrupt has always been, and still is [Re *Farnham*, (1895) 2 Ch 799] an open question Lord Eldon seems to have thought that he could be A lunatic cannot at all events commit an act of bankruptcy involving an intent unless during a lucid interval, *Crispe v P Willes*, 467 A lunatic may act by his committee of curator

Creditors precluded from making petitions.

They are (1) creditors prior to the declaration of bankruptcy, (2) parties to a composition deed, (3) creditors whose object is to put pressure on a debtor for some collateral or legitimate purpose. A creditor who is a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors cannot rely on the deed as an act of insolvency in applying for adjudication on the basis of the same. *Rukmani v. Raju* (1924) 47 M.L.J. 495, 1924 M.W.N. 813, 84 I.C. 281. The question of law argued in this case was that there was a difference between the law in England and in India on the question of the disability of a creditor who assented to a deed of arrangement. The contention was that when sec 9 now in force (Act V of 1920) was enacted the Indian Legislature had before it the English Act of 1914 but did not choose to enact the clause relating to deeds of arrangements towards the end of sub-section (1) of sec 4. Ramesam J. in delivering the judgment, held "we do not see how the addition of a clause in sec 4 (1) (d) in the English Act of 1914 the effect of which seems to extend the disability to a non assenting creditor also in case where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement (see sec 24 of the Deeds of Arrangement Act 1914 according to which any creditor is prohibited from applying after the expiration of one month from the receipt of a notice from the trustee under the deed) can affect the law in India. This extension to non assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected either in England or in India, as to assenting creditors see also *Kheta Mal v. Chuni Lal*, 2 All 173 (180)." A consenting party to a deed of arrangement or composition is estopped from filing an application for an order of adjudication. *Bhagwanji v. Raja Sampanji* 9 Mys L.J. 1.

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Section 2 of the Bankruptcy Act, 1914 enacted that the expression "debtor" includes any person whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him (a) was personally present in England, or (b) ordinarily resided or had a place of residence in England, (c) was carrying on business in England, personally, or by means of an agent or manager, or (d) was a member of a firm or partnership which carried on business in England. Before the enactment of this section it had been held in many cases, e.g. *Ex parte Crispin* (1873) L.R. 8 Ch. 374, *Ex parte Blain*, (1879) 12 Ch. D. 522 and *Cook v. Charles A. Vogelaar*, (1901) A.C. 102 that the word 'debtor' had a limited construction and would only include persons properly subject to the laws of England. Sec 2 will, therefore, be observed, to have

extended the effect of the law to bankrupt proceedings.

The following are the conditions under which a petition can be presented.

(1) *Alien and foreigner*—It was held that a foreigner could only be made bankrupt by law if he committed an act of bankruptcy at his personal residence in England but this has been removed in cases where any of the conditions named in clauses (b) (c) or (d) of section 2 of the Bankruptcy Act exist—*Waters* (1911) 11 D. p. 36. It would therefore appear that under section 11 of the Provincial Insolvency Act No. 1020, an insolvency petition can be presented against a foreigner to a Court having jurisdiction under the Act in any local area in which the foreigner ordinarily resides or carries on business or personally works for gain.

(2) *Minor*—An infant as a rule, is not liable to be made bankrupt, either on his own petition or a creditor's. *See* *Ex parte* (1881) 1 Ch. D. 109 in respect of a debt even if he carries on a trade and for it obtains goods on credit. *Leslie v Thiel* (1921) 1 K. B. 607, nor does it make any difference if he fraudulently makes a representation that he is of full age. If one member of a firm is an infant, a receiving order cannot be made against the firm simply, but it may be made against the firm other than the infant partner, *Lovell & Christmas v Beauchamp* (1894) App. Cas. 107. *Ex parte Beauchamp*, (1894) 1 Q. B. 1. So under the Indian Act it has been held that no insolvency petition can be presented against a minor partner, as a minor cannot be adjudicated insolvent, as he is not personally liable, *Sannyasi Charan Mondol v Ashutosh Ghose* 12 Cal. 225 22 I. C. 836, *Janku Prosad v Gurdhan Lall* 19 I. C. 701 16 O. C. 68, so also in *Jagmohan Narain v Girdhar Bahu* 42 All. 515 18 A. I. J. 611 58 I. C. 557, it has been held that in view of the terms of sec. 247 of the Contract Act the adjudication of a minor is illegal, *Re Sital Prosad*, 43 Cal. 1157 20 C. W. N. 1065. A person under the age of majority cannot be adjudicated insolvent for failure to pay the debts of a trading firm though he has a right to participate in its property after its obligations are discharged. It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which business was carried on. *In re Hiralal Sibnarain*, 97 I. C. 446 1927 A. I. R. (S) 18, *Mahabir Prasad Poddar v Ram Tahal Mander*, 16 P. 724.

(3) *Lunatic*—Whether a lunatic can be made a bankrupt has always been an open question and still is. *Re Tarnham* (1895) 2 Ch. 799. Lord Esher seems to have thought that he could be. A lunatic cannot at all events commit an act of bankruptcy involving an intent unless during a brief interval. *Crispe v Leith*, Willes, 467. A lunatic may act by his committee of curator *bonis*,

and the Court will at all events will be for the lunatic's benefit give leave to the committee to file a declaration of inability to pay debts or to prevent a petition. *Re James* (1884) 12 Q B D 332. A liquidation petition could not be signed by a next friend on behalf of a lunatic not so found by acquisition. *Exp Cahen* (1879) 10 Ch D 183. Where a debtor or creditor is a lunatic not so found the Court may appoint a person to act for him (*Bankruptcy Rules* 297)—*Williams* page 38 (13th Ed) see also *Periammal v The Official Receiver of Combarator* 1930 M W N 651.

(4) *Married women*—Section 125 (1) of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 provides that Every married woman who carries on a trade or business whether separately from the husband or not shall be subject to the bankruptcy laws as if she were a *feme sole*, and provision is made by sub sec (2) for applying the procedure by bankruptcy notice to married women who carry on a trade or business. A married woman who has given up or sold her business is nevertheless liable to bankruptcy proceedings if there are any trade debts remaining unpaid the trading not being complete until all the obligations imposed by the fact of trading are performed. *Re Dagnall* (1896) 2 Q B 407. *Worsley* (1901) 1 K B 309. *Re Reynolds* (1915) 2 K B 186.

(5) *Companies*—By section 120 of the Bankruptcy Act 1914 corresponding to sec 8 of the Provincial Insolvency Act a receiving order shall not be made against any corporation or against any partnership or association or company registered under any enactment for the time being in force for the registration of companies—vide Notes under sec 8 supra.

(6) *Firm*—The term debtor in the Insolvency Regulation includes also a firm and a firm can be adjudicated insolvent. *Aslaji Bhimaji v Sunni Lal* 9 Mys L J 222. A partnership has in law no corporate personal existence distinct from that of its individual partners and an order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm. *Herji Jiraj v Valabram Mulji* 25 SLR 422 136 IC 815 1932 AIR (S) 39. The term firm is not applicable to a Hindu joint family business. *Lal hand v M C Boid & Co* 38 CWN 914. *Re Gobindlal Mahata* 39 CWN 275.

(7) *Convicts*—A convicted felon can be adjudicated bankrupt. *Ex parte Grates* (1888) 19 Ch D 1.

Joint petition for Adjudication

In *Kali Charan Saha v Hari Mohon Basak* 24 CWN 461 31 CLJ 206 a case under Act III of 1907 which followed *Saroja Prasad v Ram Sukh* 2 CLJ 318 it was held that a declaration of insolvency could not be asked for in one petition

against several joint debtors. But this view was dissented from in *Boissett Momayya v Kolla Kotayya* 44 Mad 810 40 MLJ 570 1921 MWN 330 29 MLT 288 15 LW 428 63 Ind Crs 916 *Sadasiv v Aiyar J* in delivering the judgment said 'On the

procedure I don't see why against the members of a joint those members have been

guilty of a joint act or joint acts of fraudulent preferences. Section 47 (now section 5) directs the Court to follow the same procedure in insolvency matters as it followed in civil suits. Now, a suit can be maintained by a plaintiff against several defendants where the facts constituting the causes of action are one and the same against all the defendants (Or 1, CPC) *Kalicharan Saha v Harimohan Basak*, merely follows what the learned judge who decided that case considered to be the principles of the decision in *Saroda Prosad Ukil v Ram Sukh*, though they admit that the latter was decided under Ch XX of the Code of Civil Procedure and not under the Provincial Insolvency Act. Turning to *Saroda Prosad Ukil v Ramsukh*, Mr Justice Mookerjee who delivered the judgment of the Bench in that case merely points out several inconveniences which would arise in many cases from entertaining a single application directed against several persons to adjudicate them insolvents and the inconveniences of holding a single trial on such petition. But I think the learned Judge (with all respect) ignores that there would be great inconveniences also in many cases in holding separate trials, when the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency. In such a case it is neither necessary nor desirable to file separate applications for the adjudication of each of the debtors." Following this case it has been decided in *Maung Kye Oh v Arun Chellam Chetti*, 2 Rang 309 84 IC 968, that a single petition in insolvency may be filed under the Provincial Insolvency Act, 1920, against a Burmese Buddhist husband and his wife when they were alleged to be jointly indebted to the petitioning creditor and to have committed a joint act of insolvency. A single petition for the adjudication of several debtors is sustainable if the debtors incurred a joint liability and had committed certain acts of insolvency, *Ram Kishan v Ilam Din*, 130 IC 783 1931 AIR (Lah) 384.

In order to sustain a joint petition against two or more persons it is necessary that some act of bankruptcy shall have been committed by each of them. This may be a joint act of bankruptcy, but it is not requisite that they should have committed a joint act of bankruptcy or that they should all have committed an act of bankruptcy of the same kind, and in order to support a joint petition against all the members of a firm, the acts of bankruptcy

must have been committed with the continuance of the joint debt, and the petition must not be for a joint debt—*Williams on Bankruptcy*, 13th Ed 186 W. If two partners are liable to a creditor under a joint debt and one of them is alleged to have committed acts of bankruptcy during the continuance of the joint debt by making certain alienations with a view to defeat or defraud the creditors of the firm or with the object of giving fraudulent preference, a single petition for adjudging both of them insolvents cannot be deemed to be unsustainable because they have not committed a joint act of insolvency.

The test is, whether, if the application were treated as a suit, the suit would be bad for multifariousness. *Alamuri Punniah v Sagarajee Kasarmal*, 51 M L J 712 1926 M W N 983 991 C 185 1927 A I R (M) 124. There is no legal bar to a single application being made by a creditor for adjudication of two or more persons as insolvents if they are jointly liable on a debt or have committed a joint act of insolvency. The question however whether such an application should be jointly tried and decided will have to be decided on the facts of each case. *Kalu Ram v Girwar Singh*, 31 Punj L R 310 12 Lah L J 96 1930 A I R (Lah) 192. The Calcutta High Court in framing New Rules under section 79 of the New Act V of 1920, has now laid down the procedure where the debtor is a firm. The New Rules 1927 now enable joint creditor to file a single petition against the joint debtors instead of filing separate petitions. *Indice versa*. And in *ultra* High Court in *Satis* 72 Ind. Cas 60, held

that where the debtor is a firm the application for insolvency must be in the name of the firm and must be signed in the manner laid down in Rules 19 22 and 24 framed by the High Court under section 79 of Act V of 1920. For Rules framed by the Allahabad, Madras and Bombay High Courts for adjudicating a firm as insolvent, vide Rules 22 30 28 and 28 of the said High Courts respectively. In *Brojendra Nandan Saha v Nikunja Behari Das*, 39 C W N 104 60 C L J 248 1935 A I R (C) 174 it has been held that a joint petition by several debtors for adjudication as insolvents is not *per se* bad in law, the true test to apply is whether a joint petition would be bad for multifariousness that is to say, misjoinder of causes of action or of parties. It is now well settled that a joint petition for adjudication of several joint debtors is not of itself bad in law. *Maung Hanoot v The Official Receiver*, 14 R 704, *Mahabir Prasad Podder v Ram Tahal* 16 P 724, *Chettyar v Chettyar* 14 R 122.

Fresh petition

In the old Act III of 1907, there was no provision for an application for discharge as is contained in sec 41 of the present

Act, and it was open to an insolvent to apply for discharge whenever he chose to do so. This, however, does not mean that if he fail to apply for that discharge, it would be open to him to apply a second time for an order for adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled. *Ram Das v Sultan Husain Khan* 6 O W N 100 115 I C 107 1929 A I R (O) 149. Where an application for adjudication as insolvent is dismissed for default, a fresh application upon the same facts is not barred. *Ramprasad Bhagat v Mahadeb Lall*, 2 P L T 335 61 Ind Cas 870. The dismissal of first petition for being adjudicated an insolvent for failure to produce evidence does not bar the second petition on the general principles of *res judicata* as there is in the case of former application no trial on the merits, *Hasan Din v Kripa Ram* 1928 A I R (L) 374. But when an application for adjudication is dismissed on merits a fresh application for adjudication is not maintainable, *Abdul Aziz v Habib Mistry* 49 Ind Cas 229. Vide Notes under sec 13 (i). A fresh petition for adjudication is not maintainable against a person against whom an adjudication order has been annulled, on an alleged act of insolvency committed when the previous insolvency was taking operation, *Lachmi Chand v Bepin Behari* 32 C W N 716.

Concurrent Petitions

Under the section when a debtor commits an act of insolvency an insolvency petition may be presented either by the debtor or by a creditor. The question often arises as to whether insolvency petitions by the debtor and by a creditor or by different creditors are maintainable simultaneously or one after another in different Courts having concurrent jurisdiction.

(a) *Petition in High Court and District Court*. It was held in *I Re Manikchand Virchand* 47 Bom 275 that sec 18 of the Presidency Towns Insolvency Act does not confer power on the Commissioner in insolvency to stay insolvency proceedings pending against the insolvent in any other Court. It was also held that a District Court exercising insolvency jurisdiction is a Court of concurrent jurisdiction with the insolvency Court of the High Court and the latter has no power to interfere in proceedings before the District Court. *M A Sassoon and Sons v De* 31 C W N 847. *Sarat Chandra Pal v Barlow* 15 (F B). Notwithstanding sec 36 which provides that in a case in which an order of adjudication has been proved to the Court by which such order was made and that the property of the debtor could be distributed by such other Court, the Court "may adjudge or stay all proceedings thereon," it

the Privy Council in *Sasti Kinkar Bamerjee v. Hursookdas Chogmull*, 31 C W N 1002, that "a previous adjudication by a District Court does not debar the High Court to make a further adjudication." With a view to invest the Original Side of the High Court with powers to stay insolvency proceedings in District Courts and to annul the order of adjudication if any made by them, Act X of 1930 has been passed adding sec 18A to the Presidency Towns Insolvency Act which provides *inter alia* that The Court (i.e. the High Court), may at any time after the presentation of an insolvency petition stay any proceedings against the debtor in any Court subject to the superintendence of the Court and may at any time after the making of an order of adjudication annul an adjudication against the debtor made by any such Court.

(b) *Petitions in different District Courts* There is no provision in the Provincial Insolvency Act which bars concurrent petitions in two District Courts. Section 77 lays down that "all Courts having jurisdiction in insolvency shall act in aid of and be auxiliary to each other in all matters of insolvency." And section 36 provides that "if, in any case in which an order of adjudication has been made it shall be proved to the Court by which such order was made that insolvency proceedings were pending in another Court against the same debtor, and that the property of the debtor could be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon." The case of a firm having branches at Rawalpindi, Delhi and other places is referred to the District Court to be adjudicated as insolvent.

for adjudicating them insolvent

for transfer of the Delhi case

the application to the Court at Rawalpindi was prior in time, under the peculiar circumstances of the case, it was proper to allow the proceedings to continue in both the Courts, *Kedarnath v. Firm of Duarkadas Budhradas*, 109 IC 648

Court may make an order.

On hearing of the petition for adjudication under section 10 of Act III of 1907 (now section 27), the Court decides whether or not the debtor's estate is to be administered for the benefit of the creditors under the Act by one or other of the methods prescribed by the Act, i.e., adjudication, composition or a scheme of arrangement. What the Court has to be satisfied with is that the petitions fulfil the conditions mentioned in sections 9 and 10 of the Act and nothing more. In *Teja Singh v. Balwant Singh* 1930 AIR (L) 16 A presented an application that he be adjudicated an insolvent. The District Judge dismissed his application on the ground that A had some lands which he transferred to his sons but over which he still exercises rights of ownership, and further that he had not

mentioned this land in the schedule of assets. It was held that the application should be granted and that the District Judge after declaring the applicant insolvent could have taken steps to annul the transfer of land. When an application is made by a creditor under s 7 of the Act the Court is bound to adjudicate upon the facts stated in the application and on the facts if established grant the proper ruling to the applicant. The application cannot be rejected *in limine* on the ground that it was made to harass and coerce the debtor. *Mahabir Prasad v Ram Tahal* 16 P 724

Explanation, Petition by debtor is an act of insolvency

This is sec 6 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926. According to sec 1 (1) (f) of that Act it is an act of bankruptcy if a debtor files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself. It is open to the debtor to adopt either of these two courses without the other. Sec 6 of the Bankruptcy Act lays down that a debtor's petition shall allege that the debtor is unable to pay his debts and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts and the Court shall thereupon make a receiving order. When a person presents a petition to be adjudicated insolvent that petition itself is treated as an act of bankruptcy under the insolvency law. And when he says that his liabilities are more than his assets that must be taken as some evidence that he is unable to meet his liabilities. No enquiry need be made as to whether some of the debts mentioned in the petition are real debts. Such an enquiry should not be held for the purpose of considering whether the application of the applicant should be granted or not. An enquiry into the *bona fides* of the insolvent should be held when he comes up for discharge and not before. What the Court has to do is to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts. *Racharla Naranappa v Kondji Bhimappa* 92 IC 541 1926 AIR (M) 494. Presentation of a fresh petition for insolvency after annulment of a previous adjudication constitutes a fresh act of insolvency entitling a creditor to present an application for adjudication of the debtor as insolvent. *Jamaldin v Bishamberdial* 109 IC 578. When a person makes an application to be adjudicated insolvent it is the filing of that application which is an act of insolvency. *Kanai Lal Nandy v Tinkari De* 57 CLJ 148 37 CWN 535 145 IC 429 1933 AIR (C) 564

8. No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force

Exemption of corporation etc from insolvency proceedings

Review

This section corresponds to section 126 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows: A receiving order shall not be made against any corporation or against any partnership or association or company registered under the Companies (Consolidation) Act, 1908 or any enactment repealed by that Act. Section 6 of Act III of 1907 has been split up into 6 separate sections with a view to re arrange its different parts in their logical order. Section 8 reproduces section 6 (6) of the old Act section 9 reproduces section 6 (4) and (5) section 10 reproduces section 6 (3) section 11 reproduces section 6 (2) and sections 12 and 18 reproduce section 6 (1). The corresponding section in the Presidency Towns Insolvency Act is section 107.

Incorporated company not liable to adjudication under the Act

The reason for this section is that joint stock company or a limited company is governed by the special law of the Indian Companies Act VII of 1913, which contains a special procedure for winding up the same in case they are carried on at a loss. It is only a corporation or partnership or association or company registered under the Indian Companies Act that is not liable to bankruptcy proceedings under the Provincial Insolvency Act. 'Receiving order will not be made against any Corporation or against any partnership or association or Company registered under the Companies (Consolidation) Act 1908 or any enactment repealed by that Act. Companies are wound up under the Act of 1908 but as to limited partnerships formed under the Limited Partnerships Act 1907, the enactments relating to bankruptcy will now, subject to such modifications as may be made by general rules apply to them as if they were ordinary partnerships and when all the general partners become bankrupt, the assets of the limited partners vest in the trustee.'—*Ringwood's Principles of Bankruptcy*, page 9.

Unincorporated company liable to adjudication under the Act

The present law of bankruptcy is based on the Bankruptcy Acts of 1883 and 1896 (46 & 47 Vict, C 53 53 & 54 Vict C 71) and the rules of 1886, 1890 and 1891 promulgated under their authority. The Acts do not apply to incorporated companies but they do to unincorporated companies empowered to sue and be sued by public officers. Firms may proceed and may be proceeded against in their mercantile names but this rule does not apply to adjudication of bankruptcy. The Bankruptcy Act 1883 enacts that any two or more persons being partners or any person carrying on business in partnership name may take proceedings or be proceeded against under this Act in the name of the firm, but in such

case, the Court may, on application of any person interested, order the names of the persons who are partners in such firm or the names of such persons to be disclosed in such manner, or verified on oath or otherwise as the Court may direct (see 115) And the Bankruptcy Rules of 1886 contained the following provisions in the matter

Rule 259 Where any notice, declaration petition or other document requiring attestation, is signed by a firm of creditors or debt
his signing the firm shall add also
part & Co by James Green, a

Rule 260 Any notice or petition to which personal service is necessary shall be deemed to be duly served on all the members of the firm if it is served at the principal place of business of the firm on any of the partners or upon any person having had at the time of the service the control or management of the partnership business

Rule 261 Where a firm of debtors filed a declaration of inability to pay their debts or bankruptcy petition the same shall contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name, the declaration or petition shall be accompanied by an affidavit made by the partner who signs the declaration or petition showing that all the partners concur in the same

Rule 262 A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner of the firm

Rule 263 In case of partnership, the debtors shall submit a statement of their partnership affairs

Rule 264 No order of adjudication shall be made against the firm in the firm name, but shall be made against the partners individually

These English Rules have been adopted in India and incorporated in the New Rules framed by the High Courts under sec 79 of the Act Vide Rules 19, 20, 21, 22, 23, 24 of the Calcutta High Court, and Rules 28 (1), (2), (3), (4), (5) (6) of the Madras High Court Rules 28 (1), (2) (3), (4) (5), (6), (7), (8), (9) of the Bombay High Court and Rules 22—27 of the Allahabad High Court It is clear from sec 79 (2) (c) of Act V of 1920 that the Legislature contemplated orders of adjudication being passed against firms Moreover as has been pointed out by Addison J, in *Honda Ram v Chiman Lal*, 100 I C 112, a firm is not a separate legal entity, nor is it a distinct person It is merely a shorthand form for collectively designating all the partners in a firm and an order of adjudication passed against the firm is an order against individual partners of the firm who constitute it, *Official Receiver v Naraindas Lota Ram*, 89 I C 492 The decision of the Calcutta High Court in *Kalicharan Sa v. Han Mohan Basak*, 31 C L J 206 24 C W N 461 was under Ac

III of 1907 and not under Act V under the old Act (as to what against several joint debtors) is beyond all doubt in the Act Receiver, *Rawalpindi* 119 1 C 135 1 ship has in law no corporate existence distinct from that of its individual partners and proceedings against a firm is an order passed against each individual partner in that firm *Herji Jiraj v. Jil Rajan Mithi* 25 S L R 422 136 1 C 815 1932 A I R (S) 39

Hindu joint family not liable to adjudication under the Act

A Hindu joint family consisting of several members may be declared insolvent so also the partners or members can be proceeded against in the name of the firm under the Provincial Insolvency Act, and a declaration of bankruptcy can be asked in one petition against several joint debtors. Formerly there was no provision in the old Insolvency Act for proceeding against two or more persons being partners in the name of the firm *Kali haran Saha v. Harimohan Basak* 24 C W N 461 31 C L J 206 following *Sarodaprosad Ukil v. Ramsukhchandra* 2 C L J 318 but under the present Act and the Rules framed thereunder a single petition may be filed against the members of a joint Hindu family and other joint debtors *Bolisetu v. Kolla Kottayya* 44 Mad 810 *Satsuchandra Adhy v. Firm of Raj*

Maung Kyi Oh v. Members of joint bt or joint act of 1928 A I R (L)

354 When the members of a joint Hindu family trade together and are partners in a joint firm they are all personally liable for the debts of the firm and are liable to be adjudicated insolvents in respect thereof *Somasundaram Chettuar v. Raja kannoo Chettuar* 118 1 C 494 1929 A I R (M) 573 From the mere fact that a person

is in a joint Hindu family it does not follow that he is a partner in a firm and Banking Co. Ltd v. Probbhash Hindu family as such cannot be

adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency or may be proceeded against on one creditor's petition in case a joint act of insolvency can be brought home to them *Mahabir Prasad v. Ram Tahal* 16 P 724

Hindu joint family firm not liable to adjudication under the Act

Under sec 5 of the Indian Partnership Act IX of 1932 The relation of partnership arises from contract and not from status, and in particular the members of a Hindu undivided family carrying on a

business is such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business." Sec 99 (1) of the Presidency Towns Insolvency Act provides that "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm." Under the Rules framed under sec 79 of the Provincial Insolvency Act a firm may proceed and be proceeded against for adjudication in the same manner as provided in sec 99 (1) of the Presidency Towns Insolvency Act. A joint Hindu family firm is not a "firm" in the sense in which that word is used in the law of partnership. Therefore no insolvency petition can be presented against a Hindu joint family firm as such, *Sannyasi Charan Mondal v Krishnadhan Banerji*, 49 I A 108 49 Cal 560 67 IC 124 1922 AIR (PC) 237. A Hindu joint family carrying on business as such is not a partnership concern so as to be able to initiate proceedings under sec 99 of the Presidency Towns Insolvency Act. *Re Gobindlal Mohata* 39 CWN 275. Where the business of a joint Hindu family is carried on by the manager of the family and debts are contracted by him in the course of the business the other members are not personally liable for the debts and they cannot therefore be adjudged insolvent in respect of these debts, unless they render themselves personally liable by taking an active part in the business or otherwise. *Nagasu brahmanis Mudaliar v Krishnamachariar*, 50 Mad 981 (1986) 104 IC 642 1927 AIR (Mad) 922. *Mahabir Prasad v Ram Tahal*, 16 P 724.

Adjudication of minor members of a family.

Following *Sannyasi Charan Mondal v Krishna Dhan Banerjee*, 49 I A 108 49 C 560 (PC) 67 IC 124 and *Sadasiva Mudaliar v Hajee Mahomed Sait*, 27 CWN 677 (PC) 37 CLJ 569 72 IC 48 44 MLJ 396, it has been held in *In the matter of Radha Krishnaiah Chetty*, 84 IC 128 that when the adult sons of a Hindu father are adjudicated insolvents during their father's lifetime on account of debts incurred in the carrying on of a business the shares of their minor brothers in the family property do not vest in the Official Assignee and the latter is not entitled to sell or otherwise deal with such shares. *Vide* Notes under sec 28 (2) as to whether the share of a minor partner vests in the Receiver on the adjudication of the firm insolvent.

Adjudication of minor members of a firm.

If one member of a firm is an infant a receiving order cannot be made against the firm simply, but it may be made against the firm other than the infant partner, *Lowell and Christmas v Beauchamp* (1894) AC 607, *Ex parte Beauchamp*, (1894) 1 QB 1. So under the Indian Act, it has been held that no insolvency petition can be presented against a minor partner, as a minor cannot be ad-

cated insolvent, *Sannyasi Charan v. Ashuosh Ghose*, 42 Cal 225, *Janki Prasad v. Girdharilal* 61 Cal 68 19 Ind Cas 704. So also in *Jagmohan Narain v. Grish* 111 Cal 42 All 515 18 A L J 611 58 Ind Cas 557, it has been held that in view of the terms of section 247 of the Contract Act the adjudication of a minor as insolvent is illegal, *Re Sital Prasad* 10 C W N 1065. When members of a family trade together and are partners in a joint firm they are all personally liable for the debts of the firm. In *The Official Assignee of Madras v. Palaniappa Chetty* 41 Mad 824 35 M L J 473 49 I C 220, it was held that when a minor was concerned all the major members were personally liable but a minor member was not liable for debts during his minority. When there was a debt owing by the firm at the time of the filing of the petition each adult member was personally liable for the debt and he is liable to be adjudged insolvent on that debt though the decree obtained by the creditor do not make him so liable *Samasundaram Chettiar v. Rajo Kanno Chettiar*, 118 I C 494 1929 A I R (M) 573. Under sec 30, sub-sec (3) of the Indian Partnership Act IX of 1932 a minor is not personally liable for any act of the firm though his share is liable for the same. Minors must be excluded in any case from insolvency proceedings started at the instance whether of debtors or of creditors. Some confusion has sometimes arisen on account of the powers of a receiver to sell the interest of the sons in the joint family estate where the Karta being the father has been declared insolvent. This matter has been clearly decided authoritatively by their Lordships of the Privy Council in *Sat Narain v. Rai Bahadur Sri Kirhen Das* 1 L R 17 L 644 where it has been pointed out that in case where the father is adjudicated insolvent in a joint Hindu family the shares of the sons can be seized by the receiver in insolvency on the ground of the sons' pious obligation to pay the debts of the father, *Mahabir Prasad v. Ram Tahal* 16 P 724.

9 (1) A creditor shall not be entitled to present

Conditions on which an insolvency petition against a debtor
creditor may petition unless—

- (a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and
- (b) the debt is a liquidated sum payable either immediately or at some certain future time, and
- (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

Review.

This is section 6 (4) and (5) of Act III of 1907 and is based upon section 4 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926. Clause (4) of the old Act, viz., "that the debtor resides or carries on business or personally works for gain within the local limits of its jurisdiction" is made up into a new section, viz., sec 11, vide *infra*.

Creditor's remedies

Besides the ordinary remedy open to a creditor by suit or other proceedings in a Civil court this section confers on a creditor a special remedy to have the estate of a debtor administered by the insolvency court on the happening of any of the acts of insolvency as laid down in section 6. The object of the section is to afford a cheap and speedy remedy for the benefit of the general body of creditors. As has been laid down in *In the goods of Makham Lal Chatterji*, 15 C W N 350, Letters of Administration may be granted to a creditor although the liabilities of the deceased debtor appeared to be in excess of his assets. Application in the Insolvency Court is not the creditor's only remedy. It is discretionary with the Court to administer the estate in its Testamentary and Intestate jurisdiction or in its Insolvency jurisdiction. The trustee in a bankruptcy may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of bankruptcy, *Re Hecquard* (1889) 24 Q B D 71 (76). It should also be noted that if a creditor has elected to proceed against the debtor in insolvency it is not open to him to have recourse to any other remedy on the same cause of action.

In *Sinnam Chetti v G S Alagiri Iyer*, 1924 M W N 6, the plaintiff who was the owner of a ring of the value of Rs 1000 lent the same to the first defendant who was also liable to the plaintiff for Rs 2,072 8, being his contribution in respect of a joint bond. Further the plaintiff was liable to the first defendant on a pro-note for Rs 2,500. The plaintiff presented an insolvency petition against the first defendant alleging that the first defendant was indeb-

to him for Rs 3,072 8 made up of Rs 2 072 8 and Rs 1,000, the value of the ring which he alleged the first defendant refused to return and that he was a creditor of the first defendant for Rs 572-8 deducting Rs 2 500 due from him on the promissory note. The first defendant was adjudicated insolvent on that petition. The plaintiff again brought a suit to recover the ring from the possession of the second defendant. It was held that the plaintiff definitely elected to abandon all his rights to the ring in favour of the first defendant by alleging that the insolvent owed him Rs 1 000 as a liquidated sum and setting off about half of that sum against a debt due from him to the insolvent and using the balance in his favour to support his insolvency petition. It was further held that at the time of the pledge to the second defendant the first defendant had a good title to the ring and the plaintiff had none or at any rate, the title that vested in the first defendant at least on the date of his adjudication when plaintiff gave up finally all further interest in the ring inured to the benefit of the *bona fide* pledgee the second defendant and that the plaintiff therefore had no cause of action against the second defendant who took a pledge of the same without notice of the plaintiff's claim after the presentation of the petition.

Petition for adjudication

A petition for adjudication may be presented either by a debtor or by a creditor. It can be presented by a creditor when his money is at stake by commission of any act of insolvency by the debtor and by a debtor when he is not in a position to pay his debts. The object in both the cases is to have the estate of the debtor administered in insolvency. Section 9 deals with a petition for adjudication by a creditor and sec 10 deals with a petition by a debtor. Sections 9 and 10 lay down the conditions which must be fulfilled before a creditor or debtor is entitled to present the petition.

Who is a creditor

For who is a creditor and who is not in the sense in which the term is used in the Provincial Insolvency Act, vide S (2) (1) (a) and notes thereunder *supra*.

There must be relation of debtor and creditor

Sub-section (1), Conditions of a creditor's petition.

Under sub section (1) the creditor has to fulfil three conditions precedent set out in sec. 9 at the time he files the insolvency petition, viz (a) the debt owing by the debtor to the creditor must amount to Rs 500, (b) the debt must be a liquidated sum, (c) the act of insolvency upon which the petition is founded must have occurred within three months of the presentation of the petition.

Where the relationship of debtor and creditor does not exist between the parties a petition for the insolvency of the other party under section 9 is not maintainable. A applied that B who was formerly in his service be adjudged insolvent on the ground that while in service B had realised certain debts from A's debtors during his illness and had embezzled the amount so realised, B was never charged with the offence of embezzlement in proper court nor was a suit instituted against him to recover the amount in dispute. It was held that the application did not lie as the amount in question was not debt within the meaning of s 9 and there was no relation of debtor and creditor between the parties, *Raja Ram v Chand Prasad* 9 OWN 102 1932 AIR (Oudh) 107. To entitle a person to file an application for adjudication as a creditor he must be a creditor at the time when the act of insolvency is committed. M, in whose favour a promissory note had been executed by L, on the 23rd March applied to have L adjudicated insolvent alleging as the act of insolvency a transfer executed by L, of his property on the 13th March. It was held that inasmuch as M was not a creditor of L on the 13th March he was not competent to present the petition for adjudication, *Muthia Chettiar v Luxmi Narasa Aiyar*, 13 LW 141 61 Ind Cas 756. It is sufficient that the petitioners should be creditors at the time the petition was filed. It is not necessary that they should be creditors at the time the order of adjudication is passed. The mere fact that a decree postpones the payment of the decretal amount till the disposal of an appeal filed in another suit does not disentitle the decree holder from presenting and prosecuting a petition for the insolvency of the debtor, *Venkatarama Aiyar v A* 24 MLW 858 1926 MWN 946. A creditor is not entitled to file a petition under s 9, if the debt, on which the petition is founded was not in existence at the date of the alleged act of insolvency, but was incurred later, *Chhisaibhar Singh v Mrs Baines*, 1 LR 17 L 580 38 PLR 285 165 IC 151 1936 AIR (L) 800.

There is no obligation on a petitioning creditor to implead other creditors. He only has to comply with the requirements of secs 9 and 13 (2) of the Provincial Insolvency Act, neither of which demands the impleading of other creditors. There is no authority which lays down that all creditors must be impleaded. But if a creditor is impleaded as a party he has as much interest in the proceedings relating to the insolvent's estate as any other creditor and any order passed in favour of the petitioning creditor would also affect him. It cannot, therefore be said that he was merely a pro forma defendant. The inclusion of his name and that of his legal representatives in case of his death in the appeal is therefore essential. *Forind Chand Parmi Nand v Maulvi Mohammad Akram Khan*, 34 PLR 827 145 IC 474 1933 AIR (Lah) 642.

The debtor must be personally liable.

Bankruptcy is essentially a proceeding in personam and only the personal debts due by the insolvent can be proved therein. But if the creditor had sued the insolvent under sec 52 (2), CPC and made him personally liable for the debts of his father to the extent of his father's estate that had come into his hands and had been disposed of by him then the creditor could have proved in respect of this liability in the insolvency. *Kinderley v Jerus*, 22 Beav 1, P A A Chettyar Firm v T R M Chettyar Firm, 12 Rang 602. A decree against a person as the legal representative of another (such as a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act, *Nagasubramania Mudaliar v Krishnamachariar*, 50 M 981 53 MLJ 403 104 IC 642 (1927) AIR (M) 922. Where creditors who have obtained a decree against a joint Hindu family apply for adjudication of members as insolvents a member who is not personally liable under the decree, it being passed against him in a representative capacity, cannot be adjudicated insolvent, *Kalu Ram v Gutar Singh*, 12 LLJ 96 1930 AIR (L) 592. The son of a Hindu father who died after incurring debts upon promissory notes, apart from some special circumstances which would make him personally liable for the family debts cannot be adjudged insolvent on account of his inability as a member of the family to pay these debts out of the family property, *Kalagara Purnayya v Cheru Kuri Basala Kottayya* 61 MLJ 518 34 LW 761 1931 AIR (M) 788. A sum of money due on a decree obtained by the petitioning creditor against the father of the insolvent in which the insolvent is substituted as judgment debtor after the death of his father is not a debt which entitled the petitioning creditor to present an insolvency petition—*Waman Rambhau Marathe v Har noon*, ILR 1937 (N) 485 168 IC 212 1937 AIR (N) 60.

An act of insolvency to serve as the basis of an adjudication upon a creditor's petition must be an act committed by his debtor and unless there is a personal liability in respect of the debt there is no such relation of debtor as will serve to support an adjudication order, and when a petitions seeks to adjudicate the members of a joint family owning a business in respect of which his debt is owing he can sustain the petition only in respect of such members of the family who are proved to be personally liable for the debt. If the debt has been incurred on a contract entered into only by the managing member alone but other coparceners are in reality parties they have subsequently ratified the debt in respect of it. And they did an acquiescence on their part in the course of the business in which the particular contract was entered into so as to warrant their being treated as parties to the

contract *Krishna L. v. Messrs Lata Leslie & Co*, 1936 M W N 539 43 L W 587 160 L C 476 1936 A I R (M) 64

Petition by one of joint creditors.

It has been seen (see notes under sec 7) that there is no legal bar to a single application being made by a creditor for adjudicating two or more persons as insolvent if they are jointly liable on a debt or have committed a joint act of insolvency. The question arises whether one of several joint creditors can file a petition for adjudging a debtor insolvent. It has been held in *Vaithinatha Aiyar v. Vaithinatha Aiyar*, 61 M L J 544 1932 M W N 164 1932 A I R (M) 112 that an insolvency petition filed by one of several creditor-partners of a firm notwithstanding that he is described in the body of the petition as the managing partner of the firm, is not legally sustainable when it is not in the firm name or in the name of all its members, nor signed by the petitioning partner on behalf of the firm or its members.

Clause (a) ; Debt owing by the debtor.

The debt must be owing by the debtor in his own right, and not as an executor or otherwise, *Pattison v Banks*, Cooper 540, and it must continue to exist up to the date of the order of adjudication, *Ex parte Mathew*, (1884) 12 Q B D 506. It would seem from the judgment of Jessel, M R in *Ex parte Jones*, (1881) 18 Ch D 109, that not every liability in equity to pay a sum of money constitutes debt, even when ordered to be paid. A debt barred by the Statute of Limitation is insufficient, *Quantock v England*, 2 W Bl 704, so is a debt founded on an illegal consideration, *Wells v Girling*, (1819) 1 B and B 447. Statutory interest and costs on a judgment debt become a part of the judgment debt to make up the required amount £500, *Re Lehmann*, *Ex parte Haslack* 7 Mor 181. A bond upon which a debtor is jointly and severally liable along with other persons is sufficient to support a petition for adjudication. It is immaterial that the petitioning creditor may not be absolutely entitled to all the money secured by the bond, it is enough that the bond is in his favour, *Ananta Kumar v Sadhucharan*, 87 I C 751 1926 A I R (C) 234, *Ghulam Haider v Mangal Sen*, 98 I C 425. The words 'debt owing by the debtor' do not imply that the debtor must admit the debt to be owing and that unless he does so, it does not follow that the Insolvency Court has no jurisdiction to decide whether or not the debt is owing because it is for the Insolvency Court to decide whether a petitioning creditor is owed a sum exceeding Rs 500, *Noor Muhammad v Lal Chand*, 7 L L J 201 90 I C 245 1925 A I R (L) 436.

Clause (b) ; Liquidated sum

A sum is 'liquidated' if it can be computed with certainty a

a debt is 'liquidated' if it can be ascertained with certainty. *U Ba Thum v U Tun Tha*, 160 IC 367, 1935 AIR (R) 435. To constitute a valid petitioning creditor's debt there must be a certain sum, admittedly due and certainly payable to the person who presents the petition. It must be a certain amount, or the amount of which is capable of being easily ascertained—*Robson*, p. 206. A sum is liquidated if it can be computed with certainty, as for example, £100 with or without interest at a certain rate for a certain time, which is as definite a sum as may be. But a claim for damages for refusing to accept and pay for goods is distinct from a claim for the price is unliquidated until the amount payable has been definitely fixed and ascertained in legal proceedings or by the agreement of parties. A plaintiff in an action for recovery of unliquidated damages is not creditor until judgment has been signed, *R v Hopkins & Ferguson* (1896) 1 QB 652. The debt must be a liquidated sum, that is to say an agreed amount of damages either in case of a breach of contract or in an action the definitely ascertainable amount that may be indisputably due. So a claim for not making redelivery of shares lent by one person to another is not a debt or sum of money due or claimed to be due, *Owen v Ruth*, (1854) 23 LJ CJ 105. But a claim by a lender of government stocks against the borrower for not retransferring the stocks may be a good petitioning creditor's debt. *Alierson v Vernor*, 1890, 3 Term Rep 539.

A liability to pay damages is not a liquidated sum payable, either immediately or at some future time and cannot be made the basis of a petition until the damages have been liquidated. *Re Miller*, (1901) 1 KB 51. For the purpose of ascertaining the aggregate amount owing to creditors in respect of an application under old sec 6 (4) (now section 9) the difference between the contract rates of sale and purchase under a contract entered into by the debtor constitutes a liquidated sum within the meaning of clause (b) of the sub clause. In the application of *Dholan Dass* to declare the firm of *Walbdas Holaram* insolvents, 56 Ind Cas 158. Money due on a bill of exchange duly accepted is a liquidated amount and the drawer of a bill of exchange remains a surety in spite of its dishonour and can after payment in respect of it maintain an action on it and also petition in insolvency proceedings against the acceptor even though the bill is not in his hands, *Chetan Das Mohan Das v Ralli Brothers* 83 Ind Cas 135 following *Indian Specie Bank v Nagin Das Hurjan Das*, 18 Bom LR 689 35 Ind Cas 628. But a debt shown in insolvency was the collection of rents of paddy fields and of its mesne profits. It was necessary for the Court to embark on an elaborate enquiry in order to ascertain the net amount due, and it was held that the debt was not liquidated as referred in s 9 (1) (b). *U Ba Thum v U Tun Tha*, 160 IC 367 1935 AIR (R) 435.

Debt payable either immediately or at some certain future time

The express in some certain future time means any time in the future which is capable of being ascertained *Venkatarama Aiyar v Burian Sheriff* 51 M L J 650. Any debt presently due but not payable till a future day could support a petition. Every person giving credit to any trader upon a valuable consideration for any sum payable at a certain time which time had not arrived when the debtor committed an act of bankruptcy might petition whether the creditor had security for such sum or not. A petition based upon a debt for which the debtor had accepted a bill of exchange which in pursuance of an agreement to that effect had been renewed although the second bill had not become due at the date of the presentation of the petition was held to be maintainable *Re Burr* (1896) 1 Q B 616.

Enquiry as to the existence of the debt

Section 9 (1) (b) seems to show that a debt must be indubitably due but can an Insolvency Court make an enquiry into a question of this nature? Sec 24 (1) (a) lays down that the Court shall require proof amongst other matters of the fact that the creditor is entitled to present the petition. This undoubtedly refers back to sec 9. Sec 9 lays down the conditions which entitle a creditor to present a petition against a debtor. In these is included there must be a debt due to the creditor aggregating not less than Rs 500. Therefore it is incumbent on the creditor to prove the debt. The Insolvency Act V of 1920 is based on the English Bankruptcy Act. Sec 5 (5) of that Act provides expressly for an alternative reference of the creditor in such circumstances to relief by regular suit. The omission of any similar provision from the Indian Act indicates that the creditor must be allowed under sec 24 to prove the debt when the debtor denies it. Further sec 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it and this obviously involves the necessity of proving that right in order to avoid dismissal. Therefore an Insolvency Court will not be justified in referring a petitioning creditor to a regular suit to prove his debt. *A K R M C T Chetty Firm v Maung Aung Bunt* 1923 A I R (Rang) 21.

When a creditor applies for adjudicating his debtor as an insolvent if the debtor denies the debt alleged by the petitioning creditor to be due to him the Insolvency Court is bound to make an enquiry into the existence of such debt. *Hukum Chand v Ganra Ram* 99 I C 666 (1927) A I R (L) 111. Ordinarily where a creditor presents an application and the debtor challenges the creditor's right to apply the Insolvency Court will ask for proof from the creditor as to his right and is entitled to go into that question. But it does not follow that the Insolvency Court must decide every ques

tion connected with it or which cannot refer the parties to any case if it is of opinion that a complicated question arises therein, *Gopikabai v Chapsi Purshottam*, 11 LR 101 (1) 3 Bom LR 1236 1935 AIR (Bom) 80. The mere fact that the insolvency petition would not amount to proof of admission of the amount due. That has to be proved in subsequent proceedings. *Bank of India v Atanasi Chettiar*, 53 Mad 826 28 IC 118 1930 AIR (Mad) 874. It is the settled rule of the Court of Bankruptcy that the Court of Bankruptcy can enquire into the consideration for a judgment debt with a view to procure the distribution of a debtor's goods among his creditors. *Prima facie* a judgment ought to be considered as binding. But if a proper case is made, the Court ought to direct an enquiry into the consideration for a judgment-debt, *Narasimha Sastri v The Official Assignee of Madras*, 59 MLJ 321 1930 MWN 396 129 IC 650 1930 AIR (M) 751.

Clause (c) ; Acts of insolvency.

No one is to be adjudged insolvent unless he is proved to have committed one or other acts of insolvency as defined in sec 6. An act of insolvency, as defined in sec 6 must not only be set out in the petition for adjudication but strictly proved. If an act of insolvency, as defined in sec 6 is not so set out in the petition, the petition is incompetent. It is not correct for a creditor to make various allegations of acts which are not acts of insolvency as defined in that section and then endeavour to prove by evidence that, as a matter of fact an act of insolvency as defined in sec 6 had been committed. A person cannot be adjudged an insolvent on the mere ground that his assets are less than his liabilities." *Ma Kyin Myaing v Muthava Chettyar*, 127 IC 373 (1930) AIR (R) 147. In *Mashu Chettiar v Nagindas* 28 Bom LR 680, Mcleod CJ said "In my opinion it is absolutely necessary that an application for adjudication of a debtor by a creditor, on the ground that an available act of insolvency had been committed, must definitely allege what available act or acts of insolvency were committed as detailed in the section. It is not sufficient to make some vague allegations in the petition and then endeavour by means of evidence to prove that certain available acts of insolvency have been committed." A person cannot be adjudicated as an insolvent at

act of insolvency had been committed because the alleged insolvent had preferred some of his creditors by paying them off out of the proceeds of the sale, it was held that the order of adjudication was unsustainable, *Pedda Kondappa v Ganne Pullappa* 119 IC 46 (1929) AIR (M) 910.

The condition precedent to a debtor being adjudicated an insolvent on the petition of a creditor is that the debtor should be alleged and proved to have committed one or other of the acts of insolvency set out in sec. 6 of the Act. It is impossible to accede to the view that the mere fact, that a person admits he owes money to a creditor and also admits that he is unable, there and then to pay the amount can possibly be regarded as the commission of an act of insolvency as defined by the various clauses in sec. 6. For reasons which are not far to seek, the Legislature has defined the conditions on the happening of which alone such a petition for adjudication can be sustained. Adjudicating a person an insolvent is a matter of serious consequences, and Courts of law should take particular care to see that the provisions of the law are observed strictly and carefully considered. *Veeraya Chetty v. Doraiswami Reddiar*, 110 I.C. 737. 1928 A.I.R. (M.) 393. The act of insolvency alleged to have been committed by the debtor should be clearly and precisely described in the insolvency petition so as to enable him to meet the charges brought against him; and, unless the facts alleged bring his conduct well within the ambit of the Statute, the Court should stay its hands in the matter of adjudication, *Harkishan Lal v. Peoples Bank of Northern India*, 14 Lah. 117. It is not necessary in the case of a creditor, as in the case of a debtor, to prove that the debtor is unable to pay his debts while petitioning for adjudication, *Jamaldin v. Bishambar Dial*, 109 I.C. 578 : (1929) A.I.R. (L.) 72.

Act of insolvency must be within three months.

By 12 & 13 Vict. c. 106, s. 88, no person was liable to become bankrupt by reason of any act of bankruptcy committed more than 12 months before the issuing of any fiat or the filing of any petition. The Act of 1869 reduced the period to 6 months, and since the Act of 1883, 3 months has been and is now the limit. The Act of bankruptcy upon which a petition is founded must have occurred within 3 months before the presentation of the petition; indeed, an act of bankruptcy ceases to be available for any purpose *qua* an act of bankruptcy, at the expiration of 3 months after it has been committed. In the computation of time, month means calendar month, and the day on which the petition was presented is to be excluded. If an act of bankruptcy is committed on August 13, a petition presented in November 13 following is in time, *Re. Hansom, Ex parte Frester*, (1887) 4 Morr. 98. The date on which the act applied against is done and the last day if *dies non* should be excluded, *Chavadi Ramasami Pillai v. Venkateswara Aiyar*, 42 Mad. 13 : 35 M.L.J. 531 : 48 Ind. Cas. 952. The act of insolvency of a person commencing in his being arrested and imprisoned in execution of a decree continues throughout the period during which he remains in prison, *Karam v. Jhanda Mal*, 32 P.L.R. 51 : 131 I.C. 112 : 1931 A.I.R. (L.) 112.

tion connected with it or which may incidentally arise from it, and cannot refer the parties to a regular suit in any case if it is of opinion that a complicated question of fact or law arises therein, *Gopikabai v. Chapsi Purshottam*, 11 R 59B 161 36 Bom LR 1236 1935 AIR (Bom) 80. The mere filing of the insolvency petition would not amount to proof of admission of the amount due. That has to be proved in subsequent proceedings. *Imperial Bank of India v. Atanasi Chettiar*, 53 Mad 826 128 IC 118 1930 AIR (Mad) 874. It is the settled rule of the Court of Bankruptcy that the Court of Bankruptcy can enquire into the consideration for a judgment-debt with a view to procure the distribution of a debtor's goods among his creditors. *Prima facie* a judgment ought to be considered as binding. But if a proper case is made, the Court ought to direct an enquiry into the consideration for a judgment-debt, *Narasimha Sastri v. The Official Assignee of Madras*, 59 MLJ 321 1930 MWN 396 129 IC 650 1930 AIR (M) 751.

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S. 9(1)(c)] ACT OF INSOLVENCY WITHIN 3 MONTHS

The condition precedent to a debtor being insolvent on the petition of a creditor is that the debtor alleged and proved to have committed one or other insolvency set out in sec 6 of the Act. It is important to the view that the mere fact that a person admits to a creditor and also admits that he is unable, there pay the amount can possibly be regarded as the commission of an act of insolvency as defined by the various clauses in the Act which are not far to seek the Legislature has reasons on the happening of which alone such an adjudication can be sustained. Adjudicating a person is a matter of serious consequences and Courts of law particularly care to see that the provisions of the law are strictly and carefully considered. *Veerava Chetty v Reddiar*, 110 I C 737 1928 A I R (M) 393. The act alleged to have been committed by the debtor should be precisely described in the insolvency petition so as to meet the charges brought against him, and, in alleged bring his conduct well within the ambit of the Court should stay its hands in the matter of adjudication. *Lal v Peoples Bank of Northern India* 14 Lah 117. It is necessary in the case of a creditor as in the case of a debtor that the debtor is unable to pay his debts while petitioning for adjudication, *Jamaldin v Bishambar Dial*, 109 I C 191 A I R (L) 72.

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Three months not a period of limitation but condition precedent

The case of *Narayana A v Of I R & C South Malabar* 1933 M W N 1049 39 L W 449 19 4 AIR (M) 294 in which it was held that an insolvency petition which by s 9 (1) (c) should be presented within three months of the act of insolvency would if the three months expire during the vacation of the Court be validly presented on the reopening day no longer the law for it has been held in the Full Bench case of *Chenchuramanna Reddi v Arunchalam* I L R 58 M 794 1935 M W N 685 42 L W 330 69 M L J 283 158 I C 1 1935 AIR (M) 857 that the period of three months fixed by S 9 (1) (c) of the Act is not a period of limitation but constituting a condition to an adjudication and consequently when the alleged act of insolvency has taken place more than three months prior to the presentation of the petition it cannot be put up as a ground for adjudication even though the period of three months Court is closed. See also *Kuma Chettiar* 48 L W 239 1938 AIR (M) 898 (followed in *Muradan Sardar v Secretary of State* by *Nissim Ali and Sen JJ* in Appeal from Original Order No 644 of 1936 of the Cal High Court decided on 8 12 38 not yet reported)

Computation of three months in case of sale in execution of a decree

When the act of insolvency alleged is an execution sale of certain properties of the debtor a creditor's petition for adjudication of the latter as insolvent must be made within three months from the sale and not from the confirmation thereof *Kanai Lal Nandy v Tinkari De* 37 C W N 535 57 C L J 148 145 I C 429 1933 AIR (Cal) 564 Execution sale is complete when the property is knocked down to the highest bidder and it is not open to the Court to offer the property to any person who may be prepared to purchase it for higher amount. Therefore an act of insolvency in s 6 (c) occurs when the property is sold. Hence a petition by a creditor must be made within three months from the date of sale and not that of confirmation. *Lal Chand Choudhri v Bogha Rani* 40 P L R 841 1938 AIR (L) 819

Computation of three months in case of transfers Conflict

In *Sariathada Isvarayya v Kurubasubbanna* I L R 58 M 166 40 L W 413 1934 M W N 784 67 M L J 380 1934 AIR (M) 637 it was held that where the act of insolvency of a debtor is the execution of a sale deed the period of three months for presenting a petition for adjudication by a creditor commences from the date of the registration of the deed and not the date of its

execution The above is supported by a decision in *Muthiah Chettiar v Official Receiver Tinnevely* 64 MLJ 382 141 IC 101 1933 AIR (Mad) 185 The question there arose in different circumstances and with reference to a mortgage deed but the point decided was the same That question was whether the three months period under sec 54 should be computed from the date of the execution of the document or from the date of its registration It was held that having regard to sec 59 Transfer of Property Act which made registration compulsory to give validity to a mortgage the period should be calculated from the date of registration See also *Kanhaya Lal v Sadashiv Rao* 150 IC 834 1934 AIR (Nag) 171 *U Ba Sem v Mg San* 12 Rang 263 151 IC 670 1934 AIR (Rang) 216 *Kirpa Ram v Sanuala Ram* 1935 AIR (L) 55 The contrary view taken in the case of *Ratan Chand v Smail* 1933 AIR (L) 821 that the period of three months begins from the date of execution and not from the date of registration has been overruled by the Full Bench case of *Lakshmi Chand v Kesho Ram* 1 LR 16 L 735 158 IC 226 1935 AIR (L) 575 where it has been held that when a petition is presented alleging that the debtor has committed an act of insolvency by deed registered the period of limitation prescribed by sub s (1) (c) of s 9 runs from the date of registration and not from the date of execution *G W Godbole v Marotisa Balusa Bhassar* 1 LR 1937 (N) 408 169 IC 683 1937 AIR (N) 197 The Calcutta High Court on the other hand relying on sec 1908 has held in the recent case of *ar Ghosh* 1 LR (1938) 2 Cal 275

proceedings are concerned not from the date of registration but from the date of execution of the deed of transfer To the same effect is the decision in *In re on Maung v Maung Shaw* 1 LR (1937) R 375 in which it has been held that computation of three months begins from execution of the deed and not from its registration and in case of oral transfer or gift act of insolvency occurs when possession of property is handed over or passes to the donee *Sinha v Chiranjil Lal* 1939 AIR (L) 35

Computation of "three months" in case of presentation of petitions for adjudication

A creditor's petition for adjudication of a person as insolvent founded on the application of the latter must be made within three months from the date of the presentation of the application and not from the dismissal thereof for default when it has been so dismissed *Kanai Lal Nandy v Tincori De* 37 CWN 535 57 CLJ 148 145 IC 429 1933 AIR (C) 564

Secs 5 and 12 Lim Act do not apply to petition for adjudication

Sec 9 (1) (c) makes the occurrence of an act of insolvency withi

three months of the date of presentation of a creditor's petition a condition precedent to a lawful presentation, and this provision is quite independent of the Statute of Limitation. The act of insolvency on which the petition of a creditor is grounded must have occurred within three months before the presentation of the petition. In *Nur Mahomed v Lal Chand* 7 LLJ 201 90 IC 254 (1925) AIR (L) 436, an application for adjudication of a debtor by a creditor was presented more than three months after the act of insolvency has been committed and it was urged on behalf of the debtor that the application was barred by limitation. sec 5 of the Indian Limitation Act was inapplicable so as to extend the time. It was held "sec 5 of the Indian Limitation Act did not apply to petition made under Act III of 1907. The Legislature has altered the law on the subject and under the new Insolvency Act, sec 5 has been specifically declared to be applicable by sec 78. The amendment in law, effected by extending the operation of secs 5 and 12 of the Indian Limitation Act to appeals and applications under the Provincial Insolvency Act does not extend the period of the presentation of the petition for adjudication of a debtor by a creditor beyond three months. In interpreting the section it was held in *Ghulam Mahomed v Panna Ram* 72 IC 433 (1924) AIR (L) 374 that an Act is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ. In the present case it is perfectly clear that whatever the intention the Legislature may have been the words employed clearly mean that the acts of insolvency must have occurred within three months of the presentation of the petition. And the transfer by the debtor of his property in favour of his minor son having entation of the of the debtor

The doubts and difficulties on the point in the absence of an express authority have been removed by the decision in *Bulomal Variomal v Sumar Khan*, 112 IC 646 (1928) AIR (S) 114 which lays down 'Although it is true that sec 78, Provincial Insolvency Act, makes sec 5, Limitation Act applicable to appeals and applications under the Provincial Insolvency Act, yet it does not extend the application of the section 5 Limitation Act, to petitions to adjudicate a person insolvent. Such petitions are not included in the word 'applications' as used in sec 78, Provincial Insolvency Act. Delay in presenting petitions beyond three months will not therefore be excused in any case'. Section 148 Civil Procedure Code in terms applies to an enlargement of a time limit fixed by the Court, and it can have no application to a time limit fixed by Statute. An insolvency petition by a creditor or debtor is not an 'application'. A reference to section 5, Limitation Act leaves no doubt upon the question its language shows that the applications intended are applications of the description in Sch I, Div 3,

Limitation Act which may arise in the course of or out of proceedings in insolvency, *Vaithinatha Aiyar v Vaithinatha Aiyar*, 61 MLJ 544 1932 MWN 164, 1932 AIR (M) 112 followed in *Gangjee Premjee & Co v O L K K N Firm, Colombo*, 55 Mad 766 137 IC 740 1932 AIR (Mad) 352

Section 14 of the Limitation Act does not apply to proceedings under the Provincial Insolvency Act. Hence an application filed in a wrong Court to declare a debtor an insolvent and re presented to a right Court can be said to be presented only on the date of its re presentation, and if on such date of its re presentation the application is not maintainable for any reason, such as an act of fraudulent preference, having occurred more than three months, before the date of re presentation it is liable to be rejected, *Trasi Deia Rao v Parameshwarya* 39 Mad 74 27 IC 144. On the 28th June 1919 a creditor presented a petition for adjudicating his debtor insolvent. The petition having been presented in a wrong Court, was returned and re presented to the proper Court on 1st of October 1919. The act of insolvency on which the petition was based was an alleged fraudulent transfer of the debtor of his property on the 31st March 1919 and the insolvency petition was presented to the proper Court more than three months after that date. On the 21st February 1921 the District Court purporting to act under sec 78 of Act V of 1920 excused the delay in the presentation of the petition and ordered an enquiry into the merits. It was held on appeal, that the petition had become barred, and the District Court had no power under sec 78 to excuse the delay. *Aiyaparaju v Veeta Venkata*, 44 MLJ 303 1923 MWN 195 72 Ind Cas 488

The question that the Court could have extended time under sec 78, cannot be raised in the appellate Court when it was not raised in the Court below, *Kanai Lal Nandy v Tinkari De*, 37 CWN 535 57 CLJ 148 145 IC 429 1933 AIR (Cal) 564

Amendment of creditor's petition.

There is no doubt that the Civil Procedure Code gives ample powers to the Court for amendment. Or VI, r, 17 lays down that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. 'The general conditions on which amendments should be granted have been summarised in the case of *Upendra Nath Ray v Rai Janaki Nath Rai*, 22 CWN 661 in the following terms—the Court being desirous of getting at the true facts will allow an amendment subject to three general conditions (1) *bona fides* on the part of the applicant, (2) and the amendment does not cause such prejudice to the other

as cannot be compensated by costs 3) where it does not convert a suit of one character to a suit of a different character *Gyanendra Nath v Parash Nath* 26 CWN 75 Where the amendment of an insolvency petition that is sought is one that does not affect the substance of the petition but merely will have the effect of bringing the petition into conformity with the rules of practice, or of remedying a formal defect the Court in its discretion may properly grant leave for the amendment to be made even if the amended petition would necessarily be re-presented more than three months after the alleged act of insolvency provided that no hardship would thereby be worked to the respondents But where the amendment is one that goes to the root of the petition and alters the substance of the act of insolvency alleged the Court ought not to permit the amendment to be made at any rate if the effect of so doing would be that the amended petition would be re-presented more than three months after the date of the act of insolvency alleged The essential ingredient of the act of insolvency is that the act was committed by the debtor with intent to defeat or delay his creditors The omission of such an allegation is not a mere formal defect *A M M Murugappa Chettiar v N C Galliard* 12 Rang 150 151 IC 190 1934 AIR (R) 87 This view however has been dissented from in *Srirangan Chettiar v Sornam Pillai* 67 MLJ 924 1935 AIR (M) 202 where it has been held that if the words with intent to defeat and delay his creditors were omitted but the act of insolvency was clearly set out it was merely a formal defect and the amendment to include those words should be allowed The provisions relating to the amendment of pleadings contained in the Civil Procedure Codes would be applicable to petitions in insolvency under the Provincial Insolvency Act A petitioning creditor ought not to be allowed to amend his petition so as to enable him to substitute new grounds or acts of insolvency in the place of that which he had originally set up and which are of no avail to him if that would cause serious injury and grave injustice to the other party which can not be compensated by cost The Courts it is true have wide powers of amendment but they have to be exercised with care and judicially If the effect of an amendment would be to clothe the petitioning creditor with rights which he would not have had if a new petition for insolvency were presented by him on that date on which he applies for amendment the Court ought not to grant leave to amend An amendment which enables the creditor to allege new acts of insolvency which have become unimpeachable and have ceased to be act of insolvency under sec 9 and which he neither relied nor intended to rely when presenting his petition cannot be allowed *Palanappa Chettiar v Chidambaram Chettiar*, 1937 MWN 1190 46 LW 815 (1937) 2 MLJ 737

Where a petition presented by a bare trustee was dismissed on the ground of non joinder of the *cestui que trust* the Court of appeal

gave leave, more than 3 months after the presentation of the petition, to amend by adding the *cestui que trust*, *Ex parte Dearle*, (1884) 14 Q B D 184, *Re Ellis* 4 Mor 283 But after 3 months from the date of the act of bankruptcy, a petition will not be amended by adding a fresh petitioner or a fresh debt, *Re Maund*, (1895) 1 Q B 194 There is no obstacle to granting leave to a petitioning creditor to amend his petition provided the amendment is made within 3 months from the date of the act of insolvency The omission to state the fact that the petitioning creditor is a secured creditor and the value of security is a defect which can be cured by the amendment of the petition Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the Court would be depriving the defendant of the plea of limitation, *G P Gunnis & Co v T Mahomad Ayyub Sahib* 37 Mad 555 191 C 19 It is not competent to a Court under the Insolvency Act or the incorporated provisions of the Civil Procedure Code and the Limitation Act to allow an insolvency petition to be amended by the addition of a creditor who was not a party from the beginning when three months have expired since the act of insolvency, *Vaithinatha Aiyar v Vaithinatha Aiyar* 61 MLJ 544 1932 MWN 164 1932 AIR (M) 112 *Gangjee Premjee v O L K K N Firm*, 55 Mad 766 63 MLJ 152 1932 MWN 304 34 LW 544 137 IC 740 1932 AIR (M) 352 As a general rule, the amendment of a bankruptcy notice will not be allowed except in the case of merely formal defects, *Ex parte Dan Rylands Ltd Re Collier*, (1891) 8 Mor 80 The Court can allow an amendment of insolvency petition presented by a creditor, if it does not introduce a new cause of action or alter the character of the claim but merely corrects a misdescription of the property which had been sold in execution of a money decree against the insolvent The amendment takes effect *nunc pro tunc* If the insolvent had accepted the costs of adjournment necessitated by the amendment, he cannot be allowed to challenge the order allowing the amendment by way of appeal *Sodhi Lal Singh v Behari Lal Lakshare*, 171 IC 31 1937 AIR (L) 895 If the effect of the amendment is to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed or in other words if its effect is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded the Court will not grant leave to amend But if on the contrary, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing A petition was presented by a person who described himself as a creditor of the insolvent He alleged that certain amount was due by the insolvent to a firm which he claimed to be the sole proprietor, it was upon assertion that he founded his claim to be solely entitled to

debt. The petition was filed on 24th November 1930, but on that date an arbitration enquiry was pending in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on 28th November 1930 the petitioner became solely entitled to the debt on which the insolvency petition was founded. It was held that the petitioner could be allowed to amend the petition and proceed with it. All that was necessary was to allow the petitioning creditor to amend his petition by adding that the inchoate right which he had previous to the petition became perfected in virtue of the award delivered four days later. *Chockalingam Chettiar v Muthia Chettiar*, 1938—2 M L J 390 1938 A I R (M) 884

Sub-section (2), Petition by a secured creditor.

This sub section should be read with sec 47 *infra*. As to who is a secured creditor, vide sec 2 (1) (e) and notes thereunder. There is a distinction between a creditor and a secured creditor. The rights of a secured creditor to realise or otherwise deal with his security is not affected in any way by the provisions of the Provincial Insolvency Act. It is well established that a secured creditor stands on a different footing from that of the unsecured creditors. The position of a secured creditor is dealt with under sec 28 (6) and sec 47 of the Provincial Insolvency Act. Sec 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realise or deal with his security in any way he chooses unhampered by the provisions of the Act. Speaking broadly, under section 47 a secured creditor may do one of the three things, he may enforce his security and prove for the balance that may be due to him, or he may relinquish his security for the benefit of the general body of creditors and prove for the whole debt that may be due to him or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend if his security should prove insufficient. *Sant Prasad Singh v Sheo Dutt Singh*, 2 Pat 724. Therefore a secured creditor is not entitled to present a petition unless he places himself in the position of an unsecured creditor either (1) by relinquishing his security for the benefit of the general body of creditors, or (2) valuing his security and deducting the amount of the value of his security from his total dues claiming for the balance as an unsecured creditor. It should also be noted that the petition for adjudication of a debtor whether by a secured or by an unsecured creditor must fulfil the conditions laid down in sec 9. *Ko Shwe So v R M V E R Chettyar Firm* 1701 C 942 1937 A I R (R) 189. Vide also notes under sec 28 (6) and sec 47, *infra*.

"Relinquish his security."

The word 'relinquish' has been substituted in the place of 'give up' in the English Act. Giving up means giving up his interest to the trustee. A mortgagee by giving up his security does not alter the rights of prior or subsequent mortgagees, but simply puts the trustee in his place. *Cra knall v Janson* (1877) 6 Ch D 735

Estimate of the value of the security.

The omission of a statement in the petition of willingness to estimate the value of the security is merely a formal defect and will be amended by the Court. *Ex parte Vanderlingen* (1882) 20 Ch D 289. If the estimate is a real estimate the Court will not go into it. *Ex parte Westmoreland* (1905) 1 K B 602. On the other hand the petition must state the value from that value when

10 (1) A debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts and—

- (a) his debts amount to five hundred rupees, or
- (b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money, or
- (c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property

(2) A debtor in respect of whom an order of adjudication whether made under the Presidency towns Insolvency Act, 1909, or under this Act has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.

Review

Section 10 (1) a, b, c is sec 6 (3) a, b, c of Act III of 1907 and sub-section (2) is new. This section deals with a debtor's petition.

in contradistinction to a creditor's petition under sec. 9, and reproduces sec. 6 (3) of Act III of 1907 with the addition of the proviso which is a corollary to the amendments introduced in sec. 16, now 28 and sec. 44 now 41, regarding the annulment of an order of adjudication."—*Notes on Clauses*

What constitutes Debt & Debtor under the Act.

For what constitutes "debt" and 'debtor' under the Provincial Insolvency Act, vide definition of "debt" and "debtor" in sec 2 (a) and notes thereunder supra. To constitute "debt" in the sense in which the term is used in insolvency it must be a personal debt and to constitute a person "debtor" in the aforesaid sense, he must be personally liable for the debt. For as has been observed, "Bankruptcy is essentially a proceeding in personam and only the personal debt due by the insolvent can be proved therein. A decree against a person as the legal representative of another (such as a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act. *Nagasubramania Mudaliar v. Krishnamachariar*, 50 M. 981. It is well settled that a Hindu son who becomes liable for the debts of his father to the extent of the assets received by him from the father is not entitled to apply to be adjudicated an insolvent under the Provincial Insolvency Act on the ground that the assets left by the father are not sufficient to pay the debts and the debts amount to more than five hundred rupees. *Abdul Rahaman Mia v. Gajendra Lal Saha*, 11 L R (1938) 1 C, 132 : 41 C.W.N. 1288 : 66 C L J 346

Conditions of a debtor's petition.

Sec 9 deals with the conditions on which a creditor may apply for the adjudication of a debtor. Section 10 points out the limitations or conditions to which the application for insolvency of a debtor is subject. The debtor must fulfil the following conditions before he is entitled to present a petition for adjudication : (a) he must be unable to pay his debts, and (b) his debts must amount to Rs. 500/- or he must be under arrest or imprisonment in execution of a decree for payment of money, or an order of attachment in execution of such a decree has been made and is subsisting against his property, and (c) he must have ordinarily resided or carried on business or personally worked for gain within the jurisdiction of the Court — 1. 1. 1. that he has been arrested or of any Court for payment of 1 Court (sec. 11).

Adjudication—a statutory right.

It is obvious from sec. 15 (now sec 25) that before the Court

can make the order of adjudication the Court has to be satisfied with the proof of the right to present the petition, in other words the requirements of ss 5 and 6 (now ss 9 and 10) have been fulfilled, *Udaichand Maiti v Ramkumar Khara*, 15 CWN 213 In *Chatrapat Sing Dugar v Kharagsing Luchminarain*, 44 IA 11 44 Cal 535 21 CWN 497 15 ALJ 87 the Judicial Committee of the Privy Council have observed that "on the debtor's complying with all the conditions specified in the Act, e.g., sec 6 of Act III (now sec 10 of Act V) he is entitled as of right to an order adjudging him an insolvent. The mere fact that the judge was unable to satisfy himself that the petitioner was unable to pay his debts is not such a ground for the dismissal of the debtor's application for insolvency." Where the requirements of the Provincial Insolvency Act have been complied with an order of adjudication should follow as a matter of course. Whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the stage when the order of adjudication has to be made but at the final stage when the application is made for discharge, *Mohiruddin Sarkar v The Secretary Hadal Gramya Rindan Samity*, 57 Ind Cas 977. A debtor has a statutory right to get himself adjudicated an insolvent if he complies with the provisions of section 10 and the Court cannot refuse to adjudicate him merely because the petitioner does not disclose possession of assets by him. The possession of assets is not a condition necessary for a debtor to prove before he is adjudicated insolvent *Doraiswami Chettiar v Abdul Suban Sahib*, 62 MLJ 234 35 L W 248 137 IC 390 1932 AIR (Mad) 237

Joint petition by several debtors

A joint petition by several debtors for adjudication as insolvent is not *per se* bad in law, the true test to apply is whether a joint petition would be bad for multifariousness that is to say misjoinder of causes of action or of parties *Brojendra Nandan Saha v Nikunja Behari Das* 39 CWN 104 60 CLJ 248 *Vide also* Rules under sec 79. It is now well settled that a joint petition for adjudication of several joint debtors is not of itself bad in law *Maung Hanoot v The official Receiver*, 14 R 122, *Brojendra Nandan Saha v Nikunja Behari Dass*, 39 CWN 104

Sub-section (1) ; Inability to pay debts

The words unless he is unable to pay his debts' have for the first time been brought into the Act of 1920. The reason for introducing these words have been explained in the Statement of Objects and Reasons, thus "It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of a debtor on the ground that the application is an abuse of law. While admitting that the object of an insolvency law

in contradistinction to a creditor's petition under sec 9 and reproduces sec 6 (3) of Act III of 1907 with the addition of the proviso which is a corollary to the amendments introduced in sec 16 now 28 and sec 44 now 41 regarding the annulment of an order of adjudication —Notes on Clauses

What constitutes Debt & Debtor under the Act

For what constitutes debt and debtor under the Provincial Insolvency Act vide definition of debt and debtor in sec 2 (a) and notes thereunder *supra*. To constitute debt in the sense in which the term is used in insolvency it must be a personal debt and to constitute a person debtor in the aforesaid sense he must be personally liable for the debt. For as has been observed Bankruptcy is essentially a proceeding in personam and only the personal debt due by the insolvent can be proved therein. A decree against a person as the legal representative of another (such as a decree against a son for the debt of his deceased father to the extent of the assets in his hands) does not make him liable to adjudication under the Provincial Insolvency Act. *Nagasubramania Mudaliar v Krishnamachariar* 50 M 981. It is well settled that a Hindu son who becomes liable for the debts of his father to the extent of the assets received by him from the father is not entitled to apply to be adjudicated an insolvent under the Provincial Insolvency Act on the ground that the assets left by the father are not sufficient to pay the debts and the debts amount to more than five hundred rupees. *Abdul Rahaman Mia v Gajendra Lal Saha* 11 R (1938) 1 C 132 41 C W N 1288 66 C L J 346

Conditions of a debtor's petition

Sec 9 deals with the conditions on which a creditor may apply for the adjudication of a debtor. Section 10 points out the limitations or conditions to which the application for insolvency of a debtor is subject. The debtor must fulfil the following conditions before he is entitled to present a petition for adjudication. (a) he must be unable to pay his debts and (b) his debts must amount to Rs 500/ or he must be under arrest or imprisonment in execution of a decree for payment of money or an order of attachment in execution of such a decree has been made and is subsisting against his property and (c) he must have ordinarily resided or carried on business or personally worked for gain within the jurisdiction of the Court in which the petition is presented or that he has been arrested or imprisoned in execution of the decree of any Court for payment of money within the jurisdiction of the Court (sec 11)

Adjudication—a statutory right

It is obvious from sec 15 (now sec 25) that before the Court

can make the order of adjudication a condition in other words
the requirements of section 10 of the Provincial Insolvency Act have been
satisfied. *121 C.W.N. 213 In*
Cal 535 21 C.W.N. 207 The Indian Committee of
the Privy Council has observed that the debtor's compliance
with all the conditions of section 10 of the Provincial Insolvency Act III
(now sec 10 of Act V of 1920) is a right to an order
adjudging him an insolvent. The mere fact that the judge
was unable to enforce payment of the debt was unable to pay
his debts is not such a ground to withhold an order on the debtor's
application for insolvency. Where the requirements of the
Provincial Insolvency Act have been complied with an order of
adjudication should follow as a matter of course. Whether the
debtor has or has not committed any offence is to be
determined by the Court not at the time when the order of
adjudication has to be made but at the final stage when the
application is made for discharge. *Mohdun Nader v. The*
Secretary Hadal Gramma Rindan & Co. 57 Ind Cas 977 A debtor
has a statutory right to get himself adjudicated an insolvent if he
complies with the provisions of section 10 and the Court cannot
refuse to adjudicate him merely because the petitioner does not
disclose possession of assets by him. The possession of assets is
not a condition necessary for a debtor to prove before he is
adjudicated insolvent. *Doracummi Chetty v. The Subar Sarin*
62 MLI 234 35 LW 248 137 IC 390 103 AIR (Mad) 227

Joint petition by several debtors.

A joint petition by several debtors for liquidation is not per se bad in law the true test to apply is whether the petition would be maintained under the provisions of the Act. In *Nand Lal v. The Official Receiver*, 11 R 122 Profendra Nandan Singh & Behari Das 39 C W N 101.

Sub-section (1) : Inability to pay debts.

The words unless he is unable to pay his debts have first time been brought into the Act of 1920. The terms introducing these words have been explained in the Statement of Objects and Reasons, thus "It is now settled law of the Act, as it stands, it is not open to the Court to entertain a petition of a debtor on the ground that the application is not in law. While admitting that the object of an insolvency

is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed in *limine* (i.e. in the threshold) it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact *unable to pay his debts* and that he has not concealed his property. These changes in the existing law are effected by the amendments in clauses 9, and 10 (2) and by clause 12 which inserts a new section 16A as to protection orders on the lines of section 25 of the Presidency Towns Insolvency Act, 1909 "

Under the new Act a debtor's petition shall allege that the debtor is unable to pay his debts, and if the debtor proves that he is entitled to present the petition the Court may make an order of adjudication. The reason for the requirement of the debtor's allegation that he is unable to pay his debts is that a debtor-petitioner's only justification for obtaining the benefit of the Insolvency Act is his inability to pay his debts. The required allegation by the petitioner-debtor of inability to pay his debts is not a mere matter of form but goes to the foundation of the debtor's right to claim the benefit of the Insolvency Act, *Viswanatha Chetty v. Official Assignee, Madras*, 58 M.L.J. 189, 1930 M.W.N. 99, 124 I.C. 129, 1930 A.I.R. (M.) 544. No doubt, under the old Act, III of 1907, it was unnecessary for a person presenting an application to show that he was unable to pay his debts, but that is for the obvious reason that the old Act did not require him to show that he was unable to pay his debts. This is a matter which the Court under the new Act has to investigate and it can only investigate such matters on such materials as are placed before the Court by the party making the application for adjudication of insolvency, *Gobindprasad v. Kishan Lal*, 1928 A.I.R. (Pat.) 166. The Provincial Insolvency Act has now been amended by the Act of 1920 so as to make it essential that the debtor shall prove that he is unable to pay his debts before he can present any application. This is only natural in view of the fact that the whole of the insolvency jurisdiction is provided for the case of persons who are *unable to pay their debts* and not of persons who are *merely unwilling to pay their debts* although able to do so. It, therefore, appears that the debtor's petition was not one for any of the purposes for which the insolvency law was created if he was able to pay his debts and it is an abuse of the process of the Court in that it obtains the jurisdiction of the Court by a false declaration. That being so the Court certainly ought not to make the order of adjudication and is bound to annul the same on proof that the petitioner was not entitled to present the petition *Alamelumanahgata-yarammal v. Balusami Chetti*, 1928 M.W.N. 62, 108 I.C. 208, 1928 A.I.R. (M.) 394.

When assets more than liabilities.

Under the provisions of Ch XX of the C P C, 1882, it was held in *Juala Nath v Parbatu Bibi*, 14 Cal 691, that a Court cannot refuse the application of a judgment debtor seeking to be declared insolvent under this chapter unless it found affirmatively that the applicant had brought himself within the penal clauses (a), (b) (c), (d) of sec 351 of the Code, and the fact that his scheduled assets exceeded his liabilities did not entitle him to such relief. In *Satschandra Pakhira and Rasiklal Pakhira* 72 Ind C

is quite an error to suppose that a man is not entitled to be declared insolvent because the sum total of his assets is larger than the sum total of his debts. It may well be and is frequently the case that a man's securities are locked up and are not available for the time he is called upon to pay his debts but he is none the less entitled to be declared insolvent unless he is found guilty of dishonest conduct. The practice of leaving a man to the mercy of his creditors who with a view of extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is a practice which cannot be too strongly reprehended. Although a debtor may have assets, which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he is not "able to pay his debts" within the meaning of section 13(4) (b) of the Presidency Towns Insolvency Act so as to resist a creditor's petition for adjudication, *Pratapmall Rameshwar v Chunital Jahuri*, 60 Cal 345. The assets of the insolvent (consisting of inalienable land and house) if realized by him were worth more than the debts. The difference between the debts and assets on the most favourable showing was not very large. It was held that the debts due were cash debts and the assets were not immediately realisable and in that sense the insolvent was unable to pay his debts and should therefore be declared insolvent. *Karim Bakhsh v Gaja Dhari*, 148 I C 48 1934 A I R (Lah) 63.

Proof of inability to pay debts.

Vide sec 24(1) (a) proviso and notes

Clause (a) ; Debt must amount to five hundred rupees.

A person is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others, amount to more than Rs 500. *Ghulam Husain v Rameswar Das* 99 I C 524 (1927) A I R (L) 108. A bond upon which a debtor is jointly and severally liable alone with other persons is sufficient to support a petition for adjudication, *Ananta Kumar v Sadhu Charan* 87 I C 751. Where the debtors are jointly and severally liable under a decree for Rs 500 and the assets of the debtor are less than Rs 500 and can rely

Though a decree-holder who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies is not a creditor (vide *Parbat v Raja Shamnik* 20 A L J 147) the existence of a Rent Court decree in excess of the prescribed minimum of Rs. 500 against a debtor entitled him to an order of adjudication, *Munna Singh v Dig Bijai Singh*, 19 A L J 273

Clause (b) ; Arrest or imprisonment.

Under section 6 cl (h) a debtor commits an act of insolvency "if he is imprisoned in execution of the decree of any Court for the payment of money". Sec 10 (1) (b) provides for one of the three alternatives which must have taken place before the debtor is entitled to present the petition in cases where his debts do not amount to five hundred rupees. It follows that the debtor is entitled to present an application for adjudication if he is unable to pay his debts, and (a) if his debts amount to five hundred rupees, or (b) if his debts do not amount to five hundred rupees, he is under arrest or imprisoned in execution of the decree of any Court for the payment of money, or (c) if his debts do not amount to five hundred rupees, an order of attachment in execution of such a decree has been made and is subsisting against his property.

In *In the matter of William Hastie*, 11 Cal 451, it was held that a person in imprisonment is under arrest though it was contended that a person in imprisonment is not under arrest and not entitled to present an application for adjudication. This view of the Calcutta High Court has not been accepted as a correct proposition of law in *Mahomed Husein v Radhi*, 12 Bom 46 following *In re Quarrie*, 8 Mad 503. To avoid the difficulty thus created in the meaning of the words "arrest" and "imprisonment", the Legislature has thought it wise to use both the words in cl (b), sec 10 (1). It should also be noted that the arrest or imprisonment must be subsisting at the time when the petition is made. A judgment debtor who had been arrested but released cannot apply to be adjudged an insolvent after his release, *Jumai*.

11 Further, an arrest made does not entitle the debtor to present a petition.

Ditmal v Saudagarmal, 98 IC 885 1927 A I R (L) 38

Clause (c) ; Attachment.

Both under the English Bankruptcy Act, sec 1 (e) and the Presidency Towns Insolvency Act, sec 9 (e) attachment of the debtor's properties in execution of the decree of any Court for the payment of money is an act of insolvency while under the Provincial Insolvency Act, sec 6 (e), it is an act of insolvency if any of his properties has been sold in execution of the decree of any Court for the payment of money. A creditor's petition, therefore, under

the Provincial Insolvency Act for adjudication of the debtor as insolvent would not lie on the attachment of the latter's property while it would be maintainable both under the English Bankruptcy Act and the Presidency Towns Insolvency Act. But attachment of the properties of the debtor in execution of the decree of any Court for the payment of money would entitle the debtor to present an application for his adjudication even if his debts do not amount to five hundred rupees. It is only a debtor against whom an order of attachment by the Court is *actually subsisting* that can present a petition under this section. In delivering the judgment in *Jumai v Muhammad Kazim Ali*, 25 All 204 23 A W N 11, their Lordships observed "We cannot believe that it was the intention of the Legislature that any judgment-debtor against whose property, an order of attachment had been made could some years afterwards come into Court and apply to it to declare him an insolvent on the strength of a long-dropt proceeding for attachment."

If at the date of filing the petition the debtor is entitled to present an insolvency petition, the mere circumstance that the execution proceedings which brought the applicant before the Court have terminated before the date of the hearing of the petition will not put the petitioner out of Court. "It is only the attachment by any Court in execution of the decree for payment of money and not any other kind of attachment, e.g., attachment before judgment, which is not an attachment in execution of the decree for payment of money, that entitles the debtor to present an application for adjudication, *Makhan Lal v Gulzarimal*, 6 All 290. A charging order under Or 21 r 49, C P C is not an attachment within the meaning of sec 9 of the Presidency Town Insolvency Act and thus not an act of insolvency, *Gulam Mustaffa Mullick v Madanlal*, 58 Cal 624 34 C W N 1051 130 I C 877 1931 A I R (Cal) 167. The underlying principle is that the act or default which amounts to an act of insolvency must be the *personal act or default* of the particular individual or in certain circumstances of his agent. Where properties alleged to belong to three judgment-debtors remained under attachment in execution of a joint decree against them, it was held, that this alone could not be relied on as an act of insolvency on the part of one of the co judgment-debtors, *Haris Chandra v The East India Coal Co Ltd*, 16 C W N 733.

Sub-section (2) ; Defect in Act III of 1907

"One of the principal defects in the existing law (Act III of 1907) arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court and at which most of the provisions affecting a fraudulent insolvent operate is when he applies for his discharge. But there is nothing in the Act (III of 1907) which requires him to apply for his discharge."

and in practice such applications are rare. To remedy this unsatisfactory state of the law it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to extend the prescribed period and when adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, a fresh petition on the same facts will be barred"—
Statement of Objects and Reasons

Sir George Lowndes in introducing the Bill No XIV of 1918 which was passed into Act V of 1920 made the following remarks: "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the debtor, he files his petition and if he is in jail, he automatically gets his release under the existing Act (III of 1907), and he is practically protected from going to jail again. That is sufficient for him, that is all he wants. He does not want to pay his debts, all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge and until he applies for it the Court has practically no power over his misdoings. The existing Act it is true lays certain disabilities on an undischarged insolvent but these do not affect the dishonest debtor. He cannot borrow money without disclosing his condition. But in the first place he probably does not know there are any such disabilities at all, if he does he borrows all the same in disregard of the Act and nobody takes the trouble to prosecute him. This is the state of things that we have tried to remedy by this Amendment Bill. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court which we hope will in most cases be a fairly short one. If the insolvent does apply for his discharge and it must be remembered that his doing so will enable the Court to deal with any malpractices he is guilty of, the protection of the Court will be annulled and it is provided that if he does not do so the same facts will be barred."

Removal of defect in Act III of 1907.

Section 10 (2) is new and is intended to be penal inasmuch as on the failure of the insolvent to apply for his discharge within the time fixed by the Court on his adjudication the adjudication order will be cancelled and the protection of the Court withdrawn and the debtor will be subject to arrest and imprisonment and the property attached and sold. And he will not be entitled to present a fresh petition for insolvency without the leave of the Court which will not be granted unless he can satisfy the Court that he was prevented by sufficient reasons from presenting

and prosecuting the application for his discharge or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made

Amendment

By section 4 of the Provincial Insolvency (Amendment) Act XI of 1927, which received the assent of the Governor General on the 2nd September, 1927 subsection (2) of sec 10 of the Provincial Insolvency Act, 1920, has been amended in the following terms. In sub section (2) of sec 10 of the Provincial Insolvency Act, 1920, for the words made under this Act, the words *whether made under the Presidency towns Insolvency Act, 1909 or under this Act,* shall be substituted. By this amendment, the scope of the section is widened. Under the amended section the debtor must obtain the leave of the Court even where he applied previously under the Presidency Towns Insolvency Act 1909. Hitherto after failing to apply for his discharge under the Presidency Towns Insolvency Act he could apply under the Provincial Insolvency Act, and sec 10 (2) did not bar such application.

Remedy on annulment of adjudication

When an order of annulment has been passed under sec 43 (1) of the Provincial Insolvency Act it is not open to the Insolvency Court to set aside its order by virtue of the provisions of Or 9 of the C P C. Sec 10 (2) of the Insolvency Act itself provides a special procedure by means of which the insolvent can have his remedy. According to that section he can after obtaining leave of the Court file a fresh petition for adjudication on the same facts. He cannot rely upon the provisions of the C P C by virtue of sec 5 of the Insolvency Act. *Venugopala Channar v Chinnu* 49 Mad 935 51 M L J 209 1926 M W N 674 97 IC 706 (1926) A I R (M) 942

Leave for fresh petition after annulment is discretionary

The statute does not provide that leave may be granted on questions of fact nor does it provide that the District Courts should not grant leave on questions of fact. The matter is however, in the discretion of the District Court. *Shibjee Sha v Hiralal Rakhalchand* 104 IC 613 1928 A I R (P) 23. Where a person was adjudicated an insolvent and was ordered to apply for his discharge within six months and his assets were taken charge of by the Official Receiver which were sold and the amount was deposited with him but none of the creditors appeared to receive the same and the District Judge without giving any notice to the insolvent or to the other parties concerned annulled the adjudication order and the applicant thereupon presented an application for leave to present a fresh insolvency petition w

was refused it was held in appeal that leave to present fresh petition of insolvency should be granted as the estate of the insolvent was still under administration by the Official Receiver and consequently the insolvent might have been under a reasonable impression that he need not apply till the assets held by the Receiver had been distributed to the creditors *Belu Ram v Mungal Das* 117 I C 237 1928 A I R (L) 452

On the application by an insolvent for discharge the Court considering that he had not sufficient assets to entitle him to get a discharge directed him to pay Rs 25 per month to the Court and to renew his application for discharge within six months hence. No payments were made and no application for discharge was presented within six months and the Court annulled the adjudication order under section 43. The insolvent applied under section 10 (2) for leave to present a fresh insolvency petition alleging that he had misunderstood the meaning of the Court's order as to the exact period within which he has to make the application. The application was dismissed and the insolvent appealed. It was held (1) that though the order was not appealable under sec 75 (2) the case was a fit one for granting leave to appeal (2) that the order of annulment under section 43 was not warranted by law as the Court was acting under sec 42 (1) (a) and not under sec 43 (1) of the said Act and it was left open to the insolvent to apply at any time he pleased after six months (3) that under the circumstances the insolvent ought to have been permitted to file a new petition in insolvency *G H Gee v Shib Narain* 118 I C 332 (1929) A I R (Pat) 184

A prior adjudication in insolvency based on the debtors having assigned all his property in favour of creditors was annulled on the failure of the insolvent to apply in time for his discharge. Subsequent to the annulment a decree holder creditor arrested the insolvent in execution whereupon the debtor filed a fresh insolvency petition alleging that all his properties were subsequent to adjudication distributed among the creditors that he was therefore destitute and that it constituted a different set of facts from those contained in the prior insolvency petition. It was held that it did not constitute a different set of facts under sec 10 (2) and the petitioner was not therefore entitled to present a fresh insolvency petition *C M A No 163 of 1929 (Mad)* 59 M L J *Notes on Indian Cases* p 38

Adjudication on fresh petition without leave

It has been provided in section 35 that the Court may of its own motion or on application made by the receiver or any creditor annul any adjudication made on the petition of a debtor who was by reason of the provisions of sub sec (2) of sec 10 not entitled to present such petition. In *In re Ballav Chand Serowgee* 27 C W N

739, decided under the Presidency Towns Insolvency Act, an insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act his adjudication was annulled. Subsequently on his own petition on the same facts and materials, his second adjudication took place and a creditor applied to annul the adjudication, it was held on the authority of *Malchand v Gopal Chandra Ghoshal*, 21 C W N 298, that the presentation of the second insolvency petition by the debtor without the leave of the Court was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled.

11. Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody.

Provided that no objection as to the place of presentation shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

Review.

This is sec 4 (1) (d) of the Bankruptcy Act 1914 and sec 11 of the Presidency Towns Insolvency Act 1909 and section 6 (2) of Act III of 1907, and the proviso is new. Under the English law a petition will not be good unless the debtor is domiciled in England within a year before the date of the presentation of the petition, and has ordinarily resided or had a dwelling house or a place of business.

Court having jurisdiction.

The Court having jurisdiction under the Act is the District Court or any Court specially empowered by the Local Government in that behalf (see 3 *supra*). In *In re Tamincharin Guha*, 11 B L R. App 25, and in *In re Howard Bros* 11 B L R 251, it was held that "residence" within the meaning of the section may mean carrying on business, although at the time not actually residing. In every case, residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is „„

a flexible one, but in the case of persons who are traders carrying on business at several places, their place of residence is manifestly the place where they earn a living and do their daily work, nor does that place cease to be their residence because for purposes of rest or recreation or family ties they occasionally return to their family house where they and their family have been brought up, *Municipal Board, Bareilly v. Rafiq Alabaksh* 22 A L J 457

Resides

In *Srimati Anilabala Chaudhuran v. Dharendra Nath Saha Chaudhuri*, 32 C L J 314, it has been held that "the term 'residence' is an elastic word, of which an exhaustive definition cannot be given, it is differently construed according to the purpose for which enquiry is made into the meaning of the term the sense in which it should be used is controlled by reference to the object, *Mahomed Shuffi v. Laldin*, 3 Bom 227 and *Goswami Shri v. Shri Govardhan*, 14 Bom 541. The term 'residence' is equivalent to 'the abiding or dwelling in a place for some continuance of time' and to constitute a residence, there must be a settled fixed abode or intention to remain permanently, at least for a time, for business or other purposes. The term 'residence' may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, the place of his family, the place of his personal or legal residence are the same. When, on the other hand, a person has no permanent habitation or family but dwells in different places as he happens to find employment, he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations where their families constantly dwell, yet they pass a great portion of their time in other places, such persons have a legal residence with their families, and a personal residence in other places, and the word 'residence' may, with respect to such persons, be used in relation to either their personal or their legal residence. From this point of view, one may have two places of residence, in one of which he resides, during the portion of the year, in the other during the remaining portion, what may be said to be the place of personal residence during one portion of the year thus becomes place of legal residence during the remainder of the year and *vice versa*, *Walcot v. Batfield*, 1854 Kay 435 101 R R 719. Generally, if a person has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some time. If he keeps an establishment in it, the place is still his residence, and thus he may be said to have his residence in two or three different countries. The question is entirely distinct from that of domicile which is often wholly independent of actual residence, *In Re Moir*, (1884) 23 Ch D 605 and *In Re Wright*, 1915 App Cas 717.

In *Viswanatha Chetty v The Official Assignee, Madras*, 58 MLJ 189 1930 MWN 99 1241 C 129 1930 AIR (M) 544, a case under the Presidency Towns Insolvency Act it was held that it is sufficient for the requirement of sec 11 (b) of the Presidency Towns Insolvency Act that the debtor has had a dwelling house within the High Court's Original jurisdiction limits available for the occupation as a dwelling house should he choose to dwell there, although he has ordinarily resided elsewhere and has not actually dwelt in the house within the year previous to the presentation of the insolvency petition and there is no evidence that he had abandoned it as a dwelling house when he went and resided outside the jurisdiction of the High Court Original Side

"Ordinarily resides".

A foreigner who had a room in a hotel in London for 18 months before presentation of a petition and paid for the room continuously during the time has 'ordinarily resided in England,' *Re Norris, Ex parte Reynolds*, (1883) 5 Mor 115 A Scotsman who pays several visits in London, has a bed room in a lodging where he stops intermittently cannot be said to have ordinarily resided in England, *Re Erskine, Ex parte Erskine*, (1893) 10 TR 32 A domiciled Frenchman took a flat in London for three months and lived there, and was held to have had a dwelling house in England *Re Hecquard*, (1889) 24 QBD 71 Not so, however, a foreigner who had resided in a house in England, but who went to reside abroad and abandoned the house as a resident more than a year before the petition although during some part of that year he continued to own the lease of the house and had he so chosen might have returned there, *Re Nordenfelt*, (1895) 1 QB 151

In *Abdul Refak v Basiruddin Ahmed*, 17 CWN 405 15 CLJ 457, in discussing the question the High Court observed 'It is clear upon the evidence that although the petitioner ordinarily resided at Delhi towards the end of 1905 he came to the suburbs of Calcutta and established a factory and resided there upto 1908, and carried on business which was closed on account of financial difficulties about that time He had to go to Delhi to look after suits against him in the Delhi Court It has been therefore strenuously argued on behalf of the opposing creditor that under the circumstances he could not be taken to have ordinarily resided within the jurisdiction of the Court In our opinion there is no force in this contention It is not necessary for the petitioner to have resided for a long time at a place within the jurisdiction of the Court and it has been held in the case of *Ex parte Hecquard*, (1889) 24 QBD 71, that even temporary residence for a particular purpose is enough to give the Court jurisdiction "

In *Madho Pershad v A L Walton*, 18 CWN 1050, A L Walton was employed as a guard in the B N Railway He resided at

Dungargarh in C P, but he ran his truns ordinarily from Dungargarh to Nagpur. He also worked from Dungargarh to Kharagpur but had no permanent residence at that place. Insolvency was lodged in the Court of the District Judge Midnapore. The only question in controversy was whether the petition had been presented in a Court having jurisdiction under the Provincial Insolvency Act in the local area in which the debtor ordinarily resides, or carries on business or personally works for gain within the meaning of sec 6 (2). The term resides is not defined in the Statute but its ordinary interpretation is explained in *Kumud Nath Raichaudhuri v Jatindranath Chaudhuri* 38 Cal 394 13 CLJ 221. The mere fact that when at Kharagpur he stopped with Atkins does not show that he resided at Kharagpur. See also *In Re Momet*, 21 Cal 634. And in *Sugamaniam v Pichai*, 10 Ind Cas 786, it is held that where a person takes a temporary residence at a place with the object of filing his schedule of insolvency there the Insolvency Court of the locality will refuse to entertain his insolvency petition. It is enough if the debtor has remained within the limits of the District in which he presented the petition, though he may not have a permanent or continuous residence within it and may have occasionally gone outside the District and return to it. A railway servant who normally resides at Jamalpur but spends his weekends in a rented room in Calcutta has a dwelling house in Calcutta within the meaning of s 11 of the Presidency Towns Insolvency Act. *Jure Arnold Gantzer*, 42 CWN 250.

Oldfield, J, in delivering the judgment in *Lakshminarain Aiyar v C R Subramania Aiyar*, 45 MLJ 129 1923 MWN 328 73 Ind Cas 74 1923 AIR (Mad) 585 held: We have been referred to definitions of 'residence' adopted by two learned Judges of the Calcutta High Court for the purpose of Or 9 CPC in *Kumud Nath Raichaudhuri v Jatindranath Chaudhuri* 38 Cal 394 13 CLJ 221, but we are not prepared to adopt those definitions as exhaustive. We can quite understand that a person specially a person in the financial position of the debtor, may not have any permanent or continuous residence. It is, in our opinion sufficient that he has remained within the limits of the District though he may have occasionally gone outside the District and returned to it.

"Carries on business".

A very important alteration was made in the English Bankruptcy law by secs 1 (2) and 4 (1) (d) of the Bankruptcy Act 1914. By sec 1 (2) the definition of a "debtor" is a person capable of committing an act of bankruptcy, and therefore amenable to the bankruptcy laws has been extended so as to include persons not British subjects who at the time of the act of bankruptcy were carrying on business in England personally or by means of an agent or manager, or were members of a firm or partnership which carried on business in England. In sec 20 (1), CPC "carrying

on business is used as distinct from personally working. It does not necessarily involve personal presence or personal effort and a man may carry on business in a place e.g. through an agency or through a manager or by his servants without ever having gone there. It means having an interest in a business at that place a voice in what is done a share in the gain or loss and some control if not over the actual method of working at any rate upon the existence of business. *Kripa Ram v Mangal Sen* 19 A L J 696 65 I C 93 1922 A I R (All) 337. Carrying on business in sec 11 of the Presidency Towns Insolvency Act 1909 means entering into transactions which may result in personal liabilities. *Re L E Salsicioni* 39 C W N 324.

The word personally in sec 11 qualifies the word work for gain and not the words carries on business nor do the words carries on business connote the idea that the business should be carried on personally. It is not necessary therefore that to give the Insolvency Court jurisdiction over a person the latter should be personally carrying on business within the jurisdiction of the Court. *Chetandas Mohandas v Ralli Bros* 83 I C 135 1925 A I R (S) 153. Where a man carries on business at more than one place he cannot be said to be a resident exclusively of any particular place. He is a resident of both the places. *Periya Karuppan Chettiar v Angappa Chettiar* 21 M L W 52 86 I C 299 (1925) A I R (M) 483. The words either personally or through an agent in sec 11 (b) of the Presidency Towns Insolvency Act were introduced for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the Insolvency Court over foreigners carrying on business within the jurisdiction of the Insolvency Court by the employment of agents or managers properly and strictly so called and not for including purchases and sales made by employing a commission agent. The business contemplated by this section should be carried on within the limits of the Court either personally by the principal or by his agent properly and strictly so called and under his effective control but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission. Business done by commission agent in his own name though for the benefit of an undisclosed principal who is liable to indemnify the commission agent against loss is not business done by such undisclosed principal through the agent but business done by the agent. *In Re Reloomal Tolaram* 112 I C 134 (1929) A I R (S) 24.

Personally works for gain

The question whether the petitioner personally works for gain within the jurisdiction of an Insolvency Court is a question of fact but it involves the construction of sec 11. It is not possible to lay down any principle which will govern all cases the question

one of fact. It is clear that a person may be working for gain in more than one place. He may for instance be working in Bombay during the cold weather and in Poona during the rains. Again, the place where the payment is made to the petitioner is not the test, but it is one of the ingredients which has to be considered in determining where a person works for gain, and in that connection the important point seems to be the place where the money is actually paid, and not the place where the pay sheets are made out or where payment may be regarded as notionally made. The Insolvency Act is concerned with where the assets of the debtor are, and where his creditors are. The important thing in point of view of payment is where the money is actually received by the debtor and therefore available for the creditors. In the case of a man like an engine driver who in the course of his employment necessarily travels about it seems impossible to say that he is working for gain in every place which his engine may pass through. A man driving an engine or a motor car is no doubt earning his salary during the whole course of his employment, but it seems impossible to say that for that reason he is personally working for gain in every place where his engine or car may be. There must be some degree of permanency in the relation between the debtor and the places where he is alleged to work for gain. It may be that an engine driver driving his engine between two places can be said to be working for gain in both places. It may be three or four times a month that a debtor goes to Bombay, but if there is nothing to show that his connection with Bombay was in any way permanent and if he resides in Bhusawal, actually receives his pay there and takes his orders there, he cannot be said to be working for gain within the limits of the original jurisdiction of the High Court of Bombay, *Uderaj Boduram v Clement Griffith Hall*, 56 Bom 530 34 Bom LR 844 139 IC 591 1932 A I R (Bom) 432.

“Where he is in custody”

The word “or” in the section is used in the sense of giving an alternative choice. So where a debtor has been arrested or imprisoned he is not limited in the presentation of his insolvency petition to the Court having jurisdiction in the local area where he is in custody, *Ghanshamdas v Bishindein* 5 S L R 259 15 Ind Cas 830. The act of insolvency of a person commencing in his being arrested and imprisoned in execution of a decree continues throughout the period during which he remains in prison, *Karam v Jhanda Mal*, 32 P L R 51 131 IC 112 1931 A I R (Lah) 112. A confinement in jail for a considerable period say eighteen months prior to the date of the petition is sufficient to attract to him the jurisdiction of the Court. That the jail had been his ‘residence’ if not his ‘dwelling house’ for upwards of twelve months

there is no doubt and there is no reason for holding that it was not his 'ordinary' residence. An 'ordinary' residence is not to be contrasted with an 'extraordinary' residence in the popular sense. A jail is in one sense an unusual place of residence. A man's ordinary residence is that at which he has an intention of remaining for a sufficiently long period (whether continuous or discontinuous) to constitute it a residence at all. Thus a room in a hotel may or may not be an 'ordinary residence'. It depends upon the intention with, and the purpose for which the room is taken. In the matter of, *M V R Velusamy Thevar* 13 R. 192

Proviso ; Objection as to place of presentment.

In *Madho Pershad v A L Walton*, 18 C W N 1050, it was decided that "sec 47 (1), now sec 5, provided that subject to the provisions of the Act, the Court in regard to proceedings under the Act shall have the same powers and follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But this section does not directly or by implication render section 21, C P C, 1908, applicable to proceedings under the Provincial Insolvency Act. Consequently the doctrine that no objection as to the place of suing shall be allowed by any appellate Court unless such objection was taken in the Court of the first instance at the earliest opportunity, and unless there has been a consequent failure of justice, cannot be applied to these proceedings." To obviate the difficulties created by the above decision the proviso has been found necessary to be incorporated and the introduction of the proviso has been thus explained in the *Notes on Clauses*. 'This section reproduces sec 6 (2) of Act III of 1907 with the addition of a proviso which is designed to cure a defect. Sec 6 (2) laid down where an insolvency petition was to be presented but did not contain any saving in the event of the petition being presented in the wrong Court. The point was raised in *Madho Pershad v Walton*, 18 C W N 1050, where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court. The proviso is intended to stop this loop hole in Act III of 1907." Sec 21 of the C P C 1908, has now been made applicable to the proceedings under the Provincial Insolvency Act. An objection on the ground of absence of jurisdiction in the Court which made the adjudication cannot be taken notice of in an appeal unless the Court is satisfied that there has been a failure of justice, *Periya Karuppan Chettiar v Angappa Chettiar*, 21 M L W. 52 86 I C 229 (1925) A I R (M) 483. In order that proceedings may be vitiated on the ground of presentation to the wrong Court, two matters must co exist, the objection must be taken at the earliest possible opportunity and there must be a consequent failure of justice. The presentation of the petition is not to the wrong Court where the insolvent has been residing in different places and his ancestral house and lands are within the territorial jurisdiction.

of the Court in which the petition is presented *Kasi Iyer v Official Receiver Tanjore* 1925 M W N 797 (1926) A I R (M) 228

12 Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure 1908 for signing and verifying plaints

Review

This is section 6 (I) of Act III of 1907 with the omission of the portion and the procedure laid down in the said Code with respect to the admission of plaints shall so far as it is applicable be followed in the case of such petitions. It is a condition precedent that the application for insolvency either by the debtor or by the creditor shall be signed and verified either in the ordinary form of verification or by affidavit as the Court must have some statement on oath before it can be set in motion. For particulars for signature verification etc vide Order VI C P C. Where the debtor is a firm the application for insolvency must be in the name of the firm and must be signed in the manner laid down in the new Rules 19 22 and 24 framed by the High Court under sec 79 of the present Act *Sats Chandra Addy v Firm o Rajnarain Pakhira and Rasiklal Pakhira* 72 I C 60

Absence of verification

Want of verification of pleadings has not the effect of making them void. It merely amounts to an irregularity which does not affect the merits of the case and which can be rectified by permitting the party concerned to make good the deficiency by amending the pleadings. *Shib Deo Misra v Ram Prasad* 46 All 637. *Ram Labhaya v Firm Chanchal Singh* 133 I C 626 1932 A I R (L) 28

13. (1) Every insolvency petition presented by a debtor shall contain the following particulars namely —

- (a) a statement that the debtor is unable to pay his debts,
- (b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody
- (c) the Court (if any) by whose order he has been arrested or imprisoned or by which an order has been made for the attachment of his

property, together with particulars of the decree in respect of which any such order has been made ,

- (d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him ,
- (e) the amount and particulars of all his property, together with—
 - (i) a specification of the value of all such property not consisting of money ,
 - (ii) the place or places at which any such property is to be found , and
 - (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ,
- (f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—
 - (i) if such petition has been dismissed, the reasons for such dismissal, or
 - (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and if so, the grounds therefor

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (b) of sub-section (1), and shall also specify—

- (a) the act of insolvency committed by such debtor, together with the date of its commission, and
- (b) the amount and particulars of his or their pecuniary claim or claims against such debtor.

Review.

This is section 11 of Act III of 1907 with the addition of clause (f) with sub clauses (i) and (ii) and is mainly based upon section 6 (i) of the Bankruptcy Act, 1914 and corresponds to section 15 of the Presidency Towns Insolvency Act. The section is divided into two sub sections (1) and (2), sub section (1) deals with the contents of the petition by a debtor, clauses (a), (b), (c), (d), (e) and (f) enumerating the particulars of the contents. Sub section (2) deals with the contents of a petition by a creditor.

Sub-sec. (1). clause (a) : "Unable to pay."

This clause is based upon sec 6 (1) of the Bankruptcy Act, 1914 which runs as follows "A debtor's petition shall allege that he is unable to pay his debts," for on the proof of this allegation of the debtor hinges the whole question whether the debtor is to be adjudged insolvent or not. Under section 10 (1) a debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debts. The allegation of inability to pay the debts is a substantial part of the debtor's claim to be declared insolvent, and, if that fact is not proved he would not be entitled to present a petition, *Alamelumangathay Arammal v Balusami Chetty*, (1928) MWN 62 1928 AIR (M) 394. Under the present Act a debtor's petition shall allege that the debtor is unable to pay his debts, and, if the debtor proves that he is entitled to present the petition the Court may make an order of adjudication. The reason for the requirement of the debtor's allegation that he is unable to pay his debts is not a mere matter of form but goes to the debtor's right to claim the benefit of the Chetty v Official Assignee, Madras, 189 124 IC 129 1930 AIR (M) to pay debts," vide Notes under

sections 10 and 27

Clause (b), Jurisdiction.

On the face of the petition for adjudication it must appear that the Court has jurisdiction to entertain the application. The petition is admitted if the Court is satisfied *prima facie* that the Court has jurisdiction. It is, therefore, essential that statements

showing how the Court has jurisdiction should be made. As to Court's having jurisdiction, vide sec. 11 and notes thereunder.

Clause (c), Arrest or imprisonment or attachment.

It has been seen in sec 10, sub-sec. (1), clauses (b) and (c), that a debtor is not entitled to present an insolvency petition unless *inter alia* he is under arrest or imprisonment in execution of the decree of any Court for payment of money or an order of attachment in execution of such a decree has been made and is subsisting against his property. It is therefore necessary that there should be statements made in the petition showing *prima facie* that the debtor is entitled to present the petition. It is not the intention of the Legislature that a judgment-debtor who has been once arrested or against whose property an order of attachment has once been made could some years afterwards come into Court and apply to it to declare him an insolvent on the strength of a long-dropt proceeding by arrest or attachment. He is entitled to present a petition for insolvency only when the order of attachment or arrest against the debtor is actually pending at the time when he makes the application, *Jumai v. Mahammad Kazim Ali*, 25 All. 204 23 A W N. 11.

Clause (d), Pecuniary claims.

Clauses (d) and (e) refer to the schedule of liabilities and assets of the debtor. A debtor must show in his petition what his assets and liabilities are and must truly set forth in the schedule annexed to his petition both his assets and liabilities. The liabilities consist of all pecuniary claims against him, viz., those debts that are provable in bankruptcy under sec 34. *For list of the debts provable, vide sec 34 and Notes thereunder*. The statement of assets and liabilities of a debtor is necessary to be made in his petition for adjudication, (1) to enable the Court to find that he is unable to pay his debts and (2) for the purpose of administering the estate by the Receiver in insolvency, which by operation of law vests in him. A debtor who omitted from the list of pecuniary claims against him those of foreigners and others not residing in British India would incur risk of having his application rejected as sec 13 (d) requires the debtor to set forth the amount and particulars of all pecuniary claims against him, *Main Gomas Singh v. Ganesh Lal*, 35 P.R. 1888

Clause (e) iii, Declaration of willingness.

This declaration is of the debtor's willingness to place *all* his property at the disposal of the Court. It is of solemn nature and on it the debtor gets the protection of the insolvency Court. If this declaration is found to be false in course of the administration in insolvency he renders himself liable to prosecution under sec. 6 of the Act.

Clause (f), Statement of previous insolvency, if any.

This clause is new, and has been found necessary in view of the new provisions introduced in sec 10 (2) and 25 (2). The old Act, III of 1907 did not contain any provision like this and in *Muhammad Shir v. Mohabir Prasad*, 15 A L J 572 40 Ind Cas 445, which was decided under the old Act, the petition was dismissed simply because the applicant did not disclose the fact that he had once before applied to be declared an insolvent, and that the application had been dismissed. The High Court held that, that was not a sufficient reason within the meaning of sec 15, (now sec 25), of the Act. The act of filing an application by a debtor was in itself an act of insolvency. It had also been held under the old Act that where a previous application to be declared an insolvent was dismissed for non-production of evidence, a second application was not barred by the principle of *res judicata*, *Salig Singh v Ram Kishan*, 10 A.L.J. 51. In *Shaik Abdul Aziz v Lali Chandra*, 22 C W N 171 (notes) the appellant applied before the District Judge for an adjudication of insolvency. His application was dismissed "for not taking He thereupon dismissed, he ition had also he appellant's application was dismissed under Or 1A r 4, C P C it was open to him either to bring a fresh application or to apply for an order to have the dismissal set aside. He chose the second remedy and applied to have the dismissal set aside, which was refused. It was not open to him to make a fresh application for insolvency on the same facts. He could not avail himself of both the remedies." It was held by the High Court in appeal, that "there being no specific provision prohibiting the present application, the application was maintainable. The adoption of a second remedy did not deprive the applicant of his right to file a fresh application for adjudication on the same facts, which right remained with him till a decision of the matter on the merits," *Abdul Aziz v. Habib Mistri*, 49 I C 229.

Fresh application on the same facts.

I C 86- 1923 A I R. (L) 374 that "the dismissal of the first petition for insolvency because of failure to produce evidence does not bar the

that he was unable to pay his debts cannot estop him from proving

in the subsequent application that he is unable to pay his debts and so is entitled to be adjudicated as an insolvent, *Ram Asray Sahu v Sri Ram Dubey*, 11 O W N 71 1934 A I R (O) 94

It should be noted that if a petition for adjudication has been presented not *bona fide* with a view to obtain an order of adjudication but for an inequitable or collateral purpose the Court might dismiss the application as an abuse of the process of the Court. *Ex parte King*, (1876) 3 Ch D 461, *Ex parte Griffin* (1870) 12 Ch D 480, *Ex parte Tynne* (1880) 15 Ch D 125,

In re Sobhapathi, 21 Bom 297, *Sheikh C W N 244 12 C L J 445 In Malchand*

C W N 298, an application for adjudication was made on the same materials as the application for the previous adjudication order. The debts were the same, the creditors were the same, was it an abuse of the process of the Court under these circumstances? It was contended that a debtor if he comes to Court and shows that he is unable to pay his debts is entitled for his protection to get adjudication for insolvency. Under the law of England it is well settled that when the presentation of a petition amounts to an abuse of the process of the Court, the Court may decline to make any order on it, or may rescind the receiving order made on the petition, and this principle has been followed by all the Indian High Courts. *Mookherji, J.*, held "In my opinion, there is no escape from the conclusion that the application was an abuse of the process of the Court. It is admitted that there has been no change whatever in the circumstances of the petitioner. In fact, the allegations whereon the previous application was based were absolutely identical with those mentioned in the last application. If an application of this character were entertained, the result would be inevitable that an insolvent would be encouraged to make an application for insolvency to obtain an adjudication order to take no substantial steps thereafter, or to abandon the proceedings and when pursued by his creditors again to seek relief in Insolvency Court whenever convenient to him."

In *In Re Ballav Chand Scrowagee*, 27 C W N 739, decided under the Presidency Towns Insolvency Act, an insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act his adjudication was annulled. Subsequently on his own application on the same acts and materials, his second adjudication took place, and a creditor applied to annul the adjudication. It was held following *Malchand v Gopal Chandra Ghoshal*, *supra*, that the presentation of the second insolvency petition by the debtor was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled.

Therefore sec 13(1) contemplates a fresh application only on a new adjudication, or w

not on the merits or when his adjudication has been annulled under sec 43 for failure to apply for discharge within the time allowed by the Court. When an order of annulment has been passed under sec 43 (1) it is not open to the insolvency Court to set aside its order by virtue of the provisions of Or IX of the C P. Code, but under the provisions of sec 10(2) leave of the Court for a new or
Channar v Chinnu Lal, 49 Mad 153
 97 I C 706 (1926) A I R (M) 942

Sub-sec (2), Creditor's petition.

This must first of all state facts in order to confer jurisdiction upon the Court, i.e., it must state that the debtor either ordinarily resides or carries on business or personally works for gain, or if he has been arrested or imprisoned he is in custody within the jurisdiction of the Court. The creditor's petition must also specify the act of insolvency committed by the debtor and the particular date of its commission as well as the amount and particulars of his pecuniary claim against the debtor.

Clause (a), "Act of Insolvency."

No one is to be adjudged insolvent unless he is proved to have committed one or other of the acts of insolvency as defined in sec 6. An act of insolvency as defined in sec 6 must not only be set out in the petition for adjudication but strictly proved. If an act of insolvency, as defined in sec 6, is not so set out in the petition, the petition is incompetent. It is not correct for a creditor to make various allegations of acts which are not acts of insolvency as defined in that section, and then endeavour to prove by evidence that as a matter of fact, an act of insolvency as defined in sec 6 had been committed. In *Muthu Chettiar v Nagindas* 28 Bom L R 680, McLeod, C J said "In my opinion it is absolutely necessary that an application for adjudication of a debtor by a creditor on the ground that an

petition and then endeavour by means of evidence to prove that

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act of insolvency on which the petition is grounded must have occurred within three months from the date of the petition

Date of the act of insolvency.

In a petition for adjudication by a creditor not only the acts of insolvency should be stated but also their dates must be given. The reason for the rule is that the acts of insolvency upon which a creditor's petition is grounded must have taken place within three months before the presentation of the petition. The Court has no jurisdiction to entertain the petition of a creditor unless on the face of the petition it appears that the acts of insolvency on which the petition is grounded have taken place within three months before the presentation of the petition. An order of adjudication on a petition by a creditor in which acts of insolvency are recited without any date being given is wrong. In *Krishna Das Ray v. Charusila*, 35 CWN 567 an adjudication order was made on a petition which alleged certain acts of insolvency of the debtor, but no date was mentioned as to when the acts of insolvency had occurred. It was held that an adjudication order made on such a petition where the acts of insolvency were recited without any date or other particulars being given was entirely wrong. Rankin, C J observed "The proper thing to do on this petition was to immediately insist on its amendment or else to throw it out altogether."

Clause (b), Amount and particulars of pecuniary claims.

Besides the act of insolvency as mentioned in clause (a) a creditor is entitled to present down that "the debt or more creditors join in the petition the aggregate amount of debts owing to such creditors, amounts to five hundred rupees"

Secured creditor's petition.

If the petitioning creditor is a secured creditor he shall in his petition besides the particulars mentioned in sub section (2) state either that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security, [Vide secs 9 (2) and 47]

Amendment of the petition

The Court may amend a petition for insolvency upon such terms, if any, as it thinks fit to impose. See sec 6, Bankruptcy Act, 1914 and Order VI, r 17, C P C, 1908. As a general rule, an amendment of a bankruptcy notice will not be allowed except in the case of merely formal defects, *Ex parte Dan Rylands Ltd, Re Collier*, (1891) 8 Mor 80. The Court will not amend a petition by adding other creditors as petitioners after 3 months from the act of bankruptcy upon which the petition is founded. *Re Maund Ex parte Maund*, (1895) 1 Q B 194. Where a petitioning creditor had inadvertently

omitted, to mention in his petition a security which he, in fact, held, but which had been given many years ago in respect of another matter, and was admittedly valueless, it was held that a receiving order made upon the petition was not invalidated by the omission, inasmuch as, the Court had power to amend the petition even after the making of the receiving order. The statement of intent to defeat or delay the creditors must appear either in the petition or in the affidavit, otherwise the petition is liable to be dismissed as the omission to state it is a substantial defect incurable by amendment. An omission to state the fact that the petitioning creditor is a secured creditor and the value of his security, as required by section 12 (2) [corresponding to sec 9 (2)] is one that could be cured by amendment. Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the Court would be depriving the defendant of the plea of limitation, *Gunnus and Co v Mahomed Ayyub Sahib*, 37 Mad 555. Where the amendment of an insolvency petition that is sought is one that does not affect the substance of the petition, but merely will have the effect of bringing the petition in conformity with the rules of practice or of remedying a formal defect, the Court in its discretion may properly grant leave for the amendment to be made even if the amended petition would necessarily be re presented more than three months after the alleged act of insolvency, provided that no hardship would thereby be worked to the respondents. But where the amendment is one that goes to the root of the petition and alters the substance of the act of insolvency alleged, the Court ought not to permit the amendment to be made, at any rate if the effect of so doing would be that the amended petition would be re presented more than three months after the date of the act of insolvency alleged, *A M M Murugappa Chettyar v N C Gallara* 12 Rang 150 1934 A I R (R) 87. But a contrary view has been taken in *Srirangan Chettyar v Sornam Pillai*, 67 M L J 924 1935 A I R (M) 202 where the omission of the words "with intent to defeat and delay his creditors" but the express mention of the acts of insolvency was held to be a mere formal defect and the amendment to include those words was allowed.

14. No petition, whether presented by a debtor or
 Withdrawal of by a creditor, shall be withdrawn
 petitions without the leave of the Court

Review.

This is sec 7 of Act III of 1907, and corresponds to secs 5 (7) and 6 (2) of the Bankruptcy Act, 1914 and secs 13 (8) and 15 (2) of the Presidency Towns Insolvency Act III of 1909

Withdrawal of petition before adjudication.

"The petition once presented, the petitioner is no longer in

unfettered control. Neither a creditor's nor a debtor's petition can, after presentation, be withdrawn without leave. The Court should be satisfied that there is a proper case for the withdrawal of a creditor's petition, although in practice creditor's petitions are dismissed at any time"—*Ringuood*. This section provides a check upon the abuse of the process of the Court. It would appear that a petitioning creditor often would resort to the Insolvency Court not with the *bona fide* intention of getting his debtor's estate administered under the insolvency laws but for the collateral purpose of bringing pressure to bear upon the debtor to pay off his debts and to settle his claim with the insolvent, and, if successful, to apply to the Court for permission to withdraw his petition or leave it to be dismissed for default. In such circumstances the Court would refuse leave and would pass the order of adjudication, and it has been held that it is an abuse of the process of the Court and should not be countenanced in any way. *Gadigi Mudappa v. Parameswara Bhat* 1925 A I R (Mad) 242 85 Ind Cas 303. If the petitioning creditor, after having settled his claim with the insolvent out of Court, does not press the prosecution of his application, the act of bankruptcy committed by the debtor would be available to any other creditor to be substituted in the place of the petitioning creditor to support his petition—*Robson*. An arrangement come to by a debtor with his creditors will not justify a Court in allowing an insolvent to withdraw his petition. If all the parties concerned desire to take the matter out of the hands of the Court the petition may be dismissed. In *Re Pyari Chand*, 6 B L R 558. Any private arrangement with creditors and payment in accordance therewith cannot be recognised in insolvency proceedings, *Behari Lal Sikdar v. Harsokdas Chakmali* 25 C W N, 137 61 Ind Cas 904.

Insolvency proceedings are for the administration of the estate of the debtor for the benefit not of a particular creditor, but for the benefit of general body of creditors. In the case of a petition by a creditor he will be deemed to have the conduct of the proceedings not in his individual capacity but as representing all the creditors. Hence an individual creditor cannot be permitted to settle with a debtor and withdraw his petition unless it be with notice to all the creditors and for their benefit. So it has been provided in sec 16 that "where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor."

Withdrawal after adjudication.

Sec 14 applies to petitions which are pending before an order of adjudication has been made. Once an order of adjudication has been made, the debtor, who presents his own petition or the debtor, in the case of a creditor's petition, becomes an insolvent and remains so until the order of adjudication is annulled.

he obtains his discharge. A debtor who has been adjudicated insolvent on his own petition cannot even with the leave of the Court, withdraw his petition, *In Re Subratu Jan Mahomed*, 38 Bom. 200. "A petitioning creditor who gets his debtor adjudicated is not entitled to settle his claims out of Court in consideration of his withdrawing from further proceedings in the matter," *In Re. Shiv Lal Rathi*, 19 Bom. L R 365 40 Ind Cas 207

Notice of withdrawal.

No petition for insolvency is allowed to be withdrawn without notice to all the parties concerned, and apart from sec. 151, C. P. C., the Court has inherent power to set aside an *ex parte* order obtained by fraud and misrepresentation and to rectify the mistake inadvertently made, *Raja Deo Bakash Sing v Habib Shah*, 17 C.W.N. 892. In *In the Application of Messrs Fleming & Co*, 35 Ind Cas. 539, Pratts, C J held that "it may be that under the English Bankruptcy Act leave to withdraw may be given after receiving order has been made, but even if that were so, that is not an analogous case, for a receiving order does not make the debtor a bankrupt or deprive him of legal title to his property. Here the withdrawal of the petition would be of no use unless it implies an annulment of the adjudication. The Act specifies in sec. 42 (now secs. 35 and 36) the conditions on which the Court may annul an adjudication and it is impossible that it was intended that the same result could be produced by the simple device of withdrawing the original petition. The Court may grant leave for the withdrawal of a creditor's petition after being informed of the facts and terms of withdrawal, *Re Bebro*, (1900), 2 Q. B. 316. The section refers to withdrawal before making of the adjudication order. Once the adjudication is made, the Court has no power to give leave to withdraw the insolvency petition." Under the Indian Insolvency Act a practice had been

leave to withdraw
in the schedule,
application leave was
granted as a matter of course, *In Re Subratu Jan Mahomed*, 38 Bom. 200. Under s 14, a petition for adjudication, whether presented by a debtor or creditor cannot be withdrawn without the leave of the Court. It is well settled that the leave will not be granted without notice to all the parties concerned. When the Court passes under a misapprehension an *ex parte* order granting the application for withdrawal of the petition, it has got inherent jurisdiction to set it aside. *Lal Singh v. Dhanu Mal Jai Lal*, 38 P.L R 182. 1937 A.I R. (L.) 631.

Leave for withdrawal is discretionary.

It is discretionary with the Court to grant leave or to refuse

it for withdrawal of petition. Each case is to be decided on its own merits. In case of a creditor applying for withdrawal of his petition for adjudication of the debtor, the Court is bound to enquire whether the interest of the general body of creditors will thereby suffer or not. If it appears to the Court that the withdrawal of a creditor's petition is intended to enure to his own benefit to the detriment to the interest of other creditors the Court ought to refuse leave to withdraw the petition. On a debtor's application for leave to withdraw his petition, if the Court is satisfied that he had paid all his creditors to their satisfaction excepting those whose claims are not admitted and who insisted on his adjudication to obtain all their dues in full in insolvency and intended to bring the pressure of the insolvency proceedings to bear upon the debtor in order to make him pay them cheaply and expeditiously a debt which he (the debtor) desires to dispute in the Civil Courts, it was held that this is one of the worst abuses to which the insolvency law could be perverted and leave should be granted to the debtor to withdraw, *Tulsidas Lalubhai v The Bharat Khand Cotton Mill Co Ltd* 39 Bom 47. Under section 14 a creditor's petition for adjudication cannot be withdrawn without leave of the Court. It has been the practice of the Courts not to allow a creditor's application to be withdrawn solely on the ground that the debts of the creditor have been paid. It is a matter of common knowledge that creditors frequently file insolvency applications merely for the purpose of putting pressure upon their debtors to settle their claims. It is an abuse of the process of the Insolvency Court, and it is a wholesome practice never to allow any creditor to withdraw his application on the ground that his debts have been satisfied. If the claims of all the creditors are satisfied the matter is, of course, different, *Ko Maung Gyi v P L M Chettyar Firm*, (1929) A I R. (R) 338.

Appeal against order of withdrawal.

In case certain petitioning creditors are allowed to withdraw their petition under sec 14 without notice to the non-petitioning creditors, the latter have a right of appeal against the order of withdrawal passed in their absence and without notice to them. In *Nihal Chand v Jai Dayal Munni Lal*, 126 I C 442 1930 A I R (Lah) 749, the insolvency judge permitted certain petitioning creditors to withdraw their petition under sec 14. Certain non petitioning creditors were given notice under sec 19, but not one of the date of withdrawal or of intention to withdraw. The District Judge on appeal by non petitioning creditors set aside the order permitting withdrawal and remanded the case for opportunity being given to

15. Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit

Consolidation of
petitions

Review.

This is sec 8 of Act III of 1907 and sec 110 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, which runs as follows "Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit" The corresponding section in the Presidency Towns Insolvency Act is section 91

Consolidation of petitions by creditors.

This section is intended to avoid separate administrations of the estate of the same debtor. It provides for the consolidation of several petitions by creditors only against the same debtor or against joint debtors, either in the same Court or in Courts subordinate to the District Court. "It is to be observed that the power to consolidate given by this section extends to cases where two or more petitions are presented against the same debtor or against joint-debtors. In sec 80, sub sec (2) of the Bankruptcy Act, 1869, the words were, 'against the same debtor or against debtors being members of the same partnership'. An order may be made consolidating the petitions of a deceased partner and of a surviving partner, Re 1 Q B 442

Though it was formerly held that "a declaration of insolvency could not be in one petition against several debtors and there was no provision in the Provincial Insolvency Act for proceeding against two or more persons being partners in the name of the firm," (*Kalicharan Saha v Harimohan Basak*, 24 C W N 461 31 C L J 461) it has since been held in *Bolisetti v Kolla Kotayya*, 44 Mad 810, that in cases, where the debtors are members of a joint Hindu family, a single application will lie. This view has now been adopted by the Calcutta High Court in the New Rules 19-27 recently framed under sec 79 of the New Act, V of 1920 and a single petition by and against joint debtors is maintainable in law (for Rules Vide Appendix), see also *Brojendra Nandan Saha v Nikunja Behari Das*, 39 C W N 104. On a joint debtors' petition, the Court may order the continuance of the insolvency.

and two widows as insolvents on the ground that all of them had incurred joint liability and had committed acts of insolvency, it was held that in such cases the petitioner should be allowed to amend the petition by striking out the names of unnecessary parties and to proceed against those that are capable of adjudication, *Ram Krishan v. Ilam Din*, 130 I C 783 1931 A I R (Lah) 384

Consolidation of petitions after admission.

Section 15 does not empower the Court to pass an order of consolidation of a petition for insolvency before it is admitted and before an opportunity has been afforded to the other parties concerned of showing that the petition is not competent. *Prima facie* that section refers to consolidation of insolvency petitions after they are admitted and pre-supposes that such petitions are otherwise competent. Where the competency of the petition is being challenged it must be enquired into before an order of consolidation can be passed, *Dayaram Menghraj v. Sakhi Bai*, 130 I C 559 1931 A I R (Sind) 65

Simplification of proceedings.

The Court has power to simplify and facilitate proceedings. For this purpose the Court has not only the power of consolidating two or more petitions against the same debtor or joint debtors (sec 15) but also has the power to substitute as petitioner any other creditor who has a debt of Rs 500 in a case where the petitioner does not proceed with diligence on his petition (sec 16). The power of consolidating the proceedings is given to the Courts so as to minimise expenses, save public time and avoid multiplicity of proceedings and for their speedy and effective determination. The section involves both the questions of Transfer and Consolidation. Sec 24 of the CPC deals with the provisions of transfer and withdrawal of any suit, appeal or other proceeding to and from other Courts. In *Re Stick, Ex parte Martin* (1888) 3 Morr 78 where a petition had been presented in Swansea, the debtor's place of business, and in London, the proceedings in the London petition were transferred to Swansea. See *Re Linton*, (1892) 8 T L R 219. Where a member of partnership dies insolvent and an order is made under sec 125 of the Bankruptcy Act, 1883, for the administration of his estate in

application to transfer a petition against one partner from the District Court to the High Court when the petition is pending against the other partner should be in the High Court. *Vide* sec 24 CPC

Separate petitions in Courts of concurrent jurisdiction.

It has been seen that section 15 has reference only to

possess, in the event of the adjudicating creditor disappearing to allow any other creditor, or even the Official Assignee, to serve notices and bring on the matter for hearing, *Dossagopal v. Bhanji*, 26 Bom. 171

Substitution.

The section is intended to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. It is not difficult to imagine the case of a creditor, who has presented the application for insolvency against the debtor, having entered into a private treaty with his debtor, not prosecuting his application with diligence and allowing it to be struck off for default. This may no doubt enure to the benefit of the creditor and to the advantage of the debtor inasmuch as it saves his voluntary and gratuitous transfers within 2 years from the date of the presentation of his application, and transfers by way of fraudulent preference within three months from the date thereof. But it will not be to the advantage of the general body of creditors. In case the petitioning debtor or creditor does not with due diligence proceed in his petition so as to bring the estate of the debtor to be administered according to the bankruptcy law, any other creditor to whom the debtor is indebted to the amount of Rs 500 may be substituted as petitioner and the proceedings may be proceeded with. The creditor presenting the petition is considered to prosecute the petition not only for his own benefit but also for the benefit of the creditors generally, *Ex parte Maugham*, (1888) 21 Q B D 21. If the petitioning creditor, after having settled his claim with the insolvent out of Court, does not press the prosecution of his application the act of bankruptcy committed by the debtor would be available to any other creditor to be substituted in the place of the petitioning creditor to support his petition—*Robson*. Except in a case where fraud has been alleged, an order for substitution of a new creditor ought not to be made when more than three months have elapsed from the commission of the act bankruptcy, *Re Maugham*, (1888) 21 Q B D 21, *Re Maund*, (1895) 1 Q B 194. Where the original petitioning creditor is alleged not to act with due diligence it is open to any other creditor to apply to be substituted and the fact that such application is made more than three months after the insolvency is immaterial, *In re Salamatmal*, 139 IC 851 1932 AIR (S) 161. Where the order passed on the application of creditors for withdrawal was merely "file" it can not be said that those men were expressly allowed to withdraw. The word "file" does not mean withdrawal of an application. It simply means left on record and other creditors are entitled to be substituted as petitioners under s 16. An express order of substitution is not necessary under s 16 and substitution can be inferred from the Co continuing proceedings of the application of the creditor appi,

to be substituted under that section. Substitution contemplated by s. 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on. *Raghuraj Singh v. Abdul Rahman* 1938 O W N. 271 : 1938 A I R. (O) 206 (F B)

Substitution before dismissal of petition.

Where a petition for the adjudication of a debtor filed by a creditor has been dismissed by the Court another creditor cannot apply under sec. 16 to be substituted in place of the original creditor. This section applies where the proceedings are pending, and not where they have terminated by the dismissal of the petition, *Maung Gyi v. A. L. K. P. Chettyar Firm*, 11 Rang 407 1933 A. I. R. (R) 251.

Limitation for substitution.

The section provides that "the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act". The question is do these words mean substitution? The words "substitution" appear in sec. 107. But these words are in interpreting these words. In *In Re Maugham*, (1888) 21 Q B D 21 5 Mor 152, it was held that under sec. 107 the Court has no power to substitute a creditor after three months and the power under sec. 107 should not be exercised after three months. The object of the section is to prevent other creditors from being injured by the action of one creditor who, by reason of collusion or otherwise, may not diligently prosecute the petition. If it is regarded as a new petition this object is frustrated, and there is no purpose of having a section of the kind. If the original petition had proceeded up to adjudication, or if another creditor whose debt is not barred by the date

the section
petition with
n enforceable
Yeru Gulapati
(M) 608

Where an insolvency petition has been validly filed *ab initio*, it cannot be withdrawn without the leave of the Court. If the petitioning creditor does not proceed with due diligence or if fraud and collusion with the insolvent are alleged against him, it is open to the Court to substitute at any time any other creditor as petitioner; such substituted creditor takes the place of the original petitioner *ab initio*, and can rely on the same act of insolvency notwithstanding

that he is substituted more than three months after the date of such act of insolvency, *L C T R M S Chettyar v A S Chettyar Firm*, 7 Rang 785 1929 A I R (R) 291 It is open to the Insolvency Court to substitute another creditor in place of the original petitioning creditor, although the application of the former for being so substituted is made more than three months after the act of insolvency on which the petition of the latter is grounded. In the wording of sec 16 the Legislature have definitely laid down one condition for the substitution of a creditor and one only, namely, that his debts shall be not less than 'the amount required by this Act' But the 'amount' referred to is required not only by the Act but by sec 9 of the Act and it would be indeed remarkable if the Legislature had intended to prescribe all the conditions set forth in sec 9 and yet to mention only this *Ganga Nath v Kunuar Zalim Singh*, 54 All 72 1931 A L J 1089 135 IC 250 1932 A I R (All) 147

Procedure for substitution.

It would seem from the principles laid down by Lord Cairns in *Re Bristow* L R 3 Ch 247, that at all events in cases where the debtor does not appear the services notices and periods of lapse of time must be all repeated when a petitioner is substituted under this section. Lord Cairns in that case says "It would be contrary not only to the first principles of bankruptcy law, but every forensic proceeding that we are acquainted with where you are proceeding upon notice that you should in the absence of appearance and before appearance entirely shift the foundations of the case upon which you are proceeding and even where the debtor does appear it would seem that the time of hearing should be put off so as to give him time to answer the substituted petition which may proceed upon very different grounds from those upon which the petition for which it is substituted was founded

17. If a debtor by or against whom an insolvency petition has been presented dies, the
 Continuanee of pro proceedings on death of debtor proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor

Review.

This is sec 10 of Act III of 1907 and sec 112 of the Bankruptcy Act 1914, as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows 'If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall unless the Court otherwise orders, be continued as if he were

alive It would appear that sec 10 of Act III of 1907 has been amended by substitution of the clause so far as may be necessary for the realisation and distribution of the property of the debtor in place of if he were alive This amendment was introduced to make it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property —*Notes on Clauses* This section corresponds to sec 93 of the Presidency Towns Insolvency Act Sec 17 applies to a case of a debtor dying before the order of adjudication whether the petition was presented for adjudication by a creditor or by the debtor *Ramathai Anni v Kannappa Mudaliar* 51 Mad 495 27 MLW 508 (1928) AIR (M) 480 110 IC 167

Object of the section

The object of the section is that the death of the debtor should not affect the realisation and distribution of the assets *Narain Singh v Gur Baksh Singh* 9 Lah 306 (1928) AIR (L) 119 The estate which vests in the Receiver on adjudication is the interest of the debtor this interest being subject to the obligation to realise the property of the insolvent and to discharge his liabilities If the insolvent's rights were a personal right and nothing more the Receiver's right to administration in insolvency would come to an end with the death of the insolvent But the right of the insolvent is subject to the correlative obligation and the Receiver takes the estate subject to this obligation It is the Receiver who represents the estate of the debtor after adjudication and his subsequent death does not affect the position of the Receiver to administer his estate according to the bankruptcy law in insolvency proceedings without substitution of the legal representatives of the deceased insolvent in his place *Administrator General of Madras v Official Assignee of Madras* 32 Mad 462 As has been observed in *Piara Lal v Muhammad Solamat Ullah Khan* 1 LR 1937 All 616 1937 ALJ 491 170 IC 535 1937 AIR (All) 435 the question of adjudication of a person as insolvent is not a matter purely personal to him which has no connection with his property When a creditor applies for adjudication of his debtor his principal aim is to realise his debts out of the assets of the debtor which is not a matter concerning the person of the insolvent only The maxim *a tuo personalis moritur cum persona* has not been applied and can not be applied to insolvency proceedings Section 17 of the Provincial Insolvency Act also shows that the death of the debtor does not cause the proceedings to abate and the proceedings are continued

Effect of debtor's death

A person can be declared insolvent in spite of the fact that he dies before the application for his being declared insolvent filed by his creditors has been decided *Girdhari Lal v Jugal Kishore*

33 PLR 151 136 IC 733 1932 AIR (Lah) 264 In *In Re Sitaram Ahlaji* 10 Bom HC 58 it was held that the official assignee was to proceed so far as circumstances would permit in the same manner as he would have done had the insolvent been living. The law seems to have been assumed to be the same in *In Re Ram Sevak Misser* 6 BLR 119 where Norman CJ and Markby J affirmed an order of Phear J which made a rule to continue certain proceedings absolute against the representatives of the deceased insolvents. But the most striking case is that of *In Re Kaji Charan Khetry* Ind Jur OS 16 where a prisoner in custody on order had been executed without filing a schedule. It was held by Jackson that the insolvency should proceed and the official assignee should deal with the estate. In *Bromley v Goodete* 1 Atk 75 Lord Hardwicke held that a commission of bankruptcy (the then course of procedure) might be renewed though the bankrupt were dead and that notwithstanding the statute then in force mentioned only the bankrupt yet it extended to his representatives. *Fakir Chand v Moti Chand* 7 Bom 438

No Termination of insolvency proceedings on death of debtor

Insolvency proceedings do not necessarily terminate on the death of the insolvent. They should be continued so far as may be necessary for the realisation and distribution of the property of the debtor. *Ishar Das v Mst Fatima Bibi* 1934 AIR (L) 468. Ordinarily speaking insolvency proceedings would not terminate until there has been a discharge of the insolvent but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death the proceedings must automatically be held to have terminated. *Asa Nand v Bishan Singh* 147 IC 695 1933 AIR (L) 997

Death before adjudication

The section provides that the proceeding shall be continued for the realisation and distribution of the property of the debtor if he dies after the presentation of the petition. There is no provision in the Act as to whether proceedings can be started under the Act against the legal representatives of the debtor after the latter's death. The question arose for consideration in *Muthu Veerappa Chettiar v Sraguramatha Pillai* 49 M 217 49 MLJ 697 (1926) MWN 63 22 LW 617 92 IC 603 (1926) AIR (M) 133 in which the District Judge dismissed the application on the ground that the respondent should not be adjudicated in respect of his father's debt as there was no personal liability on the part of the respondent in respect of such debt. In appeal the I

Court held that "there is nothing in the insolvency Act which prevents the undivided members of the joint Hindu family from being adjudicated insolvents in respect of the debts due by the family. In the case of a joint Hindu family, if the father incurs debts and dies, the other members of the family do not stand in the relation of heirs, they only succeed to him and the debts are . . . - - them and there was no reason why the lower Court the acts of insolvency and disposed

Under sec 17 of the Provincial Insolvency Act where a debtor dies after the presentation of the insolvency petition it is competent to the Court to adjudicate him as an insolvent and allow the proceedings in the matter to continue. The words 'proceedings in the matter' include subsequent steps in connection with the petition of which the earliest will be the adjudication of the insolvent without which nothing can be done, *In Re Walker*, (1886) 3 Mor 69' *Venkatarama Ayyar v The Official Receiver, Tinnevely*, 51 Mad 344 54 M L J 585 27 L W. 437 109 IC 94 (1928) A I R (M) 476

In *Ramesh Chandra Sil v Charu Chandra Mohini*, 34 C W N 445 it was contended that sec 17 would not warrant the order of bringing on the record as necessary parties the heirs of a debtor against whom a petition had been presented for declaring him an insolvent for the limited purpose of being present for the realisation and distribution of the property of the debtor until and unless an order of adjudication was passed. The High Court held 'This contention was considered in two recent decisions of the Madras High Court, viz, *Venkatarama Ayyar v The Official Receiver, Tinnevely*, supra and *Ramathi Anni v Kannappa Mudaliar*, supra. In these cases it has been held that under sec 17 of the Provincial Insolvency Act an application by a debtor or a creditor for adjudicating himself as an insolvent filed, when he was alive, can be continued and adjudication made even after his death. We are of opinion that the reasons given by the learned judges of the Madras High Court in . . . id following them we hold it was . . . the learned judge to make the order . . . to us that when the proceedings were to be continued and it was not necessary that they should be dropped, it is only right that they should go on in the presence of the heirs of the debtor in so far as such presence was necessary for the continuance of the proceedings for the purpose of realisation and distribution of the property of the debtor." The proper order to pass in a case where the debtor dies . . . debtor and not his . . . r, Tinnevelly, 37 L W. (M) 25

Death after adjudication.

In *Re Walker*, (1886) 3 Mor 69 it was held that "if a debtor dies

after presenting his petition the proceedings may be continued against his estate" Proceedings in insolvency do not abate by reason of the death of the debtor, and the Court has power to bring on to the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent, *Ras Jas v Katha Sing*, 59 Ind Cas 51 9 P L R 192 14 P W R 1921 See also *Fakir Chand v Mouchand*, 7 Bom 438, *In Re Sitaram*, 10 Bom H C 58, *In Re Ram Sebak Misser*, 6 B L R 119, *The Administrator General of Madras v Official Assignee*, 3 Ind Cas 163 6 M L J 188 "When on the death of the insolvent after the order of adjudication the proceedings in insolvency are directed to be continued under sec 10 (now sec 17) at the instance of the representatives of the deceased insolvent, on general principles as well as on the express provisions contained in sec 24 (3) (now sec 33), read with the further provisions contained in sec 47 (now sec 5) of the Act, it is incumbent upon the Court to permit the representatives of the insolvent to be present so as to give them an opportunity of cross examining the claimants creditors and their witnesses and to offer rebutting evidence in support of their plea that their claims have either been satisfied or are barred," *Sripat Singh v Maharaja Sir Prodyot Kumar Tagore*, 48 Cal 87. 57 Ind Cas 810

Where property has vested in a Receiver after an order of adjudication, the death of the insolvent does not divest the Receiver of the property and his son is not entitled to take it by survivorship. The death of a debtor does not put an end to an insolvency proceeding on an application by him, *Lachman Das v Jai Singh* 79 I C 548 4 L L J 262 (1922) A I R (L) 399 Under sec 17 of the Provincial Insolvency Act the death of a debtor does not interrupt the insolvency proceedings so far as may be necessary for the realisation and distribution of the property of the debtor. Consequently, the vesting of the property of the insolvent in the Receiver on the making of an order of adjudication holds good even after the death of the insolvent and the latter's heirs have no remedy against the Receiver other than they would have had against the insolvent himself. In other words, they are, if so advised, at liberty to bring a suit to show that the insolvent's debts were tainted with immorality or were otherwise not binding upon them. But in other respects the death of the insolvent does not affect the insolvency proceedings, *Gokul Singh v Shiv Ram*, 88 I C 558 (1925) A I R (L) 366 Property of a deceased insolvent vested in the Receiver, although presumed to be ancestral, can be made exempt from sale after the death of the insolvent only if his heirs succeed in showing that the debts of the deceased were tainted with immorality or were otherwise illegal, *Mirza v Jhanda Ram*, 12 Lah 367 130 I C 410 1930 A I R (Lah) 1034

Notice on the death of debtor.

Rule 159 of the Bankruptcy Act provides that "if a "

against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representatives of the debtor, or on such other persons as the Court may think fit." Rule 7 framed both by the Bombay and the Madras High Courts provides that if a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representatives or on such other person as the Court may think fit in a manner provided for the service of summons."

Abatement of certain proceedings on death of debtor.

The object of the section, as has been seen is that the death of the debtor should not affect the realisation and distribution of his assets, but it has no bearing to the question whether an appeal against the order of adjudication preferred by the creditors abates or not on the death of the debtor. It has been held by the Punjab Chief Court in *Hardian Singh v Sham Sunder*, 69 P.R. 1888 that an appeal preferred against the adjudication of an insolvent abates on his death, as the right to sue does not survive within the meaning of sec 368, C.P.C. (1882) corresponding to Or XXII r 4, C.P.C. (1908) on the death of the respondent insolvent in an appeal by the creditor against an order adjudging him insolvent, such an order is purely personal to the insolvent, *Narain Singh v Gur Bakhsh Singh*, 9 Lah 306 (1928) AIR (L) 119. Where adjudication is refused on the application of the creditors, the debtor becomes wholly absolved from all manner of liability under the Insolvency Act, if such debtor dies pending appeal from such order, the appeal abates and the proceedings cannot be resurrected any more against the representatives. *Attar Chand v Mian Muhammad Mobin*, 13 Lah 396 135 I.C. 196 1932 AIR (Lah) 121.

18. The procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of complaints, shall so far as it is applicable, be followed in the case of insolvency petitions.

Review.

This is the latter portion of sec 6 (1) of Act III of 1907. The procedure laid down in the CPC 1908, for admission of complaints is to be found in Order, IV, rr 1 and 2 and Orders VI and VII. Thus the procedure to be followed in an admission of insolvency petition is (1) presentation of the application and (2) that the petition conforms to secs 9, 10, 11 and 12, and (3) that the application conforms to Orders VI and VII of the CPC V of 1908 and (4) then

the Court shall cause the same to be entered in a book to be kept for the purpose and called the Register of Insolvency Cases. Such entries shall be numbered in every year, according to the order in which the petitions are admitted (under Or IV rule 2 C P C)

19. (1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition

(2) Notice of the order under sub-section (1) shall be given to creditors in such manner as may be prescribed

(3) Where the debtor is not the petitioner, notice of the order under sub-section (1) shall be served on him in the manner provided for the service of summons

Review.

This is sec 12 of Act III of 1907. The procedure that is followed on admission of an insolvency petition is divided into (1) interim proceedings (ss 19-27) i.e. proceedings which are to be followed from the date of the presentation of the petition to the date of the order of adjudication and (2) proceedings consequent on the order of adjudication (ss 28-44)

Date of Admission of Petition.

The words "date of admission of petition" occur in several places in the Act (vide s 51 infra) and there is controversy as to what the "date of admission of petition" precisely means i.e. whether the "date of admission" of petition is the date of filing the petition or the date on which it is ordered to be registered or the date on which it was entered in the Register of Insolvency Cases. The question arose with reference to the benefit of execution by a decree holder before the "date of admission of the petition" in *Agar Chand v Prithi Singh* 38 P L R 1148 1936 A I R (L) 885 in which it is said that the insolvency law nowhere states as to which is the date of admission of the insolvency petition. But there are certain sections in the Provincial Insolvency Act that afford guidance in determining the date of admission. From a consideration of ss 18, 21 and 51 Provincial Insolvency Act, the date on which the petition was entered in the register was the date of its admission. *Ramanathan Chettiar v Subramaniam Chettiar*, 48 M 456 47 M L J 759 85 I C 216 1928 A I R (M) 248

Sub-sec. (2), Notice to a creditor.

The section provides for the service of notice on creditors of the order fixing a date for hearing the petition for adjudication. In many cases it is contended that this provision applies only when the debtor is the applicant, i.e., when a creditor applies for adjudication

against whom a bankruptcy petition has been filed dies before service thereof, the Court may order service to be effected on the personal representative, of the debtor or on such other persons as the Court may think fit." Rule 7 framed both by the Bombay and the Madras High Courts provides that if a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representatives or on such other person as the Court may think fit in a manner provided for the service of summons.

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18. The procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of petitions for admission of insolvent petitions shall so far as it is applicable, be followed in the case of insolvent petitions.

Review.

This is the latter portion of sec 6 (1) of Act III of 1907. The procedure laid down in the C.P.C. 1908, for admission of petitions is to be found in Order, IV, rr 1 and 2 and Orders VI and VII. Thus the procedure to be followed in an admission of insolvent petition is (1) presentation of the application and (2) that the petition conforms to secs 9, 10, 11 and 12 and (3) that the application conforms to Orders VI and VII of the C.P.C. V of 1908 and (4) then

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Procedure on admission of petition

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of debtor as insolvent this section has no application and no notice need be served upon the other creditors of the debtor. In *S R Darrah v Fazal Ahmed* 93 I C 903 (1926) A I R (L) 360 it was urged that sub section (2) of section 19 only applied to a case of petition by the debtor. It was held that this contention was not supported by any authority. On the other hand there is authority for the proposition for holding that sec 19 (2) does not apply only to a case of a petition by the debtor *Muthu Karuppan Chettiar v Mutha Raman Chettiar* 12 L W 1012 (1914) M W N 889 26 I C 282

Sub section (3) Notice to debtor on creditor's petition imperative

The notice must be served upon the debtor in the manner prescribed by the C P C for the service of summons in Order V r 12. In England a creditor's petition must be personally served by delivery to the debtor of a sealed copy of the filed petition *vide* section 7 of the Bankruptcy Act 1883. It must be served by an officer or bailiff of the Court or his solicitor or by some person in their employ. *Re Blackman Ex parte Branfill* (1892) 9 Morr 157. In *Nathmull v Ganeshmull Jivanmull* 34 C L J 349 it was held that the omission to serve the notice as contemplated by sub section (3) is not a formal defect or irregularity. This notice is the first notice which the Legislature contemplated was to be received by the alleged insolvent before the proceedings culminated in an adjudication order against him. It is of fundamental importance that an order of this description should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served upon him. The rule contemplates a personal service on the alleged insolvent and substituted service is permitted only if personal service cannot be effected. If a personal service cannot be effected the Court may extend the time for hearing the petition or if the Court is satisfied by affidavit or otherwise that the debtor is keeping out of the way to avoid such service or service of any other legal process or that for any other cause prompt personal service cannot be effected it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or his last known residence or place of business or by registered letter or in such other manner as the Court may direct and such petition shall then be deemed to have been duly served on the debtor.

Service of notice

Service of notice is imperative and want of notice vitiates the order. *Komara Sami v Govind* 11 Mad 136. An *ex parte* order of adjudication without service of notice is liable to be set aside. *Mool Chand v Sarjoog Pershad* 12 C W N 273 7 C L J 268. The notice may be served either by registered post or by personal service.

Personal service of notice or delivery of the notice to an agent would be good service or delivery to the principal though in fact the notice was destroyed by the agent and never seen or heard of by the principal. It is an entire mistake to suppose that the addressee must sign the receipt for the registered letter himself or that he cannot do so by the hand of another person or that if another does sign it on addressee's behalf the presumption is that it never was delivered to the addressee himself mediately or immediately. In *Harihar Banerji v Ramshoshi Rai* 23 CWN 77 29 CLJ 117 the Privy Council held that if a letter properly directed containing a notice is proved to have been put into the Post Office it is presumed that the letter reached its destination according to the regular course of business and was received by the person to whom it was addressed. That presumption would apply with greater force to registered letters. In *Girish Chandra Ghose v Kishori Mohan Das* 23 CWN 319 notice was given by registered post but the letter containing the notice was returned by the Post Office the addressee having refused to accept it. It was held that under sec 114 of the Evidence Act the Court was entitled to presume that the letter containing the notice reached the defendant and the fact that the letter was returned by the Post Office as not accepted by the addressee did not destroy the presumption. Under sec 146 of the Bankruptcy Act 1914 all notices and other documents for the service of which no special mode is directed may be sent by post to the last known address of the person to be served therewith and under sec 147 no proceeding in bankruptcy shall be invalidated by any formal defect or any irregularity unless the Court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

Private notice to a creditor in the absence of a general notice does not validate an adjudication. *Nachlappa Chetty v Thangarajah Chetty* 34 Ind Cas 696. The only things that are necessary to be decided by a Court before adjudication are whether the creditor or the debtor is entitled to present the petition whether the required notices have been served and whether the debtor has committed the alleged acts of insolvency. *Jeer v Rangaswami* 36 Mad 402. For how notices under sec 19 (2) are to be given vide Rule 5 of the Calcutta and Allahabad High Courts and Rules 21 and 24 (2) of the Madras and Bombay High Courts. Under the said Rules notice of an order fixing the date of the hearing of the petition under sec 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court directs.

Absence of Notice

Where the absence of the requisite notice under s 19 has not led to any prejudice the order of adjudication cannot be

ferred with on that ground. In *Jhanda Singh v Recener, Insolvent's Estate, Amritsar*, 158 I C 94 1936 AIR (L) 412 the contention was that no notification in the Gazette was published and that no notice were issued to other creditors of the insolvent. It was held that the absence of notices in the present circumstances has not led to any failure of justice in view of the finding that the debt of the petitioning creditor was not fictitious nor was there any evidence to show that the insolvent had sufficient property to pay off his debts. It was therefore held that it could not be said in the circumstances that the adjudication order was not properly made and there has been no prejudice to petitioner by reason of the absence of requisite notices under s 19 of the Provincial Insolvency Act. The debtor is not liable under S 22 for failure to comply with the processes of prohibition and injunction issued by an Insolvency Court on a creditor's petition at least until he had due notice of the same under s 19 (3). *S A Santiago v Emperor*, 166 I C 303 1937 AIR (N) 237.

20. The Court when making an order admitting

Appointment of interim receiver

the petition may, and where the debtor is the petitioner ordinarily shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed the Court may make such appointment at any subsequent time before adjudication, and the provisions of this sub section shall apply accordingly.

Review.

This section is new and corresponds to sec 8 of the Bankruptcy Act and sec 16 of the Presidency Towns Insolvency Act. It marks a departure from the provisions of Act III of 1907 under which a receiving order (sec 18) ordinarily used to follow and not to precede in adjudication order whereas under this new section a receiving order shall be passed, as a matter of course on the presentation of a petition for insolvency by a debtor, and in the case of a petition for insolvency by a creditor it is left to the discretion of the Court.

Section 13 (2) of Act III of 1907, empowered the Court to appoint an interim receiver between the admission of petition and the order of adjudication, but the Act was silent as to the powers

of an interim receiver. It was considered desirable that an interim receiver should normally be appointed when the petition is admitted and should be armed with such of the powers conferable on a receiver under the Code of Civil Procedure as the Court may direct (Cf sec 16 of the Presidency Towns Insolvency Act) —
Notes on Clauses

The law is now brought in a line with the English Law and the Presidency Towns Insolvency Act. According to sec 6 of the Bankruptcy Act in the case of a debtor's petition if it is in due form and complies with the prescribed conditions a receiving order is made as a matter of course except where the petition is an abuse of the process of the Court. Sections 20, 21 and 22 deal with control over persons and property of debtor pending the order of adjudication.

Appointment of interim receiver discretionary

The Court is not obliged to make a receiving order in all cases in spite of the imperative word shall used in the section. *Re Bond* (1888) 21 B B D 17. *Re Bettes Ex parte Official Receiver* (1901) 2 K B 39. Where the debtor is the petitioner the Court ordinarily shall appoint an interim receiver. The word ordinarily shows that it is not bound to do so in every case. At the same time the word shall indicates that unless the appointment is clearly unnecessary the Court is to make it. The discretion to appoint an interim receiver in the case of a petition by a creditor must be a judicious discretion and not arbitrary and when it appears to the Court to be just and convenient (Or 40 r 1 C P C) or where it is proved by affidavit or otherwise that any property of the debtor is in danger of being wasted damaged or alienated by the debtor or wrongfully sold in execution of a decree or that the debtor intends to remove or dispose of his property with a view to defraud his creditors (Or 39 r 1) or where the Court is satisfied by affidavit or otherwise that the debtor with intent to delay or defraud his creditors is about to dispose of the whole or any part of his property or is about to remove the whole or part of his property from the local limits of its jurisdiction (O 38 rr 1 and 5) the Court is bound to order the appointment of an interim receiver immediately on the presentation of the petition by a creditor. The discretion given to the Court under this section to appoint an interim receiver should ordinarily be exercised only in cases where the property of the insolvent has to be preserved from destruction and disappearance and not merely for protecting the properties from sale in execution by other Courts. *Bashyam Reddi v Sumasindaram* 32 Ind Cas 897. The act of insolvency alleged to have been committed by the debtor should be clearly and precisely described in the insolvency petition so to enable him to meet the charges brought against him and un-

the facts alleged bring his conduct well within the ambit of the statute the Court should stay its hands both in the matter of adjudication and the appointment of an interim receiver, *Harkishan Lal v The Peoples Bank of Northern India* 14 Lah 117

Object of appointing interim receiver.

The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition and before a receiving order is made appoint the Official Receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof (sec 8 Bankruptcy Act). In *Madhu Sardar v Kshutish Chandra Banerjee* 42 Cal 289 it has been held that "an order for the appointment of an interim receiver of the property of the debtor is made for the protection of the estate of the debtor for the general body of creditors. At the stage when the *adinterim* receiver is appointed no question arises as to the distribution of the property of the debtor amongst the creditors or as to preferences amongst them

Duty of Court in appointing interim receiver.

In appointing an interim Receiver the Court ought to give directions as to which of the powers ordinarily conferable upon a receiver appointed under the Code of Civil Procedure 1908 should be exercisable by the interim Receiver. *Patit Paban Daw v Hari Sadhan Nandi* I L R (1938) 1 Cal 245 66 C L J 61 1938 A I R (C) 182. The word 'thereupon' in S 20 does not mean that the receiver is not clothed with the necessary powers to act in relation to the property until he takes possession. On the other hand it indicates that on a direction being given by the Court empowering him to take immediate possession he gets clothed with all the powers that are necessary to enable him to get such possession and one of the powers contemplated under O 40 r 1 (d) C P C is realisation of the property which would also include reduction of the property into his possession. *Gogineni Ankaya v Official Receiver, Masulipatam* 1937 M W N 262 45 L W 771 171 I C 220 1937 A I R (M) 589

Effect of appointing interim receiver.

The appointment of interim receiver has not the effect of divesting a debtor of his property but merely protects it. It constitutes the Official Receiver, receiver of the debtor's property, and so deprives the debtor of all power to enter into transactions which will bind his creditors as represented by the trustee in bankruptcy in respect of it, so that a person dealing with him, whether in ignorance or not of the making of the receiving order, gets no advantage from anything which the debtor purports to do, *In Re*

Te'e (1912) 2 K B 367 If he pays money to the debtor he gets no discharge for it and may have to pay again If he receives money he is liable to return it if he buys property he gets no title as against the creditors—*Ringuood* The combined effect of sections 20 and 56 is that (a) an interim receiver may be appointed by any Insolvency Court with directions to take immediate possession of the property of the alleged insolvents (b) the powers to be exercised by an interim receiver shall be determined by the Court with reference to Order 40 CPC (c) and to ensure compliance with its order the Insolvency Court can remove a person in whose possession such property is but it cannot remove any person whom the insolvent has not a present right to remove *Lachhi v. Badri Parshad* 36 P L R 205

Status of interim receiver

A Receiver appointed under the provisions of the Provincial Insolvency Act is a public officer within the meaning of sec 2 cl 17 of the C P C and before an action can be brought against him notice must be served upon him in conformity with the requirements of section 80 of the Code *Anna Laticia De Silva v. Gound Balwant Pareshare* 58 Ind Cas 411 Vide also notes under secs 56 and 59 infra

Powers of interim receiver

(1) In regard to protection of the debtor's estate Where an ad interim receiver has been appointed in insolvency proceedings the receiver appointed after adjudication does not stand in the shoes of the interim receiver He stands on a very much higher footing The property of the judgment debtor vests in him he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by statute *Ramsaran Mandar v. Sita Prasad* 58 Ind Cas 783 In *Ram Chandra Aiyar v. Sankar Aiyar* 50 M L J 239 23 M L W 145 1926 M W N 159 93 IC 721 (1926) A I R (M) 357 the question arose whether the interim receiver by virtue of his appointment under sec 20 of the Provincial Insolvency Act had power to act under Or XXI r 89 of the CPC It was held that the interim receiver by virtue of his appointment under sec 20 of the Provincial Insolvency Act has no power to act under Or XXI r 89 CPC in the absence of the Court's order authorising him to so act and it was further held that in India a receiver put into mere possession under Or XL r 1 (c) can not arrogate to himself powers to be conferred under Or XL r 1 (d) So also in *Subramania Aiyar v. Official Receiver* 50 M L J 662 23 M L W 300 93 IC 877 (1926) A I R (M) 432 it has been held that *testino* only takes place upon adjudication An interim receiver has under sec 20 only the powers of a receiver appointed under the Civil Procedure Code and is not clothed even with those powers till he takes possession of the debtor's properties

There is apparently no provision under which the Court can make a vesting order before adjudication but the interim receiver has very much the same rights and liabilities as a receiver for sec 56 of the Insolvency Act applies its provisions so far as may be to interim receivers and though an interim receiver appointed under sec 20 cannot apply to have an auction sale set aside under Or XXI r 89 CPC as held in *Ram Chandra v Sankar Arayar* supra can apply under Or XXI r 90 CPC he being a person whose interests are affected by the sale and this is all the more so when the debtor in charge of whose property he is placed is later adjudged insolvent *Subramania Arayar v Dharapuram Nidhi Ltd* 1928 MWN 216 1928 AIR (M) 454

Whatever the receiver rightly does with regard to the property he does it simply as the agent of the owner of the property or the person interested in the property. Where on the sale of the judgment debtor's property in execution of a decree the other creditors apply to adjudge him insolvent and an interim receiver of the insolvent's property is appointed under s 20 and is ordered to exercise all the powers of an owner under Or 40 r (1) (d) CPC and is also expressly empowered to act under Or 21 r 89 CPC to set aside the sale of immovable property belonging to the insolvent appointment of the interim receiver divests the insolvent of all control over the property and operates as an injunction restraining him from interfering with the possession of the property or taking any action in regard thereto. The receiver becomes the statutory agent to do all the acts which the insolvent was entitled to do if he were not so disabled. The making of an application under Or 21 r 89 to set aside sale is an act which the judgment debtor insolvent would have been competent to do but for the appointment of the interim receiver. The interim receiver is therefore competent to file an application to set aside sale under Or 21 r 89 CPC *Gogineni Ankayya v Official Receiver Masulipatam* 1937 MWN 262 42 MLW 771 171 IC 220 1937 AIR (M) 589

(2) In regard to his taking possession of debtor's property S 20 relates and relates only to the property of the debtor. The interim Receiver should only take possession of property which is admittedly or at any rate *prima facie* property belonging to the debtor himself. The moment a third person sets up a claim to a property the matter should be investigated before the Receiver proceeds to exercise any right over it. In *Patu Pabari Diw v Hari Shadan Nandi* ILR (1938) 1 C 245 66 CLJ 61 1938 AIR (L) 182 a debtor put in a petition for and prayed that he should be adjudicated insolvent. One of the creditors then put in a petition praying for appointment of an interim Receiver. The Court accordingly appointed the Official Receiver as *ad interim* receiver and further ordered that he would take possession immediately of a shop on

deposit of costs. In pursuance of this order the Official Receiver went and took possession of the shop and that he did in spite of a protest of a third person and his employees who were then in the premises that the shop in question had nothing whatever to do with the petitioning debtor. The application of the creditor which was purported to have been made under s. 20 was really a petition asking for an order of the kind contemplated not by s. 20 but by s. 21 of the Provincial Insolvency Act. It was held that in these circumstances it is clear law beyond all question that the receiver should have stayed his hand until the question of whether or not the shop was the property of the debtor has been determined by the Court. The receiver should have gone away and the matter should have been brought before the Court in order that the claim put forward by the third person might be properly adjudicated upon. It was further held that the proceedings in the present case were wholly misconceived and the order of the Court in so far as it purported or was assumed to authorise the receiver to take possession of the shop was in illegal order and one made without jurisdiction.

An interim receiver appointed before adjudication has not all the powers of a receiver appointed after adjudication under section 56, in the former case the property of the debtor does not vest in the receiver unless and until the Court makes an order under section 20 by which the receiver is authorised to take immediate possession of the property. *Surajmal Firm v Chouthmal Bai* AIR (Pat)

70 The only order that a Court can pass under sec 20 is to direct an interim receiver to take possession of the property and the only manner in which it can enforce its orders is to remove the person in possession provided that the person does not come within the purview of the proviso to sec 56 (3), *Lachhi v Badri Prashad*, 36 PLR 205 1934 AIR (Lah) 1006 Rankin CJ has observed in *Mohitosh Dutta v Rai Saus Chandra Choudhuri Bahadur*, 35 CWN 971, that where a receiver in insolvency comes to the executing Court not under sec 52 of the Insolvency Act but under the CPC with the objection that the property attached cannot be sold, it having vested in himself for the benefit of the creditors, he is not a representative of the judgment debtor for the purpose of sec 47 and an interim receiver in insolvency is not competent to make an application under sec 47. It has been held in *Suasami Odayar v Subramania Aiyar* 55 Mad 316 62 MLJ 68 1932 AIR (M) 95 that an interim receiver is entitled to apply under section 52. Section 52, as now amended contemplates the presentation of an application not as it used to do after adjudication, but at an earlier stage—that is to say, after an insolvency petition has been admitted. In this case the view held in *Subramania Aiyar v The Official Receiver*, *Supra*, has been dissented from. Following the case of *Suasami Odayar v Subramania Aiyar*, it has been :

in *Mahendra Kumar Baisya Saha v Dinesh Chandra* 37 C W N 392, that an *ad interim* receiver is entitled to be put in possession of the property under attachment by the executing Court in execution of a decree for the payment of money on simply being apprised of the mere admission of the petition for insolvency and even if no application by the *interim* receiver for delivery is made. In *Ethirajulu Chettiar v The Official Receiver East Tanjore*, 56 Mad 453, it has however, been held that the *interim* receiver is not entitled to be put in possession of any immovable property under attachment by the executing Court as the property cannot be said to be in possession of the Court merely by virtue of attachment.

21. At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may either of its

Interim Proceedings
against debtor

own motion or on the application of any creditor make one or more of the following orders, namely —

- (1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that, in default of giving such security he shall be detained in the civil prison ,
- (2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ,
- (3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary ,

Provided that an order under clause (2) or clause (3) shall not be made unless the Court is satisfied that the

debtor with intent to defeat or delay his creditors or to avoid any process of the Court,—

- (i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or
- (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid

Review.

This is mainly section 13 of Act III of 1907 subject only to the exclusion of clause (2) which provided for the appointment of an interim receiver of the property or any part thereof which has been provided for in the preceding new section 20. It often happens that considerable time elapses between the date of the presentation of the petition and the order of adjudication and a debtor may in the meantime easily dispose of or remove his property in order to defeat or delay his creditors. Secs 20, 21 and 22 are intended to provide Courts with power to control the person and property of the debtor from the date of the admission of the petition to the date of adjudication. Pending adjudication the Court has summary powers to prevent the debtor from absconding or removing his property books or papers.—*Robson*

Interim proceedings

This section applies to petitions presented by the creditor for the adjudication of the debtor in which case for the safety of the creditors in general any one or all of the orders mentioned in this section may be passed by the Court either on the application of the creditor or of its own motion. Under sec 21 the Court is given the discretion to make an order for security at any time at or after admitting petition. *S R Darrah v Faral Ahmad* 93 IC 903 (1926) A I R (L) 360

Position and power of Court before and after Adjudication.

There is a wide difference between the position and powers of the Insolvency Court before and after adjudication. Before adjudication the debtor continues in possession of the property and is subject to the provisions of the Act, entitled to deal

like any other owner. Therefore in order to prevent alienation and waste the Insolvency Court is empowered under sec 21 (2) to order attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor provided the conditions laid down in the Proviso obtain. But these powers of attachment are limited to the position before adjudication and they are as wide as powers of attachment conferred upon a Civil Court under the Code of Civil Procedure. After adjudication the position changes entirely. Under sec 28 (2) the whole of the insolvent's property immediately vests in the Court in the receiver and when there is no receiver the Court is invested with all the rights and is authorised to exercise all the powers conferred on receiver by the Act under s 58. One of these rights is the right to actual physical possession of the insolvent's property by the receiver and in order to enforce that right the Court is empowered under s 56 (3) to remove any person who is in possession or custody of the insolvent's property from such possession or custody subject to the Proviso of that section. *Mt Jasodabai v Firm Shrikishan Radhakishan* 1939 AIR (N) 10

Clause (1), Security for appearance

Section 21 gives power to the Court to secure the debtor's due attendance at the hearing either by taking security from him or by issuing a warrant with or without bail and directing that he be detained in the civil prison until the disposal of the petition. *Sassoon v Kissen Chand* 30 PLR 1910. It is for the Judge to determine whether the security is sufficient. *In the matter of Bhuban Mohan Bose* 15 WR 571. The obligation of the surety is discharged on the debtor's death. *Krishnan Nayar v Lunnan Nayar* 24 Mad 637. *Nabin v Mritinjoy* 40 Cal 50 17 CWN 1241. Where security for appearance of the debtor was given the insolvency petition dismissed and the surety failed to produce the debtor when called upon the security money cannot be forfeited to Government but should be paid to the decree holder. *Basant Lal v Cheddi Singh* 39 Cal 1048 16 CWN 664. Where money is deposited in Court by the debtor during the pendency of insolvency proceedings against him it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of insolvency proceedings. If the debtor is adjudicated insolvent the money will be available for the benefit of the whole body of creditors. If on the other hand the application is dismissed the money may be paid to a particular creditor with the consent of the debtor or the creditor may file a suit and get an attachment of the money before it is paid to the debtor. *Ko Maung Gyi v P L M Chettyar Firm* 1929 AIR (R) 338.

Stamp duty payable on the Security Bond

On a reference under s 57 of the Indian Stamp Act by the

Board of Revenue v Full Bench of the Madras High Court has held in *Abubacker v Madarsa Labba* 1 L R (1938) M 460 1938 M W N 190 47 L W 154 (1938) I M L J 159 174 I C 587 1938 A I R (M) 262 that a security bond for Rs 4500 executed by two sureties in pursuance of an order of subordinate judge under s 21 (1) of the Provincial Insolvency Act in favour of the sheristadar of that Court by hypothecating also immovable property and binding themselves to the Sheristadar that the insolvent would attend when called upon should be stamped under article 40 Schedule I, and not under article 57 Schedule I of the Indian Stamp Act

Remedy against the surety

Under the old Civil Procedure Code (section 336) a covenant by a surety was enforceable by an action within 3 years from the date of his failure to produce the insolvent when required by the Court *Mir Ansar Ali v Gurus Charan* 16 All 37 But under section 145 of the new C P C 1908 no suit is necessary the covenant may be enforced against him in the manner provided for the execution of decrees Clause (1) of this section should be read with section 55 (4) of the C P Code 1908 The assignee of the security bond given to a District Judge for the production of an insolvent when called upon to appear is entitled to take an action upon that bond *Gopinath Chaudhuri v Bino lal Rai Chaudhuri* 51 Cal 162

Clause (2), Attachment by actual seizure

In *Hasmat Bibee v Bhagwan Das* 36 All 65 it was held that an order of attachment of the property of the insolvent made before the order of adjudication must be made according to the provisions of the Civil Procedure Code 1908 (Orders 21 and 38) The Courts in India as in England may cause a debtor to be arrested and any books papers money and goods in his possession to be seized if there is probable reason for believing that he has absconded or is about to abscond with a view to avoiding payment of the debt in respect of which the bankruptcy notice was issued or if after presentation of a petition by or against him there is probable cause for believing that he is about to remove to prevent or delay possession being taken by the official receiver or that he has concealed or is about to conceal or destroy any of his goods or books of account documents writings which might be of use to his creditors in the course of his bankruptcy or if after service of a petition on him he removes any goods in his possession without the leave of the receiver See section 73 (1) (a) (b) (c) of the Bankruptcy Act 1914 The power given to the Court by sec 21 to attach any property of the debtor by actual seizure is intended to prevent the debtor from making away with what is his property—documents and books of account which might be used against him—property that he might run away with and take

like any other owner. Therefore in order to prevent alienation and waste, the Insolvency Court is empowered under sec 21 (2) to order attachment by actual seizure of the whole or any part of the property "in the possession or under the control of the debtor" provided the conditions laid down in the Proviso obtain. But these powers of attachment are limited to the position before adjudication and they are as wide as powers of attachment conferred upon a Civil Court under the Code of Civil Procedure. After adjudication the position changes entirely. Under sec 28 (2) the whole of the insolvent's property immediately vests in the Court in the receiver, and when there is no receiver, the Court is invested with all the rights and is authorised to exercise all the powers conferred on receiver by the Act under s 58. One of these rights is the right to actual physical possession of the insolvent's property by the receiver, and in order to enforce that right the Court is empowered under s 56 (3) to remove any person who is in possession or custody of the insolvent's property from such possession or custody subject to the Proviso of that section, *Mt Jasodabai v. Firm Shrikishan Radhakishan*, 1939 A I R (N) 10.

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away out of the reach of the creditors. Where, therefore, on the application of a creditor, the Court ordered the attachment of a certain house not included by the debtor in his assets and claimed by the wife of the debtor as her own property before any adjudication into the claim by the wife had been made, it was held that the order of attachment should be set aside, *Srimati Minnalini Dassi v Hanhar De*, 59 Cal 1338 36 C W N 741 56 CLJ 307. Under this section the Receiver has no power to cause an attachment by actual seizure without an order of the Court.

Attachment by Prohibition and Injunctions.

S 21 Ins Act prescribes interim proceedings against the debtor including attachment by prohibition and injunction. The Insolvency Court is empowered to issue such processes as prohibition and injunction. *S A Santiago v Emperor* 166 IC 303 1936 AIR (N) 237.

Attachment of books of account.

Books of account are not attachable under section 60, C P C, 1908, but under the Insolvency Act books of account have been made attachable and they have been exempted from the particulars mentioned in section 60, C P C, 1908.

Property exempted from attachment.

For properties exempted from attachment and sale in execution of a decree under the Civil Procedure Code, 1908, or any other enactment for the time being in force vide Notes under secs 2 (d), 13 (e) and 28 (2).

Nature of the attachment by the Insolvency Court.

The Provincial Insolvency Act lays down no procedure to be followed when effecting an attachment. According to sec 5, therefore, the Court must follow the same procedure as it would do in the exercise of its original civil jurisdiction and must also exercise the same powers. Now an attachment under sec 21 cl (2) is strictly analogous to an attachment before judgment effected under Or 38, rr, 5 12, C P C, 1908. According to Or 38, r 8, C P C claim may be preferred to property attached before judgment, and the Court is, thereupon, bound to investigate such claims in the manner provided for the investigation of claims to property attached in execution of a decree for payment of money. *Hasmat Bibee v Bhagwan Das*, 36 All 65, *Manak Chand v Ibrahim*, 62 IC 307, S 21 (2) contemplates an attachment analogous to attachment before judgment and the provisions of the Code of Civil Procedure, apply to such attachments by virtue of provisions of s 5 of the Provincial Insolvency Act. *Patit Paban Das v Harishadan Nandi*, 11 LR (1938) 1 C 245 66 CLJ 61 1938 AIR (C) 182.

Clause (3), Interim arrest.

The Court may order a warrant to issue for the arrest of the debtor if the Court is satisfied by affidavit or otherwise that "the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court, has absconded or departed or is about to abscond or depart from the local limits of the jurisdiction of the Court or has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing or any part of his property other than such particulars as aforesaid" The power to issue a warrant extends to the case of a debtor who has absconded before the issue of a notice or the presentation of a petition, *R v Northalerton County Court Judge*, (1898) 2 Q B 680 When the Court has only ordered the debtor to appear in Court to answer the complaint, the penalty for his not appearing is the absence of the insolvent, the warrant for the arrest of the debtor. Such order cannot be deemed to be under clause (1) It can only be passed under clause (3), section 21 *Amar Singh v Imperial Bank of India* 1929 AIR (L) 808

Proviso.

Condition precedent to the issue of processes of (i) attachment, (ii) injunction, (iii) prohibition and (iv) warrant of arrest by the Insolvency Court is that it should be satisfied by affidavit or otherwise that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court has absconded or has departed from the local limits of the jurisdiction of the Court or is about to abscond or to depart from such limits or is remaining outside them, or has failed to disclose or has concealed, destroyed, transferred or removed from such limits or is about to conceal, destroy, transfer or remove from such limits any documents likely to be of use to his creditors or any part of his property The proviso to sec 21 requires that there must be something to show that the Court was satisfied as to any of the things mentioned in the proviso upon materials upon which the Court could properly form an opinion as to whether the necessary conditions precedent to the making of the order under section 21 were present or not

Where a creditor filed an application, unsupported by an affidavit, nominally under the provisions of sec 20, but really to get an order under sec 21 praying for the appointment of an interim receiver of not only the properties of the debtor but also the properties which were supposed to be his and for directing him to take immediate possession thereof, and the Court ordered accordingly and the Official Receiver went and took possession of a shop which stood in the name of and which was accessible

carried on by somebody quite different from the debtor, though he protested and set up a claim to be the owner of the shop and contended that the property had nothing to do with the insolvent, it was held that the conditions required by sec 21 and the proviso to it had never been fulfilled and no materials had been placed before the Court. It was also held that the Receiver should have stayed his hands until the question whether or not the shop was the property of the debtor had been determined by the Court after an investigation. The order of the Court in so far as it purported or was assumed to authorise the receiver to take possession of the shop of a third party was held to be illegal and *ultra vires* *Pant Paban Daw v Hansadhan Nandi* ILR (1938) 1C 245 66 CLJ 61 176 IC 437 1938 AIR (C) 182

22. The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver, or as may be prescribed

Review

This corresponds to sec 33 (1) (2) of the Presidency Towns Insolvency Act and sec 43 (1) of Act III of 1907 with the difference that under sec 43 (1) of the Act III of 1907 every debtor after the order of adjudication as a matter of course and before the order of adjudication if so required by the Court, was bound to produce his books of accounts, etc but under the present section the receiving order being at once passed on the presentation of the application of the debtor he is required to comply with the time of the presentation is thus explained in the Notes s imposed on the debtor by soon as the Court has made an order under sec 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property unless he is adjudicated an insolvent. It is proposed therefore to amend the concluding part of sub section (1) and to relegate to a separate sub-section the provisions which impose on the debtor the duty of aiding in the distribution of his property." Sir George Lowndes in intro

ducing the Bill also observed. The next point I should like to refer to is the penal provisions of the Act. Section 43 of the existing Act is lacking in precision and clearly wants remodelling. Its form has led to many difficulties and we therefore propose to re-cast it again resorting to the model of the Presidency Towns Insolvency Act which seems to us to be better. I should like to say in this connection that the ideal state of affairs would undoubtedly be that an Insolvency Act should itself deal only with what I may call the special offences under the Act such as refusal or neglect to comply with orders of the Court or statutory requirements.

Duties of the debtor before adjudication

Section 22 deals with the duties of the debtor on admission of his petition and before the order of adjudication while section 28 (1) deals with the duties of the debtor after the order of adjudication. The question often arises whether the duties mentioned in this section are imposed upon the debtor on admission of a creditor's petition for his adjudication. The section has no application to a creditor's petition inasmuch as the debtor cannot possibly be aware of the admission of a creditor's petition until notices thereof have been served on him under sec 19 (3). It cannot therefore be said that the duties of the debtor arise on the making of an order admitting the petition of which he has no knowledge. Besides as has been observed in Notes on clauses (cited supra) it is difficult to see how the debtor can be under any obligation to assist in the distribution of his property unless he is adjudged an insolvent.

The first part of sec 22 which requires the debtor to produce all books of account on the making of an order admitting the petition does not apply to cases where the petition is a creditor's. But the second part which requires him to do all such things as he may be required to do at any time thereafter applies to cases of both debtor's and creditor's petitions and to all stages of the proceedings following the admission of the petition even after the order of adjudication. The second part covers a requisition to produce account books. *Akhoy Chand Begu in v The Emperor* 61 Cal 537 38 CWN 642 1934 AIR (C) 409. When the creditor of a person applies to adjudicate him as an insolvent it is unfair on the part of the Court to order the debtor in every case to file inventories of his property and list of debts due from him to others without the petitioning creditor having first established his right to present the petition as it may lead to the failure of the business of an otherwise solvent person by being forced to disclose his property and his creditors and the debts due to them on the petition of a person who is not really his creditor but is inimically disposed towards him and has presented a false petition. In the absence

of circumstances justifying such an order the Court should proceed under section 24 Provincial Insolvency Act by calling on the petitioning creditor to establish his right to present a petition before taking any other action against the debtor *Ganesh Das v Khilandaram*, 119 IC 753 1929 AIR (L) 636 Accordingly it has been held in *S A Santiago v Emperor* 166 IC 303 1936 AIR (N) 237 that the debtor is not liable under s 22 for failure to comply with the processes of prohibitions injunction issued by an Insolvency Court on a creditor's petition at least until he has due notice of the same under s 19 (3) of the Act And it has also been held in *Ramaswami Gounden v Emperor* 1935 MWN 919 that unless and until the Court or the Official Receiver issues orders to the insolvent in person that he has been actually adjudicated insolvent on a creditor's petition it is impossible to hold that the insolvent must carry out the duties imposed on him by s 22 at the pain of being punished if he does not do so otherwise the insolvent cannot be said wilfully to fail to perform these duties under s 69 (a) of the Act

The first duty of the debtor after a receiving order has been made against him is to attend on the official receiver at his office immediately after the service of the order The official receiver must ascertain his affairs from a personal interview with the debtor and furnish him with instructions for the preparation of his statement of affairs The debtor must give such inventories of his properties such list of his creditors and debtors submit to such examination and give such information as the official receiver may require and also give a list of debts due to and from him and do all other things that may be required of him by the official receiver [see sec 22 (2) of the Bankruptcy Act] On the request of the receiver he must furnish trading and profit and loss accounts and a cash and goods account for such period not exceeding two years from the date of the receiving order as the receiver shall specify or for a longer period *Re Cronmire Ex parte Cronmire* (1894) 2 QB 246 The Insolvency Court has power to direct the insolvent to appear for his examination touching his estate effects and dealings although he resides more than two hundred miles away from the court house *In Re Naoraji Sarabji* 33 Bom 462

Court's discretion to call for accounts, etc

As under sec 21 the Court is given discretion to make an order for security at the time of or after admitting the petition so under sec 22 the Court may at any time after admitting the petition demand an inventory of the debtor's property and lists of his creditors and debtors and of the debts due to and from them The matter is entirely in the discretion of the Court and the High Court should not in second appeal interfere with that discretion *S R Darrah v Fazal Ahmed*, 93 IC 903 (1926) AIR (L) 360

Production of books of account

Books of account are required to be produced by the debtor more for the purposes of administration than for the purposes of adjudication. The only things that are necessary to be decided before adjudication are as has been observed in *Kalikumar v Gopi Krishna* 15 CWN 990 and *Jeer v Rangaswami* 36 Mad 402 whether the debtor is entitled to present the petition and the debtor has committed the alleged acts of insolvency. In *In the matter of Veethaldas Kalidas* 91 C 632 it was held that the fact that the applicant has not kept his accounts regularly is a matter which may be considered when he applies for discharge—it is not relevant to the order of adjudication. Failure on the part of the debtor to produce books of account does not stand in the way of the Court in believing *prima facie* that the debtor is not able to pay his debts. In *Jogendra Nath Saha v Rai Kishori Das* 59 Cal 1279 55 C.L.J. 356 36 CWN 698 Rankin C.J. in disposing of the argument viz. whereas under section 22 the debtors ought to have produced their books of account on the making of the order admitting the petition the debtors had not satisfactorily explained how they came to be as they said unable to produce the books for three certain years observed: I cannot find from beginning to end that the District Judge had any *prima facie* difficulty in inferring that these people were unable to pay their debts. But he thought that the books would show when they became unable to pay their debts and that they would show when they first became unable to pay their debts. It appears that the insolvent suffered an attachment in 1334 B.S. and that they have been trying to wind up their business ever since and it is said that they are only now carrying on a very small trade just enough to keep themselves and their family in existence. It is perfectly obvious that this is a case where an adjudication order should be made. In these appeals we will make the adjudication order here.

Consequences of refusal or neglect to comply

Though it is obligatory on the debtor to produce all books of account and give inventories of his properties etc. it does not follow that non-compliance with the orders of the Court to the above effect means dismissal of his application for insolvency. An order for discovery made under sec. 36 of the Presidency Towns Insolvency Act may if disobeyed involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court as happened in the case of *Orangan v. Desikachary* 36 M.L.J. 461. Under sec. 69 of the Provincial Insolvency Act V of 1920 it is an offence if a debtor whether before or after the making of an order of adjudication wilfully fails to perform the duties imposed upon him under sec. 22 and renders himself liable to imprisonment which

may extend to one year In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were either not in existence or were not under his control *Shukhlal v Official Assignee Calcutta* 34 CLJ 351 When after the adjudication of a person as an insolvent on a creditor's petition he is required to produce his books of account and he fails to do so he commits an offence under sec 69 (a) of the Provincial Insolvency Act and not under sec 69 (b) The Court cannot convict a person under sec 69 (b) on a charge framed under sec 69 (a) Having regard to the expression wilfully in sec 69 (a) of the Provincial Insolvency Act a person charged with failure to produce account books cannot be convicted unless it is proved that the books were in his possession or power to produce *Akhoy Chand Begun v The Emperor* 61 Cal 537 38 CWN 642 1934 AIR (C) 409

23 (1) At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary

(2) The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released

(3) At the time of making any order under this section the Court shall record in writing its reasons therefor

Review

This section is new and is intended to afford relief and protection to the debtor before adjudication from arrest or imprisonment for debts provable under bankruptcy while sec 31 is intended to afford relief and protection to the debtor after adjudication The reasons for the introduction of this new section are to be found in the following extracts from Sir George Lowndes speech — The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors I will pursue for a moment the course of a debtor who files his petition and if in jail the existing Act and he is again That is sufficient for it want to pay his debts all he wishes is to escape the penalty of jail This section should be read with sec 55 (4) of the CPC 1908

Application of the section.

As this section is intended for the release of the debtor before adjudication it contemplates the admission of a petition by the debtor for his adjudication. A debtor who is unable to pay his debts and who is under arrest or imprisonment in execution of the decree of any Court for payment of money and has presented an application for his adjudication comes within the jurisdiction of the insolvency laws and is entitled to the protection under sec 23. Though the word 'petition' is used in the section without any qualifying word as to whether it refers to a petition by a creditor or by the debtor it is clear that it cannot refer to a creditor's petition because in a creditor's petition for adjudication of a debtor the Court has no jurisdiction over the latter until he is adjudged an insolvent on proof of the acts of insolvency alleged by the creditor to have been committed by him. A debtor is entitled to an order of adjudication on the presentation of a petition for insolvency and the jurisdiction of the insolvency Court arises from the admission of his petition for adjudication. It is otherwise in the case of a creditor's petition. A creditor's petition is liable to be dismissed if the Court is not satisfied as to his right to present the petition. It therefore follows that on a creditor's petition for his adjudication a debtor though under arrest or imprisonment, is not entitled to present an application for his interim protection until he is adjudicated or until he comes within the jurisdiction of the Insolvency Court by expressing his willingness to be so adjudged.

Automatic interim protection under English law.

Blackstone in his *Commentaries on the Laws of England*¹ says that 'b when a debtor cannot pay the persons to whom he cannot obtain satisfaction of their claims the State in certain circumstances takes possession of his property by an officer appointed for the purpose, and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities. The debtor at the same time obtains protection from legal proceedings by the persons to whom he has incurred debts or liabilities subject to certain clearly defined exceptions'. Under the English Bankruptcy Act, a receiving order is made on the presentation of a bankruptcy petition (sec 3) and on the making of a receiving order the official receiver takes possession of the property of the debtor and thereafter no creditor to whom the debtor was indebted in respect of any debt provable in bankruptcy had any remedy against the property or person of the debtor in respect of the debt (sec 7). In earlier English law on bankruptcy the creditor was the only party whose interests consulted and even the complete realisation of the estate and

equitable division were made secondary object compared to the infliction of punishment on the debtor while he was to be stripped of all his property no provision was made for affording him even temporary freedom and protection after his surrender of everything. But at length it appeared harsh to strip a man of all his resources without relieving at the same time from his difficulties and by the Statute of Queen Anne (4 Anne) for the first time it was provided that a bankrupt who had been compelled to surrender the whole of his assets and had in all matters conformed to the law of bankruptcy should be entitled to his discharge from all further liability for the debts theretofore contracted.

No automatic interim protection under Indian law

The Indian law of Insolvency which is mainly based upon the English Bankruptcy Act differs in this respect from the English law and under it the debtor is not entitled to get his automatic release from arrest or imprisonment on the presentation of the petition but it is made to depend upon the discretion of the Court on his making an application for that purpose. The practice of leaving a man to the mercy of his creditors who with a view of extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is a practice which cannot be too strongly reprehended. *Satishchandra Addy v Firm of Rajnarain and Rasiklal Pakhira* 72 Ind Cas 60

Protection on arrest or imprisonment only

The section contemplates release of a debtor at the time of admission of petition if he is already under arrest but there is no express provision in the Act empowering the Courts to grant interim protection in anticipation of arrest pending the order of adjudication. Sec 31 deals with application for protection only after the order of adjudication is made. The only other provision which deals expressly with what may be called protection before adjudication is sec 23. The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment creditors before adjudication is where a decree holder has arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated unless he has been arrested. *Sinnasuami v Aligi Goundan* 47 M L J 530 (1924) M W N 836 80 I C 938 1924 A I R (Mad) 893. In *Ghanasham das Khatumal v The Manager Encumbered Estates* 99 I C 930 (1927) A I R (S) 123 it has been held that an Insolvency Court cannot under the provisions of sec 23 of the Provincial Insolvency Act grant a person an interim order of protection before he is adjudicated an insolvent if he is not under arrest in execution of a decree of any Court for payment of money. The condition precedent to an order under sec 23 is that the debtor must be under arrest or detention.

in execution of the decree of any Court for the payment of money. A petitioner cannot be said to be under arrest if he has been released after arrest on account of the decree holder's failure to pay the subsistence money or for any other reason and the proceedings having been dropped. The facts must clearly show that at the time he puts in his application he must be suffering under the duress of Court and liable to be arrested in a proceeding still pending against him though he might be released on furnishing security for his appearance. *Jumai v. Karim Ali* 25 All 204. In *Jeuraj Kharewala v. Lalbhai Kalyanbhai* 30 CWN 834 96 IC 131 (1926) AIR (C) 1011 Page J held that there is no provision in the Provincial Insolvency Act in respect of protection orders to prevent the arrest of a petitioner pending the hearing of a petition of insolvency and Cuming J held that the Provincial Insolvency Act has specially laid down that in such a case as the present one (i.e. where the petitioner applies to be declared an insolvent and asks the Court that pending the decision of his application to be adjudicated an insolvent he should be protected against arrest at the instance of creditors) protection cannot be granted.

No inherent power to grant protection in anticipation of arrest

The question is in the absence of any express legislation whether the Court can be presumed to be invested with the power of granting interim protection to a debtor in anticipation of his arrest or imprisonment in execution of any decree pending the order of adjudication if it thinks necessary to do so in the interest of creditors. In *Abdul Rajah v. Basiruddin Ahmed* 14 CWN 586 11 CLJ 435 a case decided under the old Act the Calcutta High Court held that although there is no express provision on this subject the Court in the first instance as well as the Appellate Court is competent to make an order for *ad interim* protection of the appellant and for the appointment of a receiver pending the order of adjudication and during the pendency of the appeal. In *Vallagati Goundan v. Ramana Goundan* 47 M.L.J. 783 a case decided under the present Act the appellant who had filed an application for an adjudication as an insolvent applied for interim protection and his application was rejected by the District Judge. There was an appeal and in appeal the High Court held following *Abdul Rajah v. Basiruddin* 14 CWN 586 that the District Judge has inherent powers under sec 5 to grant the appellant the protection he claimed.

In *Jeuraj Kharewala v. Lalbhai Kalyanbhai* 30 CWN 834 96 IC 131 (1926) AIR (C) 1011 the question whether or not a Court has in its inherent powers the power to grant *ad interim* protection was not decided. Cuming J in delivering the judgment said: "Without discussing whether or not a Court has in its inherent powers the power to grant *ad interim* protection it is quite clear

the Provincial Insolvency Act has specifically laid down that in such a case as the present one protection cannot be granted and Page J avoided the question by saying that even if the Court has jurisdiction to make an order of this description in the exercise of its inherent powers having regard to the express provisions with relation to protection orders and release from arrest set out in the Provincial Insolvency Act (as to which I desire to reserve my opinion) the fact that the lower Court has not passed an *ad interim* protection order in the exercise of its inherent powers in my opinion does not bring the order in question within the ambit of sec 115 C P C

In *Paran Chandra Sen v Blackwood and Blackwood & Co* 36 C W N 345 it was held that the Provincial Insolvency Act of 1920 makes no provision for *ad interim* protection pending the hearing of an application for adjudication and therefore there can also be no protection pending the hearing of an appeal against an order refusing adjudication. In *Mariam Bibi v A E Motala* 10 Rang 71 1932 A I R (Rang) 51 it has been held that under the Provincial Insolvency Act the Court has no power to issue a protection order before adjudication. The Court may under sec 23 release the debtor only if he is under actual arrest or imprisonment in execution of a money decree. Protection order can only be passed after an order of adjudication has been passed. Consequently where the Court orders that the applicant debtor be protected from being arrested in execution of a decree or detained in prison for any debt pending the disposal of the application to be declared insolvent it is a pure nullity. So also in *Tara Chand v Jawahar Mal* 131 I C 208 1931 A I R (Lah) 121 it has been laid down that an application under sec 23 can be made by a debtor after his arrest and not before it.

There is no inherent jurisdiction for the Insolvency Court under sec 5 to pass a protection order or an order protecting the alleged insolvent from arrest and imprisonment in execution of a money decree otherwise than the provisions of section 23 and 31. Pending an application for adjudication if warrant for arrest of the alleged insolvent is issued in execution of a money decree but no actual arrest is effected and an application is filed by him in the Insolvency Court for an order of protection it is held that neither sec 23 nor sec 31 applies to the case and the Court has no inherent jurisdiction to pass the protection order under sec 5. *Ghulam Sarwar v Guru Piar* 1934 A I R (L) 113. In view of the above authorities it is no longer possible to contend that the Court has inherent power to grant interim protection to a debtor in anticipation of his arrest.

Order of release is discretionary

The provision under sec 23 is a temporary procedure pending the adjudication order and final protection under sec 31. Sec 23 is

not mandatory and the judge is not bound on admitting the petition for insolvency to release the petitioner who has been arrested on security. But the Court is bound to give reasons under cl (3) when it rejects his petition for protection. *Nand Lall v Nathal Srinivas* 3 Patna 443 83 Ind Cas 877 (1924) A I R (Patna) 559

Nature of protection under sec 23

It will be noticed that the protection granted under the section is a special protection as opposed to a general order of protection pending the order of adjudication. If the debtor is under arrest or imprisonment in execution of a decree of any Court for the payment of money order of his release from arrest or imprisonment in execution of that decree does not prevent his arrest or imprisonment in execution of other decrees for payment of money pending the order of adjudication. This section does not authorise a Court to pass a general interim order but merely to release a debtor who is already under arrest in execution of a decree. *Ghanshamdas Khatumal v The Manager Encumbered Estates* 99 IC 930 1927 A I R (S) 123

Protection—its extent

(1) *In respect of alimony* The protection can only be afforded in respect of a debt or liability which is provable under the Act. Thus obligation to make payment of alimony is not a debt or liability which is provable under the Act and therefore orders for the payment of arrears of alimony may be made and enforced in spite of the receiving order. *Linton v Linton* (1885) 15 Q B D 239. *Re Hawkins Ex parte Hawkins* (1894) 1 Q B 25. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under sec 34 and not otherwise. *Hira Lal v Tulsu Ram* 80 IC 946

(2) *In respect of maintenance under sec 488 Cr P C* Though in *In the matter of Tokee Bibi v Abdul Khan* 5 Cal 536 it was held that arrears of maintenance included in the schedule filed by the insolvent are a debt or liability within the Insolvency Act and an insolvent who has received a protection order is not liable to arrest or imprisonment in respect of such in *In Application by Parmanmall Hemanmall* 35 Ind Cas 541 it was held that maintenance order to a wife by a decree is not a debt provable under the Insolvency Act. In *Mariam Bibi v A E Morala* 10 Rang 71 1932 A I R (Rang) 51 it was argued on the authority of *In the matter of Tokee Bibi v Abdul Khan* supra that the order for maintenance could not be enforced as against a person who was an insolvent or who had applied for insolvency. The High Court held. This ruling goes from 1879. Insolvency in this country was then governed by Insolvency Act (11 & 12 Vic. C 21) and under sec 13 of that *

interim protection could be granted by an order which could be made to apply to all debts and liabilities mentioned in the schedule including money due under an order for maintenance. There is no corresponding section in the Provincial Insolvency Act now in force and although under English law a protection order can be given the English law does not apply in this country despite the fact that the law in general in this country is based on the English law. We have got to keep within the provisions of the Provincial Insolvency Act. The fact that a husband, who is in arrears of maintenance has been adjudicated insolvent under sec 27 of the Provincial Insolvency Act V of 1920 is conclusive as long as the order of adjudication stands that he is unable to pay the amount due and is not therefore guilty of wilful neglect within sec 488 (3) of the Cr P Code. *Halfhide v Halfhide* 50 Cal 867. It is an anomaly that while under the Provincial Insolvency Act, the arrear of maintenance ordered under s 488 Cr P Code has been held to be not a debt provable in insolvency, under the Presidency Towns Insolvency Act it has been held to be a debt provable in insolvency and is one in respect of which a protection order could be given, *In Re Yahia* ILR 1937 Mad 90.

(3) *In case of decrees and orders of Revenue courts* A revenue officer is not a 'Court' and the arrear of land revenue is not the amount of a decree. It therefore follows that a debtor who is under arrest or imprisonment by reason of the order of a revenue officer made under the provisions of sec 45 Lower Burma Land and Revenue Act is not under arrest or imprisonment in execution of the decree of any Court and the provisions of sec (1) have no application to the case of such a debtor and the Insolvency Court has no jurisdiction to order the release of respondents under that section. *Collector of Akyab v Pau Tun* 5 R 80 1928 AIR (R) 81 109 IC 145. Where the arrest is not by an order of any Court in execution of a decree but by the order of the Manager Encumbered Estates, it cannot be said that the arrest or detention is in execution of a decree of any Court for payment of money, *Ghanashamdas Khatumal v The Manager Encumbered Estates* 99 IC 930 1927 AIR (S) 123.

Release on Security

Where the Court accepts the security furnished by a petitioner in insolvency but on objection by the other side finds that it is not sufficient, it has inherent jurisdiction to demand fresh security, if it is satisfied that the security which has already been given is not sufficient. It is fair to presume in such cases that a fraud has been committed on the Court or in any case that the Court has acted under a misapprehension in accepting the security, *Gulati v Hardy*, 158 IC 371 1935 AIR (L) 148.

Effect of release.

If a debtor is once released from arrest or imprisonment in execution of a decree of any Court for the payment of money, by the order under this section he is not liable to be re-arrested a second time in execution of the said decree though there is no order to the contrary. *In the matter of, Balai Chand Datta*, 20 Cal 874, following *The Secretary of State v Judah*, 12 Cal 652

Sub-sec. (2) ; Re-arrest.

It should be noted that under this sub-section there is no bar to the released debtor being re-arrested and re-committed by the Insolvency Court by whose order he has been released. In *Sellayammal v Perianna Pillai*, 1934 M W N 1144, the first respondent, when arrested before judgment, stated that he had properties worth nearly Rs 20,000 and debts about Rs 4,500 and got himself released. About two months after, he filed a petition in insolvency valuing his assets at about Rs 11,000 and showing debts amounting to nearly Rs 14,000. He was given interim Protection. The judgment-creditor applied for his re-arrest under sec 23 (2). It was held that having regard to the statements made before and after insolvency, an order for re-arrest could be made.

24. (1) On the day fixed for the hearing of the petition, or any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely —

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition

Provided that, where the debtor is the petitioner he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon.

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition, and

(c) that the debtor has committed the act of insolvency alleged against him

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in

presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon.

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the judge, and shall form part of the record of the case.

Review.

This is section 14 of Act III of 1907 with the proviso newly added. In this section is combined the procedure to be followed at the hearing of a creditor's as well as of a debtor's petition. This section corresponds to sec. 13 (2) and 90 (3) of the Presidency Towns Insolvency Act.

Sec. 5 of the Bankruptcy Act, 1914 lays down the procedure to be followed at the hearing of a creditor's petition which runs thus: cl. (2)—At the hearing, the Court shall require proof of the debt of the petitioning creditor, of the service of the petition and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

Sub-sec. (1); What should the Court enquire on a creditor's petition.

Sec 24 provides that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned the Court shall require proof (a) that the creditor is entitled to present the petition, and (b) that the debtor has been served with notice of the order admitting the petition [in the manner laid down in sec. 19 (3), i.e., in the manner provided for the service of summons in the C. P. C.] Under section 9 a creditor shall not be entitled to present his petition for adjudication of a debtor unless (a) the debt owing by the debtor to him amounts to five hundred rupees, (b) the debt is a liquidated sum payable either immediately or at some certain future time and (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

What the creditor has to prove.

A creditor has to prove (1) that there exists a relationship of

creditor and debtor that is his debt subsisting at the time of the presentation of the petition and that it is not barred by limitation [vide notes under sec 9 (1)] *Raja Ram v Chand Prasad* 9 O W N 102 (2) the debt due to him is not less than five hundred rupees (3) that the sum due to him by the debtor is a liquidated one that is it is an ascertained sum which can be computed with certainty and is not unascertained like a claim for damages (4) that the debtor has committed one or other of the acts of insolvency upon which the petition is founded and it has occurred within three months of the presentation of the petition Besides these the creditor has to prove that notice of the order admitting his petition and fixing a date for its hearing has been served upon the debtor are (1) whether or not acts of insolvency) the other they were trans

fers with intent to defeat or delay creditors and (3) whether the transfers made in favour of the creditors within three months of the date of presentation of the petition were with a view to give them preference *Firm Baijnath Rameshwar Lal v Atal Prasad Kumar* 17 P L T 857 168 I C 140 1937 A I R (P) 134

Proof of debt by a creditor

Sec 9 (b) seems to show that a debt must be indubitably due but can an Insolvency Court make an enquiry as to a question of this nature? Sec 24 (1) (a) lays down that the Court shall require proof amongst other matters of the fact that the creditor is entitled to present the petition This undoubtedly refers back to Sec 9 Sec 9 lays down the conditions which entitle a creditor to present a petition against a debtor In these is included—there must be a debt due to the creditor aggregating not less than Rs 500 There fore it is incumbent on the creditor to prove the debt The Act is based on the English Bankruptcy Act Sec 5 (5) of that Act provides expressly for an alternative reference of the creditor in such circumstances to relief by a regular suit The omission of any similar provision from the Indian Act indicates that the creditor must be allowed under sec 24 to prove the debt when the debtor denies it Further sec 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it and this obviously involves the necessity of proving that right in order to avoid dismissal Therefore an Insolvency Court will not be justified in referring a petitioning creditor to a regular suit to prove his debt *A K R M C T Chetty Firm v Maung Aung Bunt* 1925 A I R (Rangoon) 21 Where the insolvent having admitted the debt of the petitioner the Court did not consider it necessary to frame an issue and call for further proof it is open to the District Judge in appeal to frame an issue on the point and remand the case for evidence thereon if it thought it fit to do so but he is not justified in dismissing the petition without giving the petitioner an op

tunity to produce proof of his debt *Ram Parshad v Rattan Chand*, 148 I C 910 1934 A I R (Lah) 128 It is not the business of the Insolvency Court to see whether or not one of the creditor's reasons in applying for the insolvency of the debtor is to save court fee stamp An Insolvency Court cannot decline to adjudicate upon the right of a petitioning creditor to present an insolvency petition and the existence of such a right involves the fact that some debt is due to the creditor It is the duty of the Insolvency Court to decide such question There may be cases when having regard to the nature of the claims put forward by a creditor the court may find it inconvenient to adjudicate his right to be ranked as a creditor, but such cannot be said to be the case where there is a registered mortgage deed in favour of the creditor *Kanshi Ram v Harnam*, 129 I C 218 1930 A I R (Lah) 602 Ordinarily where a creditor presents an application and the debtor challenges the creditor's right to apply, the Insolvency Court will ask for proof from the creditor as to his right and is entitled to go into that question But it does not follow therefrom that the Insolvency Court must decide every question connected with it or which may incidentally arise from it and cannot refer the parties to a regular suit in any case, if it is of opinion that a complicated question of fact or law arises therein In such cases the Insolvency Court has got the discretion to refer the parties to a regular suit even though it may be that the question if actually decided by it would have the effect of *res judicata*, *Gopikabai v Chapsi Purshottam* 1 L R 59 B 161 36 Bom L R 1236 1935 A I R (B), 80

Proof of act of insolvency.

The condition precedent to a debtor being adjudicated an insolvent on the petition of a creditor is that the debtor should be alleged and proved to have committed one or other of the acts of insolvency set out in sec 6 of the Act It is impossible to accede to the view that the mere fact, that a person admits he owes money to a creditor and also admits that he is unable there and then to pay the amount can possibly be regarded as the commission of an act of insolvency as defined by the various clauses in sec 6 For reasons which are not far to seek, the Legislature has defined the conditions on the happening of which alone such a petition for adjudication can be sustained Adjudicating a person an insolvent is a matter of serious consequences and Courts of law should take particular care to see that the provisions of the law are observed strictly and carefully considered, *Veerayya Chetty v Doraiswami Reddiar*, 1928 A I R (M) 393 The mere fact that the debtor is unable to pay his debts amounting to more than Rs 500 is insufficient to justify an order of adjudication against him because before adjudicating a person insolvent the Court has to record a definite finding that he has committed the act of insolvency as defined in sec 6, *Jagan Nath v Ram Saran* 1929 A I R (L) 239 A person

cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities *Ma Kyin Myaing v Muthaya Chettyar*, (1930) A I R (R) 147 For fuller treatment vide Notes under section 9 clause (c)

Right of a Creditor to contest application by another creditor

When an insolvency petition has been presented by a person claiming to be a creditor of the debtor it is open to another creditor of the debtor to contest the petition on the ground that the petitioner is not a creditor at all For it has been said that section 9 provides that a creditor shall not be entitled to present an insolvency petition against a debtor unless *inter alia* the debt owing by the debtor amounts to Rs 500 Therefore in order to decide the right of the creditor to present the petition under s 24 it is necessary for the Court to determine whether more than Rs 500 is due to him and a person who is admitted to be a creditor and who has been summoned to the Court to appear at the date of hearing of the petition is necessarily entitled to question the right of the petitioning creditor to present the petition *Mr Chand Kaur v Official Receiver* 38 P L R 729 163 I C 383 1936 A I R (L) 499

Proceedings on debtor's petition

This section lays down the procedure to be followed in hearing the petition by and against the debtor for adjudication and the evidence that will have to be adduced in each case It follows the procedure laid down in sec 15 of the Bankruptcy Act 1914 According to the English practice on a receiving order being made against a debtor on the presentation of the application for insolvency a day and hour is fixed for the public examination of the debtor and the Court orders the debtor to attend the Court on such day and at such hour The Court thereupon holds a public sitting on the day appointed for the examination of the debtor and the duty of the debtor is to attend and to be examined as to his conduct dealings and property The Court may adjourn the examination from time to time Any creditor who has tendered a proof may question the debtor at his public examination concerning his affairs and the cause of his failure The Court may put such questions to the debtor as it may think expedient The debtor is examined on oath and his duty is to answer all such questions as the Court may put or allow to be put to him Such notes of the examination as the Court thinks proper are taken down in writing and read over to the debtor and signed by him and may afterwards be used against him

What should the Court enquire on a debtor's petition

The scope of enquiry at the hearing of the petition for adjudication is very limited In the case of a debtor he is not

to present the petition unless (1) he is unable to pay his debts and either (2) that his debts all told amount to not less than Rs 500 or (3) that he is under arrest or imprisonment for a money decree or (4) an order of attachment in execution of such decree has been made and is subsisting Vide sec 10 *supra*. Therefore he has a right to present the petition on the happening of any of the two events viz (1) that he is unable to pay his debts and (2) that one of the three events mentioned in sec 10 (a) (b) (c) has happened.

What the Court should not enquire on a debtor's petition

(1) *Acts of insolvency of a debtor* That the debtor has committed an act of insolvency (sec 6) need not be proved in the case of a debtor as the presentation of a petition by the debtor shall be deemed an act of insolvency Vide Explanation to sec 6 *supra*.

(2) *Genuineness of debts* Where the petitioner is a debtor the Act does not contemplate an elaborate enquiry at the time of adjudication into the genuineness or otherwise of the debts mentioned by the petitioner in the list of his liabilities. *Ram Rattan v Nathu Ram* 109 IC 552. Courts need not go into an elaborate enquiry as to the validity of the debts. It is sufficient if the Court is satisfied that there are *prima facie* grounds for thinking that the debtor is unable to pay his debts. *Manindra Nath Roy v Rasik Lal Pakhira* 97 IC 463 (1927) AIR (C) 69. In summary enquiry it is not proper to go into the question whether the debts mentioned are real debts but the Court has to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts. *Mahesh Das v Bhag Singh* 10 LLJ 493 (1929) AIR (L) 49. The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition though it could be taken into consideration at the time of discharge and other action could be taken against the petitioner if considered advisable. *Allah Bakhsh v Charan Das Daya Das* 126 IC 192 1930 AIR (Lah) 738. If there are *prima facie* grounds for believing that a person is unable to pay his debts the Court should not for the purpose of adjudicating him an insolvent hold an enquiry as to whether some of the debts mentioned in his petition are real debts or whether there has been a fraudulent concealment of his property or whether he has transferred his property *benami* to defraud his creditors. These are matters to be dealt with upon the debtor's application for discharge. *Sashi Bhusan Maity v Fani Bhusan Bose* 37 CWN 841 1934 AIR (Cal) 27. In the summary enquiry under s 24 it is not proper to go into the questions whether the debts mentioned are real debts but the Court has to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts. The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition though it

can be taken into consideration at the time of discharge *Sadhu Ram v Kishori Lal*, 19 L 535 1938 AIR (L) 490

(3) *Bad faith* Under the provisions of the C P C, 1882 (secs 334-351), a judgment-debtor was required to satisfy the Court of his good faith, *Gladstone Wyllie v Umes Chandra Chatterjee*, 25 WR 96 And he was also to satisfy the Court that he came within the provisions of section 351, and the burden of proof lay on him, *Mumtaz Hussain v Brijmohan Thakur*, 4 Cal 888 Even after the passing of Act III of 1907, in *Nathumal v District Judge of Benares*, 32 All 547, the High Court expressed the opinion that the Court should dismiss an insolvency petition by a debtor on proof that he has fraudulently transferred part of the property so as to put it out of the reach of his creditors, destroyed his books of account and committed the other similar acts of bad faith In *Shaikh Gholam Rahaman v Shaikh Wahed Ali* 16 CWN 859, Justice Bret queried 'whether if upon the facts before the Court it is clear to the Judge that the debtor applying for insolvency is not an insolvent, is he bound to adjudicate him an insolvent?' It is very important to note that the scheme of Act III of 1907 differs entirely from the scheme of the aforesaid sections of the C P Code which relate to insolvency matters Under section 351 of the C P Code of 1882, the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors, and had not contracted debts and given no unfair preference to any of his creditors, and had not committed any other act of bad faith regarding the matter of the application Under the Insolvency Act III of 1907, these appear to be grounds for refusing an absolute order of discharge under section 44, but not grounds for refusing to make an order of adjudication, *Girvadhari v Joynarain* 32 All 645 In *Udaichand Maiti v Ram Kumar Khara*, 15 CWN 213 the debtor vent the creditors applicant concealed by the Court of first instance *Mookerjee & Carnduff, JJ*, held that 'it is obvious from section 15 (1) that these are not circumstances which can be taken into account by the Court at this stage to determine whether the application should be granted or refused It is clear that the question whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the preliminary stage when the order of adjudication has to be made but at the final stage when the application is made for final discharge' The same view has been adopted in *Shaikh Samiruddin v Kadumovee Dissee*, 15 CWN 244 In *Mohuruddin Sarkar v The Secretary, Hadal Gramya Rindan Samiti*, 57 Ind Cas 977, it has been held 'where the requirements of the Provincial Insolvency Act have been complied with an order of adjudication should follow almost

as a matter of course. Whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the stage when the order of adjudication is to be made but at the final stage when an application is made for an order of discharge. The fact that the debtor acts *mala fide* and dishonestly in presenting insolvency application inasmuch as he includes some fictitious items both on the sides of liabilities and assets is no ground for refusing application if it is found that he is unable to pay his debts. *Kaka v Nandoo* 125 I C 638 1930 A I R (Lah) 644

(4) *Abuse of the process of the Court*. Their Lordships of the Judicial Committee of the Privy Council in *Chatrapat Singh Dugar v Kharagsing Luchminaram* 44 I A 11 44 Cal 535 25 C L J 215 21 C W N 497, observed. The dismissal of Chatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was - abuse of the process of the Court and notably it was on this ground too that appeal no other reason is indicated. Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles the debtor to an order of adjudication when its conditions are satisfied. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court. It is no ground for the rejection of a petition to be declared insolvent filed by the debtor that the petitioner may perhaps have been guilty of criminal misappropriation in respect of property belonging to one of his creditors. *Jagannath v Gangadutta Dobey* 41 All 486 17 A L J 565

(5) *Concealment or fraudulent transfers*. A debtor is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs 500. Questions relating to alleged fraudulent transfers by the debtor do not arise at the time he is to be declared insolvent but are more appropriately to be determined when the question arises for realising his assets. *Ghulam Hussain v Rameswar Das* 99 I C 524 (1927) A I R (L) 108. Where the petitioner is a debtor the Act does not contemplate an elaborate enquiry at the time of adjudication as to the dealings of the petitioner with his property such as concealment or fraudulent transfer thereof. Such matters can and ought to more appropriately be dealt with after the adjudication order if any has been passed and the whole of the property of the insolvent has vested in the Court or the official receiver. *Ram Rattan v Nathu Ram* 109 I C 552. It cannot be held that the failure to keep account books must *ipso facto* disqualify a man from being declared insolvent. A person has

only to make out a *prima facie* case and if there be any fraudulent concealment of assets the matter can be gone into by the Insolvency Court later on *Ganesh Lal v Duarkaram* 98 IC 900 27 PLR 734 1927 AIR (L) 27

(6) *Failure to produce books of accounts* On a debtor's application to be adjudicated insolvent only two questions arise viz whether his debts amount to Rs 500 or over and whether he is unable to pay his debts. These two questions arise under sec 24 and it is on consideration and determination of these two points that the application of a debtor succeeds or fails. The concealment of accounts is not one for which the application can be dismissed *Sohna Mal v Jewan Dass* 34 PLR 69 142 IC 690 1933 AIR (L) 330

What the debtor has to prove

Section 24 does not contemplate a searching enquiry when the debtor applies to be adjudicated an insolvent. Under that section only *prima facie* proof of his right to present an application has to be taken *Kaka v Nundoo* 125 IC 638 1930 AIR (Lah) 644. On a debtor's petition to be adjudicated an insolvent the onus is on the debtor to show (1) that on the date of the presentation of the petition he was resident within the jurisdiction of the Court to which he presented the petition (2) that he was unable to pay his debts and (3) that he was entitled to present the petition under sec 10 (1) *Lakshmi Narain Aiyar v Subramania Aiyar* 45 MLJ 129 1923 MWN 328 73 Ind Cas 74 1923 AIR (Mad) 585. A petitioner has to prove only that he is unable to pay his debts not that he will never be able to pay his debts. The fact that the petitioner's father and other relations are wealthy and the petitioner would one day succeed to them is no ground for rejecting an application to be declared insolvent *Ghulam Haidar v Durga Das* 99 IC 7. For purposes of being declared insolvent all that an applicant need show is that *prima facie* his debts are more than Rs 500 and that he is unable to pay the same. The fact that his father is a rich man or that his father allows him to cultivate some land is not sufficient to show that he can pay his debts *Thakur Singh v Hardit Singh* 106 IC 574 1928 AIR (L) 237. A debtor is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs 500 *Ghulam Husam v Rameswar Das* 99 IC 524 1927 AIR (L) 108 *Mulsingh v Lakshmi Devi* 95 IC 1055 (1927) AIR (L) 95. When a debtor applies to be declared insolvent and shows that his assets exceed his liabilities he must show also that by the sale of his interest or after realisation of his assets a sum would not be secured which would enable him to pay his debts in full *Firm Moti Ram Prem Chand v Firm Kailash Ram Dharim Chand* PLR 468 105 IC 568 9 LLJ 550 1928 AIR (L) 207

Inability to pay debts.

The allegation of inability to pay the debts is a substantial part of the debtor's claim to be declared insolvent and if that fact is not proved he would not be entitled to present a petition, *Alameluman gathay Arammal v Balusami Chitti* 1928 M W N 62 1928 A I R (M) 394 The new Act had made no change with regard to what was required to be proved before it could be decided that the petitioner had a right to present the petition As a matter of fact there is no material difference in this respect between Act III of 1907 and Act V of 1920 Under sec 11 (1) of Act III of 1907 the debtor had to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation of the opposing creditor the Court was satisfied that the statement was incorrect it could dismiss the petition But if the debtor had made a disposal of his property with a view to defraud his creditors who might otherwise have been paid then the Court was not justified in holding that he was able to pay his debts, but should have admitted the petition so that the interest of the creditors might be benefited by the special powers given to the Court while administering insolvent's estate *The Laxmi Bank Ltd v Ramchandra Narayan Apte* 46 Bom 75 24 Bom L R 292

In *Kalikumar Das v Gopikrishna Rai* 15 C W N 990, Jenkins, C J observed 'section 4 of the Act provides that the presentation by the debtor of a petition to be adjudicated an insolvent is an act of insolvency, and *prima facie* the debtor is entitled to an adjudication unless some ground is shown for the dismissal of his petition The mere fact that the Judge was unable to satisfy himself that the petitioner was unable to pay his debts is not such a ground' The mere fact that his assets are more than his liabilities will not show that he is able to pay his debts *Joualla Nath v Parbatty Bibi*, 14 Cal 691

debts of dealing should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) to sec 24 the debtor has proved inability to pay his debts, *Sauschandra Addy v Firm o Rajnarain Pakhira* 72 Ind Cas 60, *Gopal Prosad v Bhaneshwar*, 108 I C 433 Although a debtor may have assets, which if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he is not "able to pay his debts" within the meaning of sec 13 (4) (b) of the Act. In a creditor's petition *Nilal Jahun* 60 Cal 100, the court held that the debtor's interest in his imalienable land and other assets was not sufficient to enable him to pay his debts The

difference between debts and assets on the most favourable showing was not very large. It was held that the debts due were cash debts and the assets were not immediately realisable and in that sense the insolvent was unable to pay his debts and should therefore be declared insolvent. *Karim Bakhsh v Gaja Dhar* 1934 A I R (L) 63. Application for adjudication cannot be rejected on the ground that the debtor has shortly before applying for adjudication transferred his property fictitiously to another if his debts amount to more than Rs 500 and he is in fact unable to pay his debt, *Keramat Ali v Baidya Nath* 95 I C 297 (1926) A I R (C) 955. Under sec 10 a petitioner has to prove only that he is unable to pay his debts. The fact that the petitioner's father and other relations are wealthy and that the petitioner would one day succeed to them is no ground for rejecting an application to be declared insolvent, *Ghulam Haidar v Durga Das* 98 I C 7 (1927) A I R (L) 136.

Proviso, Prima facie proof of inability to pay debts

This proviso is new and the object of it is quite obvious namely, that the Court should not and need not at this stage go into an elaborate enquiry as to the validity or otherwise of the debts. It is sufficient if the Court is satisfied that there are *prima facie* grounds for thinking that the debtor is unable to pay his debts. *Manindra Nath Roy Choudhury v Rasik Lal Pakhura*, 97 I C 463 (1926) A I R (C) 69. The object of the proviso is explained in the Statement of Objects and Reasons — 'It is now settled law that under the Act as it stands it is not open to the Court to reject the petition of the debtor on the ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents whether honest or not and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine* it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case the debtor being required to show that he is in fact unable to pay his debts and that he has not concealed his property. These changes in the existing law are effected by the amendment' (i.e. the proviso newly added). 'With reference to this addition it has been objected that it will involve preliminary enquiry into matters which have to be gone into fully at a later stage, particularly if it is alleged that there has been any fraudulent concealment or assets. To meet this objection we have provided that at the stage with which sec 14 deals *prima facie* proof only shall be required of the debtor's inability to pay his debts'—Select Committee Report, dated 24.9.19.

As regards the quantum of evidence to be adduced in proof of his inability to pay his debts only so much proof is to be given to make out a *prima facie* case as is sufficient to satisfy the Judge the point and not to enter into a detailed examination of his

and liabilities and so forth. It is necessary to point out in this connection that it is not in the province of the Insolvency Court to enquire at this stage as to malifolius of the petitioner and as to his dealing with his property. These are proper matters of enquiry when an insolvent applies for an order of discharge. Under the proviso to sec 24 (1) the debtor can be required to furnish only proof that there are *prima facie* grounds for believing his allegation as to his inability to pay debt. Where the admitted facts were that the debtor's debts amounted to over Rs 40 000 and his assets to over Rs 51 000 but that the properties which constituted his assets were under attachment and presumably would be sold under pressure and it was accordingly not possible for the debtor to realise a fair price it was held though there was a balance of about Rs 8 000 in the debtor's favour there was sufficient *prima facie* proof of his inability to pay his debts. *Lakshminarayan Aiyar v Subramaniya Aiyar* 45 MLJ 119 1923 MWN 378 73 IC 74 1923 AIR (Mad) 585.

In an application for being adjudicated an insolvent it is not necessary in order to establish the petitioner's inability to pay his debts to prove that the value of his assets is less than his liabilities if he satisfies the Court that he cannot raise sufficient money to meet his liabilities by transferring the whole of his property. *Ram Rattan v Nathu Ram* 109 IC 552. Where the insolvent himself has given evidence saying that he is unable to pay the debts there is no purpose in closely scrutinising the acts of insolvency. *Periya Kuruppan Chattrar v Anappa Chattrar* 21 MLW 52 86 IC 229 (1925) AIR (M) 483. The provisions of secs 10-25 are intended to prevent the abuse of debtors filing their application as a method of evading liability of arrest and getting out of payment of their debts. A finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such way that it may be checked against the evidence and weighed in the balance. *Mathura Ram v Baldeo Ram* 80 Ind C1s 21 1924 AIR (All) 800.

When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the insolvency law. And when he says that his liabilities are more than his assets that must be taken as some evidence that he is unable to meet his liabilities. No enquiry need be made as to whether some of the debts mentioned in his petition are real debts. An enquiry into the *bona fide* of the insolvent should be held when he comes up for discharge and not before. *Richarla Narayanappa v Konligi Bheemappa* 92 IC 541 (1976) AIR (M) 494. At the stage of the application for adjudication no very careful enquiry is necessary with regard to the inability to pay debts. If the Court is satisfied that a *prima facie* case is established by the debtor the Court will adjudicate him to be an insolvent and the considera-

tion of the further question as to whether there has been a concealment of property and as to title to property such as an enquiry into the *benami* character of a transaction or the jointness or separateness of a family is deferred till the stage when the discharge is applied for *Bhagirath v Msst Jamuni* 8 P L T 184 (1927) A I R (P) 188 101 I C 445 *Sita Ram v Hukum Chand* 101 I C 624

Under section 24 the only proof that is required from the petitioner when the debtor is the petitioner is *prima facie* proof of his right to present the application. In a case the petitioner gave such proof by swearing to the correctness of the debts mentioned by him in the schedule and by swearing that he had no other property. It was held that the petition should not be dismissed for want of such proof because if he would have other property besides that mentioned in the schedule it would be liable to be seized by the Official Receiver *Nihal Chand v Gela Ram* 127 I C 720 1930 A I R (L) 75. An application for adjudication of insolvency should not be dismissed on the ground that the applicant has not produced his witnesses to prove his inability to pay his debts where he has himself deposed to his inability to pay his debts and the evidence is not disbelieved by the Court *Bholai Karim v D D Dessai* 100 I C 1004 6 Bur L J 14.

Only two questions arise for decision in an application for adjudication by a debtor (1) whether his debts amount to rupees 500 (2) whether he is unable to pay his debts. Adjudication is now the rule rather than exception. All that a debtor is required to do is to afford *prima facie* proof of his inability to pay his debts and it is not for the Court to hold on a nice calculation of the assets that these will satisfy the debts and therefore adjudication should be withheld *Imam Din v Rupa Jhangi Atma Ram* 1930 A I R (Lah) 21 (notes). In *Jogendra Nath Saha v Rai Kishori Das* 59 Cal 1279 36 C W N 698 55 C L J 356 Rankin C J observed:

The proviso (to sec 24) appears to be thoroughly unnoticed. The creditors alleged that the insolvents had landed properties, they alleged that the insolvents were carrying on business and having failed in these two contentions they next contended that whereas under sec 22 the debtors ought to have produced their books of account on the making of the order admitting the petition the debtors had not satisfactorily explained how they came to be as they said unable to produce the books for three certain years. I cannot find from beginning to end that the District Judge had any *prima facie* difficulty in inferring that these people were unable to pay their debts but he thought that the books would show how they became unable to pay their debts and that they would show when they first became unable to pay their debts. It appears that the insolvents suffered an attachment in 1334 B S and that they have been trying to wind up their business ever since and it is said that they are only now carrying on a very small trade just enough to keep themselves and their family in existence it is,

obvious that this is a case where an adjudication order should be made

Narayan Mistri v Ram seems to differ in this respect from the Courts. In *Narayan Mistri v Ram* 1978 AIR (Pat) 477 MacPherson (1) ought not to be interpreted in such a way as to reduce the requirement of a most salutary provision that the debtor must prove his inability to pay his debts to a mere assertion or nominal proof. The least that is required of him is such proof as would satisfy the Court that there are *prima facie* grounds for believing his plea of inability to pay his debts as soon as the Court is so satisfied the Court may stop taking evidence on the point and if it is not forthcoming to dismiss the petition. This case was followed in *Ganesh Lal Saraugi v Sanchi Ram* 12 Pat. 107 141 IC 223 1933 AIR (Pat) 43 where it was held that the Court is not bound to accept the statement of the petitioner but is required to investigate the facts for itself. Again *MacPherson and Agarwala JJ* have held in *Jagannath Sadhu v Beni Prasad* 12 Pat 866 1934 AIR (Pat) 97. Before adjudicating an applicant to be an insolvent the Court is required to be satisfied that he is not in a position in fact to pay his debts. The Court is not bound to accept the statement of the debtor but is required to investigate the facts for itself after following the necessary investigation. In *Munshi* 41 CWN 804 a Bench of the under s 24 at the time of the hearing of the application for insolvency the Court is bound to require proof of the fact that the debtor is entitled to present the petition. In order to entitle the debtor to present the petition for insolvency it must be proved by him that he is unable to pay his debts. It is true that at this stage the debtor is required to furnish such proof as to satisfy the Court that there are *prima facie* grounds for believing that he is unable to pay his debts. But this does not mean that the Court is bound to accept a mere statement as *prima facie* proof of his allegation that he is unable to pay his debts.

Creditor's right to adduce evidence in opposition to debtor's petition

The meaning of the proviso is merely that the Court is enabled to deal summarily with the opposition by the creditor that is to say the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross examined and if the Judge is satisfied after such hearing he may refuse to hear any further evidence and may grant the adjudication but this is very far from saying that the Judge if he shall be inclined to hear any evidence presented by the creditor he is not entitled to hear such evidence. He may if he likes hear the evidence as he may think fit in the circumstances which will vary according to the difficulties of the

case. *Mohammad Alam v Babulal Marwan*, 1 L.R. 15 Pat. 177 16 Pat. L.T. 833 1936 A 1 R (P) 18 F.B

Sub-section (2) ; Examination of the debtor, mandatory.

This procedure is designed not only to give the receiver and the creditors an opportunity of asking the debtor for information on any point which they may desire, but also to disclose to the world the manner in which he has conducted his business and managed his affairs. It is important that any creditor who has reason to suspect dealings by the bankrupt which will prejudice an application for his discharge should have these dealings investigated on public examination. The debtor's account of his affairs is thus recorded and kept available for the use and guidance of all concerned in the collection and realisation of the assets and in dealing with the debtor according to his deserts. It is particularly useful to the receiver in deciding which of the debtor's transactions, if any, may be repudiated, and to the Court in considering applications for the approval of any scheme of arrangement or for the debtor's discharge. The object of the provision for examination of the insolvent under section 14 (2) [now section 24 (2)], is to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings, *Jeer v Rangaswami*, 36 Mad 402 22 M.L.J. 52, and *Girvadhari v. Joy Narain*, 32 All 646. Where the debtor is examined on oath he must answer all questions put to him in the course of his examination—he cannot refuse to answer questions on the ground that the answer would incriminate him. See section 132 of the Evidence Act and *Queen v Gopal*, 3 Mad 271.

A debtor against whom a receiving order had been made had carried on a business in the manufacture and sale, in England, France and America, of certain proprietary articles made according to secret formulas invented by him and his brother with whom he was in partnership. In his public examination he was required to disclose these formulas in writing to his trustee. The debtor and his brother had each of them agreed not to disclose the secret. Upon the dissolution of the partnership, the bankrupt retained the assets and the good-will of the business in England and America, while his brother continued to carry it on in France. The formulas had never been committed in writing. The bankrupt refused to disclose them on the ground that they existed only in his brain as the result of his skill and capacity and that to disclose them would be a breach of his agreement with his brother. It was held that the formulas were part of the good will and assets of his business and that he was bound to communicate them to his trustee, *In Re Keene*, (1922) 2 Ch D 475. Under sub-sec (2) creditors have the right to question the debtor as regards his conduct, dealings and property ; but there is nothing in the

which would empower the creditor to produce substantive evidence as regards the concealment of property by the debtor. It is only at the stage of making the order of discharge that the question as regards the concealment of property or the debtor being guilty of fraud or fraudulent breach of trust can be raised and it is only at that stage that the creditors are entitled to adduce evidence on these points. *Bhagirath v Jinnu* (1928) AIR (Pat) 188. *Naram Mistri v Ram Das* 9 PLT 444 (1928) AIR (Pat) 477.

In the case of petition by debtor It is the duty of a petitioner for insolvency to put himself in the witness box and give a full account of his conduct dealings and property in the presence of such of the creditors as appear at the hearing and the creditors have a right to question thereon. *Ram Rattan v Nathu Ram* 109 IC 152 1929 AIR (L) 87. The provisions of sec 24 (2) are mandatory and the Court must examine the insolvent with reference to the facts stated in the petition before dismissing his application for being adjudicated insolvent. *Rala Ram Sant Ram v Gayan Singh* 126 IC 439 1930 AIR (Lah) 746.

In the case of petition by creditor In the case of a petition presented by a creditor although the act of insolvency may have been proved it is not open to the Court merely on the fact being proved to adjudge the debtor an insolvent. The Court must examine the debtor as to his property conduct and dealings and his ability to pay his debts. *Murlu v Sohan Lal Bansilal* 127 IC 360 1930 AIR (Lah) 855. No valid or examination of the debtor without *Miranbaksh* 23 PLR 1917 39 Ind.

Das 9 ALJ 253 14 Ind Crs 416. *Gumore v Bulackilal* 19 PR 1900. *Manaparanna Padyachy v Armugum Padyachy* 1 LBR 229. The provisions of sub section (2) of sec 24 of the Provincial Insolvency Act with regard to the examination of the debtor are mandatory but are applicable to a case where the debtor is present. Where a debtor alleges a contravention of the provisions of the sub-section the onus is on him to show that he was present in Court at the time of the hearing of the petition. *Anant Kumar Saha v Sadhu Charan Saha Poddar* 87 IC 751 (1926) AIR (C) 234. Failure to examine the debtor if he is present in Court vitiates the order of adjudication. *Gangadas Seal v Percival* 97 IC 792 (1927) AIR (C) 32. In *Maung Chu v S P Y S P Chettyar* 10 Rang 187 1932 AIR (Rang) 67 in the presence of the debtor and with his consent the advocates for the petitioning creditor and the debtor agreed that no evidence should be taken on either side and that the debtor was not to be examined and without examining the debtor the judge adjudicated the debtor insolvent on an act of insolvency under sec 6 (b) of the Act. It was held that failure to examine the debtor as provided in sec 24 (2) unless the debtor is thereby prejudiced does not *ipso facto* vitiate the adjudication order. The object of s 24 (2) P I Act is to obtain

information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings, therefore, the failure to examine the debtor when the petition is presented by a creditor does not invalidate the subsequent proceedings unless it can be shown that the debtor has been prejudiced by the omission. When the debtor files the written statement and gives evidence on his behalf and is in no way prejudiced by the omission to examine him under s 24 (2) the order of adjudication cannot be set aside on the ground of such omission *Sitaram v Amrutrao*, 1937 A 1 R (N) 226

Sub-section (3), Adjournment of hearing

Under sec 5 the Court, in regard to proceedings under this Act, has the same powers and follows the same procedure as it has and follows in exercise of its original civil jurisdiction. Under Or XVII r 1 C P C, the Court may if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them and may from time to time adjourn the hearing of the suit. Under r 1 (2) the Court shall fix a date for the further hearing of the case and may make such order as it thinks fit with respect to the costs occasioned by the adjournment. Under r 2 where, any date to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the case in any one of the modes prescribed by Or IX or make such other order as it thinks fit.

25. (1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

(2) In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.

Review.

This is sec 15 (1) of Act III of 1907, and corresponds to sec 13 (4) of the Presidency Towns Insolvency Act and sec 5 (3) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows — 'If the Court is not satisfied with the proof of the penning creditor's debt, or of the act of bankruptcy, or of the service of the petition or is satisfied

by the debtor that he is able to pay his debts or that for other sufficient cause no order ought to be made the Court may dismiss the petition. This section deals with dismissal of a petition either of the creditor or of the debtor and lays down the grounds therefor.

Sub section (1), Dismissal of creditor's petition

In the case of a petition presented by a creditor what the Court is required to be satisfied with is (1) that the debt owing to the creditor or if two or more creditors join in the petition the aggregate amount of debts owing to such creditors amount to Rs 500 (2) that the debt is a liquidated sum payable immediately or at some certain future time (3) that the act of insolvency on which the insolvency petition is grounded has occurred within three months before the presentation of the petition (sec 9). A creditor's right to present the petition accrues only on the happening of these three events and at the hearing he will have to prove the combination of the above three elements and that the notice of his application has been served upon the debtor in the manner prescribed for the service of summons [s 19 (3)]. In addition to the above he will have to show that the debtor ordinarily resides, carries on business or personally works for gain within the jurisdiction of the Court (s 11). If the creditor cannot establish by evidence the points above referred to or if the debtor proves that he is in a position to pay his debts or for any other sufficient cause such as that the presentation of the petition is an abuse of the process of the Court his petition should be dismissed otherwise the order of adjudication should be passed and the vesting order made.

Walsh A C J says: Sec 25 is rather a trap for Judges who do not take pains to understand it. When an act of insolvency is alleged under this section the Judge must first satisfy himself whether the creditor is for the amount alleged or for a sufficient amount to justify a petition under the Act or in other words that the creditor has a right to present the petition. The Court must then be satisfied of the service of notice on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction for adequate reasons with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts. In conclusion when the learned Judge has come to all the necessary findings on the issues indicated above and he still finds that there is *prima facie* ground for making an order against the insolvent he must consider whether there is any other sufficient cause why no order should be made. The mere fact that payments have been made to the creditors of an insolvent between the filing of the petition for insolvency and the hearing is not a ground for dismissing the petition. It is not sufficient for a Judge to seize hold of a

Dismissal for failure to prove act of Insolvency.

On the debtor executing a sale deed in favour of his wife in lieu of dower, the creditor presented a petition for adjudging the debtor an insolvent, and the Insolvency Court adjudged him insolvent with the remark that "transfer of one's tangible property to wife in lieu of dower is always suspect". It was held that in the absence of a finding that the debtor committed an act of insolvency within the meaning of S. 6 of the Provincial Insolvency Act, no order of adjudication could be passed in the absence of a finding that the transfer was made "with intent to defeat or delay creditors" or the transfer was made by the debtor of his property or any part thereof which would, under the Provincial Insolvency Act or any other enactment for the time being in force be void as fraudulent preference if he was adjudged insolvent. The Court observed: "before adjudicating the appellants insolvents the learned Judge should have definitely found, as alleged by the respondent, that the sale in question amounted to a fraudulent preference. In the absence of such finding, the order of adjudication, passed by the lower appellate Court was not justified". *Mahammad Yar Khan v. Turan Prasad*, 1935 A.L.J. 487, 1935 A.W.R. 505, 157 I.C. 47, 1935 A.I.R. (All.) 416.

Dismissal for debtor's ability to pay debts.

Under sec 25 on a petition presented by the creditor for adjudicating a debtor insolvent it lies on the debtor to satisfy the Court that he is able to pay his debts *Kalu Ram v. Girwar Singh* 12 LLJ 96 126 IC 445 1930 AIR (Lah) 192 Although a debtor may have assets which if liquidated would provide sufficient money to discharge his debts yet if he has no liquid assets wherewith to pay his debts at present, he is not 'able to pay his debts' within the meaning of sec 13 (4) (b) of the Presidency Towns Insolvency Act so as to resist a creditor's petition for adjudication, *Pratapmall Rameshwar v. Chumtilal Jahur*, 60 Cal 345 144 IC 142 1933 AIR (Cal) 417 Following this case it has been held in *Chidambaram Chettiar v. Durvanai Achi* 1935 MWN 1159, that under s 25 a debtor in order to escape adjudication on a well founded petition and act of insolvency must satisfy the Court that he has a present ability to pay his creditor and it is not sufficient for him to show that he will be able to pay more or less in the distant future Where under s 25 of the Act an application is made by a creditor for adjudicating his debtor an insolvent, the burden of proof lies upon the debtor to show that he is 'able to pay his debts' Although a debtor may have assets, w

liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts, he should be deemed to be unable to pay his debts within the meaning of s 25 of the Act *Gadi Bhikaji Dhanagar v Govindrao Bapuji* 169 IC 846 1937 AIR (N) 127

Dismissal for want of service of notice on debtor.

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the proceedings has been served on him *Nathmull v Goneshmull Jnanmull* 34 CLJ 349 Where, however, the adjudication has been obtained without proper service of notice of the date fixed for hearing the insolvent may apply under Or IX CPC read with section 5 of the Provincial Insolvency Act to have the order of adjudication set aside *Bhagwan Das v Chuni Lal*, 121 IC 303 1930 AIR (L) 996 But when the absence of the requisite notice under s 19 has not led to any prejudice, the order of adjudication cannot be interfered with on that ground In *Jhanda Singh v Recener Insolvency Estate Amritsar*, 158 IC 94 1935 AIR (L) 412 the contention was that no notification in the Gazette was published and that no notices were issued to other creditors of the insolvent it was held that the absence of notice in the present circumstances of the case has not led to any failure of justice in view of the finding that the debt of the petitioning creditor was not fictitious nor were there any evidence to show that the insolvent had sufficient property to pay off his debts It was therefore held that it could not be said in the circumstances that the adjudication order was not properly made and there has been no prejudice to the petitioner by reason of the absence of requisite notice under s 19 of the Provincial Insolvency Act

Dismissal for sufficient cause.

Sec 15 (1) of Act III of 1907 which empowers the Court to dismiss a petition for any sufficient cause dealt entirely with a petition of a creditor and not by a debtor, *Trilokinath v Badridas*, 36 All 250 (FB), 12 ALJ 355 (FB), *Mu Bu v Ngapo Soung* UBR (1911) 84 11 Ind Cas 743 *Tin Ya v Subya Pillay*, 6 LBR 136 5 Bur LT 277 18 Ind Cas 500 It is impossible to specifically state what will be sufficient cause, *Re, Otuay, Ex parte Otuay*, (1895) 1 QB 812 If the Court is satisfied by the debtor (1) that he is able to pay his debts or (2) for any other sufficient cause no order ought to be made, the Court shall dismiss the petition, *Preo Nath v Nibaran* 15 CLJ 631 See also *Giradhar v Jai Narain*, 32 All 645 What the circumstances of each Ind Cas 461 In the case *ath Pillai*, 49 M 217 49 617 92 IC 603 (1926) sed the creditor's application to adjudicate the debtor's son an insolvent on the death of his

father. In appeal it was held that there is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of the debts due by the family. Each case would depend upon its circumstances. If the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of the joint family insolvents. Where it appears that the petitioner's object is to bring pressure of insolvency proceedings to bear upon the debtor in order to make him pay cheaply and expeditiously a heavy debt which he desired to dispute in the Civil Courts, it is one of the worst abuses to which the law could be perverted. *Tulsidas v. The Bharat Khand Cotton Mill Co., Ltd.*, 39 Bom 47. If the creditor wrongfully refusing the tender of payment by the debtor, which, if accepted, would have reduced his dues below rupees five hundred, files a petition for the adjudication of the debtor, the refusal by the creditor of the tender by the debtor amounted to "sufficient cause" within the meaning of sec. 5 (3) of the Bankruptcy Act, *In re Lawrence, ex parte*, (1928) 1 Ch. 665. When an insolvency petition is dismissed by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed, such dismissal is one under s. 25 (1) of the Act as it comes within the words "for any other sufficient cause" *Ramasuami Iyer v Subramanian Chettiar*, (1938) 2 M.L.J 179 1938 A I R (M) 267.

Effect of dismissal of creditor's petition.

The fact that a petition has been dismissed will not bar a creditor from presenting a second petition based on the same debt on a new act of insolvency, *Re Victoria* (1894) 2 Q B 387, *King v Henderson* (1998) A.C 720, *Oriental Bank v Richter*, 9 A C 413. This order of dismissal may be set aside if it has been obtained by fraud, *In the matter o Ramsebak Misser*, 6 B L R 119. An order of the Court rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditors. The other creditors having only the right to question the debtor as to his conduct, dealings and property, it cannot be said that the mere fact that notices are issued to them has the effect of making them parties to the proceedings for all purposes. A judgment vacating an order of adjudication passed against a person on the ground that he was not proved to be a partner of the insolvent firm is a negative judgment and amounts to nothing more than holding that sufficient grounds have not been made out for adjudicating such person an insolvent. Such a judgment does not come within s. 41 of the Evidence Act, as the judgment does not declare that the legal character of being a partner exist and has ceased to exist, but it proceeds on the basis that it proved not to have existed at all, *Radhakishen v. Gangabai*,

liquidated, would provide sufficient money to discharge his debts yet if he has no liquid assets wherewith to pay his debts, he should be deemed to be unable to pay his debts within the meaning of s 25 of the Act *Gadi Bhikaji Dhanagar v Govindrao Bapuji* 169 IC 846 1937 AIR (N) 127

Dismissal for want of service of notice on debtor.

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the proceedings has been served on him *Nathmull v Goneshmull Jnanmull* 34 CLJ 349 Where however, the adjudication has been obtained without proper service of notice of the date fixed for hearing the insolvent may apply under Or IX CPC read with section 5 of the Provincial Insolvency Act to have the order of adjudication set aside *Bhagwan Das v Chuni Lal*, 121 IC 303 1930 AIR (L) 996 But when the absence of the requisite notice under s 19 has not led to any prejudice, the order of adjudication cannot be interfered with on that ground In *Jhanda Singh v Receiver Insolvency Estate Amritsar*, 158 IC 94 1935 AIR (L) 412 the contention was that no notification in the Gazette was published and that no notices were issued to other creditors of the insolvent it was held that the absence of notice in the present circumstances of the case has not led to any failure of justice in view of the finding that the debt of the petitioning creditor was not fictitious nor were there any evidence to show that the insolvent had sufficient property to pay off his debts It was therefore held that it could not be said in the circumstances that the adjudication order was not properly made and there has been no prejudice to the petitioner by reason of the absence of requisite notice under s 19 of the Provincial Insolvency Act

Dismissal for sufficient cause.

Sec 15 (1) of Act III of 1907 which empowers the Court to dismiss a petition for any sufficient cause dealt entirely with a petition of a creditor and not by a debtor, *Tilokinath v Badridas*, 36 All 250 (FB), 12 ALJ 355 (FB), *Mu Bu v Ngapo Soung* UBR (1911) 84 11 Ind Cas 743 *Tin Ya v Subva Pillay*, 6 LBR 136 5 Bur LT 277 18 Ind Cas 500 It is impossible to specifically state

Oway, (1895) 1 QB
that he is able to pay
no order ought to be
Nath v Nibaran 15
32 All 645 What

would be sufficient cause must depend on the circumstances of each case *Aruna Chellam v Maung Po Thin*, 9 Ind Cas 461 In the case of *Muthu Verappa Chettuar v Snagurunath Pillai*, 49 M 217 49 MLJ 697 1926 MWN 63 22 LW 617 92 IC 603 (1926) AIR (M) 133, the District Judge dismissed the creditor's application to adjudicate the debtor's son an insolvent on the death of his

father. In appeal it was held that there is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of the debts due by the family. Each case would depend upon its circumstances. If the petitioner makes the necessary allegations and proves them then the Court would be justified in adjudging the members of the joint family insolvents. Where it appears that the petitioner's object is to bring pressure of insolvency proceedings to bear upon the debtor in order to make him pay cheaply and expeditiously a heavy debt which he desired to dispute in the Civil Courts it is one of the worst abuses to which the law could be perverted. *Tulsidas v. The Bharat Khand Cotton Mill Co. Ltd.* 39 Bom 47. If the creditor wrongfully refusing the tender of payment by the debtor which if accepted would have reduced his dues below rupees five hundred files a petition for the adjudication of the debtor the refusal by the creditor of the tender by the debtor amounted to sufficient cause within the meaning of sec 5 (3) of the Bankruptcy Act. *In re Lawrence ex parte* (1928) 1 Ch 665. When an insolvency petition is dismissed by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed such dismissal is one under s 25 (1) of the Act as it comes within the words for any other sufficient cause. *Ramaswami Iyer v. Subramanian Chettiar* (1938) 2 MLJ 179 1938 AIR (M) 267.

Effect of dismissal of creditor's petition

The fact that a petition has been dismissed will not bar a creditor from presenting a second petition based on the same debt on a new act of insolvency. *Re Victor* (1894) 2 QB 387. *King v. Henderson* (1998) AC 720. *Oriental Bank v. Kitcher* 9 AC 413. This order of dismissal may be set aside if it has been obtained by fraud. *In the matter of Kimsbak Misser* 6 BLR 119. An order of the Court rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as res judicata against the other creditors. The other creditors having only the right to question the debtor as to his conduct dealings and property it cannot be said that the mere fact that notices are issued to them has the effect of making them parties to the proceedings for all purposes. A judgment vacating an order of adjudication passed against a person on the ground that he was not proved to be a partner of the insolvent firm is a negative judgment and amounts to nothing more than holding that sufficient grounds have not been made out for adjudicating such person an insolvent. Such a judgment does not come within s 41 of the Evidence Act as the judgment does not declare that the legal character of being a partner existed and has ceased to exist but it proceeds on the basis that it was proved not to have existed at all. *Radhakrishn v. Angabai II*

1 C 739 1928 A I R (S) 11 The order dismissing the petition for adjudication is not a decision which falls within the purview of sec 4 Provincial Insolvency Act. The incidental determination of the question whether an alienation is fraudulent for the purpose of deciding whether adjudication should be ordered or not can not be regarded as final determination. A suit to establish plaintiff's right to attach certain properties of his judgment debtor in execution of his decree on the ground that the sales of these properties in favour of the defendants are void as being intended to defraud creditors cannot be held to be barred by *res judicata* by reason of an order dismissing an insolvency petition which sought to adjudicate the judgment debtor insolvent by reason of such alienations and to which the alienees were also parties. *Tangathur Ramayya v K. V. Sreenivasayya* 1935 M W N 547

Sub sec (2) Dismissal of debtor's petition

In the case of a petition presented by the debtor what the Court is concerned with is to satisfy itself that the debtor is entitled to present the application and nothing more and that he satisfies the requirements of sec 10 (1) that he is unable to pay his debts (2) that his debts amount to Rs 500 or (3) that he is under arrest or imprisonment in execution of a money decree or (4) that an order of attachment is subsisting. And his petition is liable to be dismissed only on his failure to prove the above and on no other grounds. *Udai Chand Mann v Ramkumar Khara* 15 C W N 213. *Saikh Samiruddin v Kalunoyee Dassi* 15 C W N 244. *Shaik Golam Rahaman v Shaik Wahid Ali* 16 C W N 853. *Chatrapat Sing Dungar v Kharagsing Luchmiram* 21 C W N 497. 25 C L J 215. *Jeer v Rangiswanu* 36 Mad 402. *Girwadhar v Jaynaram* 37 All 645. *Jagannath v Ganga Dutt* 41 All 486. Under sec 13 (1) the debtor has to state in his petition that he is unable to pay his debts and if either on the face of the proceedings or on a representation of the opposing creditor the Court is satisfied that the statement is not correct it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid then the Court is not justified in holding that he is able to pay his debts but admit his petition. *The Laxmi Bank Limited Poona v Ramchandra Narayan Apte* 46 Bom 757. 24 Bom L R 292.

Under the Act of 1920 it is a condition precedent to the making of an order of adjudication that a debtor that he must satisfy the Court that he is unable to pay his debts and if he fails to satisfy the Court his petition must under sec 13 (1) be dismissed. The Court is not required to make a detailed or lengthy enquiry into the alleged inability of the appellant to pay his debts. It is not intended that there should be a regular trial of this matter at the very outset. But at the same time it is necessary that the debtor must make out a

prima facie case to the satisfaction of the Court as to his inability to pay his debts. The onus of proof of all the essential conditions required under sec 10 lies on him otherwise he has no *locus standi* to apply and his application must be dismissed *Mou Ram v. Kewal Ram*, 28 P L R 468 105 I C 568 1928 A I R (L) 202. The possession of assets is not a condition necessary for a debtor to prove before he is adjudicated insolvent. The conditions which should be complied with by a debtor presenting an application for adjudication are mentioned in sec 10. The debtor has a statutory right of getting himself adjudicated an insolvent if he satisfies the provisions of sec 10. The Court can refuse adjudication only if it is not satisfied as to his right to present the petition, *Doraisami Chettiar v. Abdul Suban* 62 M L J 234 35 L W 148 1932 A I R (Mad) 237.

Dismissal on the ground of assets exceeding liabilities, concealment of property and failure to keep accounts

A judge should state the ground or one of the grounds set forth in s 15 (1) (now sec 25) as that on which he dismisses the insolvency petition *Preonath v. Nibaran* 15 C L J 631 15 Ind Cas 870. A debtor's application to be adjudged an insolvent cannot be dismissed on the ground that the assets of the debtor as set out in the schedule exceed his liabilities or that the debtor has concealed some of his properties *Jaula Nath v. Parbau Dibi*, 14 Cal 691, *Baldeodas v. Sukhdodas* 19 All 125 21 A W N 97 *Kali Kumar v. Gopikrishna* 15 C W N 990 *Shaikh Gholam Rahaman v. Shaikh Wahed Ali* 16 C W N 853 16 Ind Cas 470 *Bidhata Din v. Jagannath* 9 A L J 699 *Muhammad Hussain v. Elahi Baksh* 10 A L J 188 17 Ind Cas 92 *Khasim Hussain v. Bishun Sing*, 14 Ind Cas 224 *Tulsi Ram v. Golam Mahiuddin*, 10 P W R 1903, *Karim Baksh v. Gaja Dhar* 1934 A I R (Lah) 63.

A debtor applied to be adjudicated insolvent but his petition was dismissed on the ground (1) that he had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers, (2) that he had removed his place of residence, (3) that he had inserted fictitious amounts of his income. It was held that none of these grounds was a valid ground for dismissal at L T 166 60 adjudication of the value of property of the debtor, and not to dismiss the petition on the ground that the value of the properties was or might have been more *Satischandra Addy v. Firm of Rajnarain Pakhura*, 72 Ind Cas 30. See also *Lakshminarayan Ar v. Subramaniam Anar*, 45 M L J 129 1923 M W N 328 73 Ind Cas 74.

A debtor's application cannot be dismissed on the ground that he has concealed some of his properties or has not made a true petition, *Bidhata Din v. Jagannath, 1er Ma'*, 38 I C 822. 1 P.L.W. 227.

Absence of available assets is no ground for refusing an order of adjudication, *Shera v Ganga Ram* 37 I C 214. The fact that the insolvent has not kept regular accounts has been considered irrelevant for the purpose of an adjudication, *In Re Vithal'das*, 9 I C. 632. The application of the debtor cannot be dismissed on the

Sohna Ma' v. Jewan Dass, (Lah.) 330. It should be s petition the Court can dismiss his application if it is not satisfied with proof of his right to present the petition or of the service on the debtor of notice admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts or for any other sufficient cause. But in the case of a debtor it can only dismiss the petition if it is not satisfied of his right to present the petition and not for other sufficient cause. It would, therefore, appear that the Court is only adjudication in the cases prescribe *Dugar v Kharagsing Lachmi-lok Nath v Badri Das*, 36 All. 250.

The mere fact that some of the debts entered in the petition are fictitious would not by itself justify an order of dismissal of the petition, though it could be taken into consideration at the time of discharge, *Allah Bakhsh v Charan Das Daya Das*, 126 I C 192. 1930 A I R (Lah.) 738

Dismissal for abuse of the process of the Court.

Under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it, or may rescind the receiving order made on the petition. The principle was recognised in the cases of *In Re. Betts*, (1901) 2 K.B. 39; *In Re. Painter*, (1895)

10 B. 95. and has been applied by all the Indian High Courts. It act in the

12 C.L.J. *Badri Das*, 36 All. 250, and the in *Ponnusami Chettu v. Narayan-MLT*. 355; and has also been *Subraya Pillay*, 6 L B R. 149; 5 Bur. must take it then as well settled

that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court, *Ma'chand v. Gopal Ch. Ghosal*, 21 C.W.N 291.

What is or is not an abuse of the process of the Court is to be judged in each case according to its circumstances. An abuse implies that the petition was presented in order to perpetuate a fraud, *Maung Po Mya v Maung Pa Kya*, 30 Ind Cas 943. When the presentation of petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind a receiving order made on the petition. Thus for husband and wife, if they are neither partners nor joint traders and have no joint assets or liabilities, to present a joint petition for the sake of avoiding the payment of the additional court fee which would be payable on separate petitions, is an abuse of the process of the Court, the proper order to make is to strike out the name of one of the joint-petitioners, *Re Band*, (1888) 21 Q B D 17, *Kali Charan Saha v Harimohan Basak*, 24 C W N 461 31 CLJ 206. Again where a debtor who is an undischarged bankrupt makes a practice of incurring debts and then presenting his own petition for the sake of evading committal orders against him, the presentation of the petition in such circumstances is an abuse of the process of the Court, and no receiving order will be made, and even if an order be incidentally made, it will be rescinded, *Re Betts, Ex parte Official Receiver*, (1901) 2 KB 39, *Vide Notes under sec 13 (f)*. In *Re Ballav Chand Serougie*, 27 C W N 739 it was held, following *Malchand v Gopal Chandra*, that the presentation of a second insolvency petition by the debtor on the same facts was an abuse of the process of the Court, and the second adjudication order founded on it must be annulled.

Their Lordships of the Judicial Committee of the Privy Council in *Chatrapat Sing Dugar v Kharag Sing Luchmiram*, *supra* observed "the dismissal of Chatrapat's petition by the District Court does not purport to rest on any failure to comply with any express terms of the Act. What was held was 'the application was an abuse of the process of the Court and so must be dismissed'. Presumably, it was on this ground too that the High Court dismissed the appeal—no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitled the debtor to an order of adjudication when its conditions are fulfilled. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court." If a debtor satisfies the conditions laid down by the Act for the presentation of his insolvency petition it cannot properly be said that he has abused the process of the Court on the ground that he had recklessly contracted debts which led to the insolvency and that his presentation of an insolvency petition in such circumstances was an abuse of the process.

Court, *Thana Velayutha Nadar v Subramania Pillai*, 109 I C 636
 A petitioner who brings his case within four corners of the Provincial Insolvency Act is entitled to an order of adjudication as a matter of right. There is no question of the abuse of the process of the Court, *Abdul Kuddes Gazi v Mutual Indemnity Finance Corporation*, 51 C L J 545

Effect of dismissal of the debtor's petition.

Vide Notes under sec 13 (f)

Appeal.

An appeal lies against an order dismissing a petition under this section, vide section 75, and schedule 1 *infra*. An order refusing to grant permission to the petitioner to verify a petition for insolvency (which he has omitted to do) and a petition for insolvency struck off the register under sec 25 and is appealable.

Singh Jaswant Singh, 133 I C 626 1932 A I R (L) 28

26. (1) Where a petition presented by a creditor is dismissed under sub-section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised as if it were a fine.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

Review.

This is sec 15 (2) and (3) of Act III of 1907.

Application of the Section.

For the application of the provisions of s 26 of the Act it is not necessary that at the time of dismissal under s 25 (1) itself the Court should be satisfied that the petition was frivolous or vexatious. The Court can consider the matter on a separate application even though it did not do so at the time of the dismissal of the petition under s 25 (1), *Ramaswami Iyer v. Subramanian Chettiar*, (1938) 2 M L J 179 - 1938 A I R (M) 267.

Application by the "debtor" for compensation.

The word 'debtor' in s 26 of the Act means any one against whom an insolvency application has been presented by a creditor. The person applying for compensation under this section need not in truth be a 'debtor' at all. Suppose for example, that some one wishing to harass another files an insolvency petition against that other person falsely alleging that he is indebted to him and his petition is on that ground dismissed why should not the alleged debtor be entitled to have compensation awarded under s 26 (1) instead of being driven to the expenses of a suit. *Ramaswami Iyer v Subramanian Chettiar*, (1938) 2 M L J 179 1938 A I R (M) 267

Compensation on dismissal of a creditor's petition

In English law both before and after the Act of 1869 an action would lie independently of special damage for maliciously and without reasonable and probable cause taking proceedings in bankruptcy and the reasons why such an action would lie independently of special damage seems to be that proceedings in bankruptcy are not of a civil but of a criminal or quasi criminal nature, necessarily causing damage to a man's fair name *Wilson v United Counties Bank Ltd*, (1920) 1 A C 102 (120). The proceedings in bankruptcy must be maliciously taken in order to support this action but that the moment the Judge holds that there is a want of reasonable and probable cause there is evidence of malice to go to the jury. In *Metropolitan Bank v Pooley* 10 App Cas 210 it was held that an action of this kind cannot be maintained unless the plaintiff proves that the adjudication has been set aside and the judgment of the Court on the hearing of the petition giving the reasons for its dismissal is not evidence against the creditor in an action by the debtor for malicious presentation of the petition *King v Henderson* (1898) A C 720.

With a view to avoid multiplicity of proceedings the Indian Legislature has invested the Insolvency Courts with summary jurisdiction to award compensation where such an application presented by a creditor is found to be frivolous and vexatious. It provides for the imposition of a penalty up to Rs 1000 upon the creditor payable to the debtor in case the creditor's application is rejected on the ground that the creditor had no right to present the petition or that the notice of the application had not been served upon the debtor or that the debtor had not committed the acts of insolvency alleged in the petition or that the application of the creditor was not bona fide but made for a collateral purpose or it is an abuse of the process of the Court. The sum is awarded by the Court to the debtor as compensation and it has been provided that the penalty will be realised from the creditor "a fine, i.e., according to the provisions of sec 386 of the Crim

Procedure Code, by distress warrant and seizure and sale of movable and immovable property. It provides a prompt remedy against wanton and malicious applications by creditors.

Frivolous and vexatious.

Frivolous implies that the accusation is of a trivial nature but it may or may not be false. Vexatious implies that the accusation is one which ought not to have been made and which is intended to harass the accused, *Beni Madhab v Kumud Kumar*, 30 Cal 123 6 CWN 799. A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family presented a petition in insolvency against the father and his two sons to have them declared insolvents. About 4 months later on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under s 25 (1). The sons claimed compensation under s 26 of the Act. It was found on evidence that the debt was one binding on the family for which the sons' shares could be made liable and that within ten days immediately after a notice demanding payment of the debt was made by the creditor the sons together with their father had set about alienating a large portion of the family properties and that they had no ready money to pay the debt. It was held that under the circumstances the creditor had sufficient grounds to reasonably suppose that fraud was being attempted by the sons also and therefore it could not be held that the petition of the creditor against the sons was frivolous or vexatious and therefore no compensation was recoverable. *Ramaswami Iyer v Subramanian Chettiar*, (1938) 2 MLJ 179 1938 AIR (M) 267.

Sub section (2), No suit for compensation

No suit for damages lies if any compensation has been awarded to the debtor under this section.

Appeal.

An appeal lies against an order awarding compensation *vide* section 75 and Schedule I *infra*. It is not usual in the High Court to go into the facts in revision even under sec 25. *Narsi v Gopalji* 1930 AIR (S) 282.

Order of Adjudication.

27. (1) If the Court does not dismiss the petition, it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.

(2) The Court may, if sufficient cause is shown,

extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

Review.

This is sec 16 (1) of Act III of 1907 with the omission of the words "and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the Court in the manner hereinafter provided" before the words "it shall make an order, etc" in sub-sec (1). On account of the omission of these words from the section there is considerable difference between the scope of sec 16 (1) of Act III of 1907 and the present section about the passing of the order of adjudication. Under sec 16 of Act III, if the petition either of the debtor or of the creditor was not dismissed, the order of adjudication would not be passed if the debtor could propose any scheme of composition to the Court for the acceptance of the creditors. The Court used to issue notices upon the creditors, consider their objections, if any, to the scheme, and then passed such orders as it thought fit and proper. Under the present section, the Court has no other alternative but to pass either an order of adjudication or to dismiss it, and the Court would not consider any scheme for composition before adjudication if the debtor had any to propose, *Vide, Lachminarain Dube v Kripan Lall*, 10 A L J 763 47 Ind Cas 733, *Ramrakha Mal v Nazar Mal*, 52 P R 1918 47 Ind Cas 435.

"Both sec 16 (1) and sec 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in sec 28 on the other hand, only contemplates a composition after adjudication. Under the English law a composition can be made (1) after the receiving order and prior to adjudication or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication. It is, therefore, proposed to follow in this respect the procedure under the Presidency Towns Insolvency Act and allow compositions and schemes only after adjudication."—*Notes on Clauses*

Sub-sec. (1); Order of adjudication.

Where a petitioner has obviously brought his case within the four corners of the Act he is entitled to an order of adjudication as a matter of right when there is no question of abuse of the process of the Court. It may be that when the petitioner applies

the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of the debts *Ramprasad Lohar v Ramjee Maruani* 126 I C 526 1930 A I R (Rang) 236

Order of adjudication must specify the time for discharge

In passing an order of adjudication the Court shall also under the present section pass an order that the insolvent should apply for his discharge within a time to be fixed by the Court in that behalf failing which the order of adjudication will be annulled *Vide sec 43 infra*. The period within which an insolvent must apply for his discharge has to be specified in the order of adjudication itself *Arimagiri Mudaliar v Kundaswami Mudaliar* 83 Ind Cas 955 1924 M W N 331 1924 A I R (Mad) 635 Where the Court does not specify the time within which the insolvent is to make an application for discharge in terms of cl (1) of sec 27 the penalty prescribed by section 43 of annulling the adjudication does not come into operation *Gopal Ram v Magni Ram* 7 Pat 375 (F B) 107 I C 830

Simultaneous order of adjudication and annulment of transfers

The Court has no power to set aside a transfer at the time of making an order of adjudication before the appointment of a receiver even if the act of insolvency on which the petition is founded is that very transfer Where in a petition under section 7 of the Provincial Insolvency Act 1920 put in by two creditors praying for an order of adjudication and cancellation of certain alienations made by the judgment debtors about a month previous the District Judge passed an order adjudicating them insolvents and also cancelling the alienation as transfers coming under section 6 (b) of the Act it was held it is the Receiver and no one else in the first instance who is empowered to take action for the cancellation of the sale deeds under section 53 of the Act and the Court has no power to order

Appa Reddi v

816 following

is nothing in the Act on which it can be held to be illegal for a Court to try the two questions (a) whether A has committed an act of insolvency (b) whether the property in respect of which the act is alleged to have been committed belongs to A or B *Waru Singh v Janki Das* 97 I C 174 (1927) A I R (L) 679

Court's power to pass an order passing an order of adjudication 177 32 L W 66 138 I C 31

ors were declared insolvent on

a creditor's petition The alleged act of insolvency was the fraudu

lent execution of a mortgage and it was prayed that the alienation be declared void. The Court passed an order of adjudication annulling the transfers and vested the property in the Official Receiver in the absence of the mortgagee who remained *ex parte* in spite of notice. It was held that the order declaring the transfer void was without jurisdiction. The Court in such cases should not avoid alienation until moved by the Official Receiver under sec 53 or by an aggrieved party. Such an order was an erroneous exercise of the Court's power and cannot constitute *res judicata*.

Adjudication of a Firm

The effect of an adjudication of a firm whether carried on by partner or members of a joint Hindu family is to make all the members (of the family in case the business was carried on by the members) insolvents (vide Rule 26 framed under s 79) *Bhagwan Das v Lakshmi Chand* 1935 A L J 673

Sub section (2), Extension of the period of discharge

Sub section (2) is new and the reason for this new provision is explained in the Statement of Objects and Reasons thus. One of the principal defects in the existing law arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court and at which most of the

perpetrate is when the Act which provides such application of the law it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to extend the prescribed period and when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge fresh petition on the same facts will be barred. These proposed changes are effected by sub section (2)

Reason for extension

Although the language of sec 43 (1) of the Provincial Insolvency Act is mandatory that if a debtor fails to apply for an order of discharge within the period specified by the Court in its order of adjudication the adjudication shall be annulled the Court has under sec 27 (2) of the Act power to extend the period within which the debtor must apply for discharge. The purpose of this extension is to prevent an enquiry into the discharge within the time prescribed is to prevent an enquiry into allegation of fraudulent conduct the Court can take hold of the

fact and extend the time for applying for discharge *Selam Chettiar v Venkatachalam Chettiar* 59 MLJ 710 129 IC 36 1931 AIR (M) 10

Court's power to extend the period of discharge after its expiration

There is no doubt that the Court has power to extend the time. The only question is whether it can do so after the expiry of the period originally fixed. The section if read subject to sec 43 no doubt leads to the inference that on the expiry of the period specified adjudication becomes automatically annulled if no application is made prior to expiry of the period. The Calcutta High Court in *Abraham v Sukias* 51 Cal 337 81 Ind Cas 584 1924 AIR (Cal) 777 has held that it is true that sec 43 provides that the order of adjudication shall be annulled but that seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself and does not stand cancelled automatically on the expiry of the period. We think that under sec 27 clause (2) the Court has the power to extend the time even after the expiry of the period of the order of discharge. Sections 43 and 27 should be read in a manner so as not to contradict each other and an Insolvency Court can extend the time for applying for discharge even after the expiry of the period fixed on the date of adjudication. A power to grant further time carries with it a power to grant extension even after the expiry of the term originally fixed since annulment of adjudication is not automatic. *Madho Prasad v Madho Prasad* 55 All 241 1933 ALJ 117 145 IC 668 1933 AIR (All) 230.

In *Arinagiri Mudaliar v Kandaswamy* 83 IC 955 *Krishnan J* held that the power conferred by sec 27 (2) to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired under sec 43 of the Act. Sec 148 C P Code 1908 is applicable to the insolvency proceedings by virtue of sec 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. *Waller J* on the other hand held that sec 43 is absolutely peremptory in its terms and directly the Court is informed of the insolvent's omission to apply for discharge within the time fixed the only course open to it is to annul the adjudication. no application for extension of time can lie after the expiry of the period originally fixed and sec 148 C P Code is applicable to insolvency proceedings only so far as it does not conflict with provisions of the Provincial Insolvency Act.

If before the expiry of the term fixed an application is made under section 27 (2) it is obvious that it is not obligatory upon the

Court under section 43 to annul the adjudication. To this extent it is plain that the term "shall" is not imperative, *In re Lord Thurlow, Exp Official Receiver*, (1895) 1 Q B 724 is an authority on this point. Then comes the question, supposing the Court is moved under section 27 (2) after the expiry of the time originally fixed, but before adjudication is annulled under sec 43 has the Court power to extend the period within which the debtor could apply for his discharge? In the first place the adjudication does not get automatically annulled under sec 43 on the expiry of the original period. The words of the section show that the Court must make an order of annulment. This is the correct interpretation of the section as has been held in *Abraham v Sikeas* supra. It is open to the Insolvency Court under section 27 (2) to extend the time on a proper application to that effect made at any time before the adjudication is annulled. *Jethaji Peraji Firm v Krishnayulu* 52 Mad 648 57 M L J 116. In *Lakhi v Molar* 86 I C 115 (1925) A I R (L) 416 the insolvent was granted discharge on his application after the period fixed by the adjudication order. It was held, that it was not a fatal defect that the application for extension was made after expiry of the fixed date. Sec 148 of the C P Code established this principle and there is nothing repugnant to it in the provisions of the Provincial Insolvency Act. An Insolvency Court has power to extend the time fixed by it within which an insolvent is directed to apply for his discharge and it is not a fatal defect in the application for extension of time that it is made after expiry of the fixed period, *Fateh Muhammad v Maya Dass* 100 I C 134.

Section 27 of the Provincial Insolvency Act is imperative and a Court should, on making an order of adjudication specify the time within which the debtor should make an application for discharge. An order of adjudication in insolvency is not *ipso facto* annulled by the expiry of the period fixed for applying for discharge, but has to be determined by an order of annulment, and until the adjudication is so annulled, the Court has seisin of the case and has power to extend the time for making the application for discharge under sec 27 (2) of the Act regardless of the period originally fixed, *Gopal Ram v Magni Ram*, 7 Pat 375 (F B) 107 I C 830 followed in *Ganpat v Hangir*, 113 I C 357 1929 A I R (N) 11 and *Sohan Ram v Tara-hand*, 117 I C 87 (1929) A I R (L) 399. A Court has jurisdiction to extend the time originally fixed under sec 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under sec 43 of the Act, *Palani Goundan v The Official Receiver, Coimbatore*, 53 Mad 288 (F B) 58 M L J 369. In *Wally Mohamed Cassim v Haji Ayoob Haji Abba & Coy*, 144 I C 869 1933 A I R (R) 133, the Judge was absent on the day fixed for applying for discharge and the insolvent did not apply on that ground. The case was posted to another date when the insolvent applied. The

Judge dismissed the application as being belated on the ground that he had no power to extend time. It was held that the Judge had power to extend time and that he had power to consider the application.

Section 27 (2) authorises a Court to extend the time for an application for discharging an adjudicated insolvent if an application for extension of time is made after the period specified for the application for the order of discharge has expired. An application for extending the time for an application for discharge should be allowed if the result of the annulment of the adjudication would be to prejudice the creditor. It certainly was not the intention of the framers of the Act that the debtor should derive advantage from his failure to apply, *Laduram v Sakharam*, 27 NLR 374 1932 AIR (Nag) 22, under s 27 (2) the Court has power to extend the time for discharge even after the expiry of the period allowed to the insolvent for applying for his discharge *Shankardal v Bansidhur* 1937 ALJ 773 171 IC 594 1937 AIR (All) 686

Who can apply for extension of the period of discharge.

From sec 27 (1) and (2) read together it is clear that the Court has the power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of anybody interested. The section merely requires that sufficient

debtor alone may
Jethaji Peraji Firm
ion 43 is controlled
by section 27 and an application for the extension of the period of discharge can be made by any one interested and is not restricted merely to the debtor. *Suppiah Moopnar v Mallappa Chetty*, 124 IC 219 1930 AIR (Mad) 342. There is nothing in law incompatible with the extension of the period within which a debtor should apply for his discharge at the instance of and cause shown by the petitioning creditor, *Chettiar v Maung Myat Tha* 6 Bur LJ 5 100 IC 921 (1927) AIR (R) 136. It is open to an Insolvency Court to extend the period specified in the order of adjudication within charge on the application
v Official Receiver 10 Lah
f a Court from the pro

ceedings before it is of opinion :
for applying for discharge ought to be extended, the Court has power to extend the time of its own motion. There is nothing whatever in sec 43 (1) which could be construed as meaning that a Court cannot extend time for the application for discharge on its own motion *R M K R M Chettyar v Ko Po Thut* 8 Rang 506 128 IC 841 1931 AIR (Rang) 27

Appeal.

An appeal lies against an order of adjudication under this section, *vide* section 75 and schedule I, *infra*. An appeal lies to the High Court from an appellate order of a District Judge upholding the orders of the trial Court passed under sec 27 of the Act, *Kallukutt Parambath Perachan v Kuttiali* 49 MLJ 595 (1926) AIR (M) 123. But no appeal lies when the application for extension of the period of discharge fixed by the order of adjudication is rejected, *In the matter of Ganga Prasad* 89 IC 959 (1926) AIR (O) 186. No second appeal lies against an order granting extension of time for discharge under section 27 (2) *Sambamurthi v Ramakrishna*, 52 Mad 337 33 CWN 164 (Notes) 55 MLJ 837 114 IC 847 1929 AIR (M) 43.

28. (1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

Effect of an order of adjudication

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceeding have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

(3) For the purpose of sub-section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent.

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or

receiver, and the provisions of sub-section (2) shall apply in respect thereof.

(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

Review.

This is mainly sec 16 (2), (3), (4), (5), (6) and (7) of Act III of 1907. The sub-section (1) is new. The introduction of sub-section (1) is explained in the *Notes on Clauses* thus "Apparently the duties imposed on the debtor by sub-section (1) of section 43 arise as soon as the Court has made an order under sec 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property, unless he is adjudged an insolvent. It is proposed, therefore, to amend the concluding part of sub-section (1) and to relegate to a separate sub-section the provisions which impose on the debtor the duty of aiding in the distribution of his property." Sec. 28 summarises not only the rights of the creditors but also defines the properties that are liable to be distributed amongst them. It should be

"the whole of the property
or in the receiver" it defines

and 28 (5) Section 28 (3)

lays down that for the purposes of insolvency all goods in the possession, order or disposition of the insolvent in his trade or business at the date of the presentation of his petition by the consent and permission of the true owner, shall vest in the Receiver and be divisible among his creditors, though he may not be the real owner thereof. Sec. 28 (4) lays down that not only the property which he was possessed of at the date of the presentation of the petition but also the properties which may be acquired or inherited by him after order of adjudication would vest in the Receiver and be liable to be

distributed among the creditors Section 28 (5) lays down that the properties which are exempted from attachment either under sec 60 of the C P Code or any other law for the time being in force do not vest in the Receiver and are not liable to be distributed among the creditors Section 28 (6) defines the rights of the secured creditors and sec 28 (7) lays down the period from which the order of adjudication takes effect

Sub section (1) Duties of the insolvent
after adjudication

The duties of the insolvent under the Act before adjudication are given in sec 22 and those after adjudication in the present sub section 3) of the Bankruptcy Act (Amendment) Act 1926 judged bankrupt and to the of his property and the distribution of the proceeds among his creditors The order of adjudication means an order that the debtor by or against whom an insolvency petition was presented has been legally found by the Court to be unable to pay his debts and the effect of that order is (1) to vest all property of the debtor in the Court or a Receiver appointed by the Court so that he may get in and collect all the dues of the debtor and rateably distribute them to his creditors and (2) to release the debtor from his liabilities This is the statutory right of an honest debtor and his paramount duty is to help the Receiver in getting in and collecting all his dues and assets and to place his assets unreservedly at the disposal of the Receiver so that his creditors may get as much as possible for their dues out of the same A debtor is bound to appear for his examination though he may reside more than two hundred miles away from the court house *In Re Coussji Polkerji* 13 Bom 144 The principle of the matter is that both before and after discharge the insolvent is put under the duty to assist in every way the liquidation of the assets for the benefit of his creditors That is very extensive and that is his primary duty *Shadan Chandra Bhandari v Seunarnai Golabru* 37 CWN 718 57 CLJ 467

Once an order of adjudication has been made the debtor is he official receiver or He must furnish them that can reasonably be required must answer questions about his affairs, attend meetings wait on the Official Receiver execute conveyances and other instruments—in short everything that the Official Receiver may reasonably require of him or that the Court may order him liquidation and distribution amon Act) He must even after request of the trustee

without being subpoenaed *In Re Fitzgerald ex parte Hobbs* (1916) H B R 157 The Court can even order that his letters be delivered by the Post Office not to him but to the Official Receiver and the Post Office officials must comply with the order (sec 24 B Act) But there are limits He cannot be compelled to do that which does not relate to his property He cannot be ordered to submit to examination to enable the trustee to effect an insurance on his life *Board of Trade v. Black* 13 App Cas 570

Failure to perform the duties

If a debtor wilfully fails to perform the duties imposed in him by this section or to deliver up possession of any part of his property which is divisible amongst his creditors under the Act and which is for the time being in his possession or under his control to the Official Receiver he shall in addition to any other punishment to which he may be subject be liable to punishment under section 69 of the Act *Nanhi Mal v. Emperor* 17 O C 138 25 I C 363 *Ubukobin v. District Court* 3 U B R 97 49 I C 55

Sub section (2), Effect of adjudication

This is section 7 (1) of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 which runs as follows

On the making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor and thereafter except as directed by this Act no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose Sub section (2) is divided into two parts the first part being on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided and shall become divisible among the creditors and the latter part which is as a corollary to the first part being no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court on such terms as the Court may impose The words as hereinafter provided qualify the word receiver and not the word vest in that sub section *Official Receiver of Coimbatore v. D D Kanga* 45 Mad 167 14 L W 655 1921 M W N 858 59 I C 908

Nothing is more firmly established in Bankruptcy Law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate He had no right to gather it.

if it is not already in his hands or to make payments to his creditors out of that which he has actually at his command. He can give no good discharge to a debtor who pays him with notice of the act of bankruptcy because the debt may by subsequent bankruptcy proceeding be turned into a debt due to the trustee and not to himself. This is a principal and fundamental part of
sford Baker & Co v Union of
 5) 2 Ch D 444 (451) *The Official*
India Ltd 12 Rang 577

Automatic vesting on Adjudication

Under the provisions of the Provincial Insolvency Act the property of an insolvent vests in the Receiver at the date of adjudication and if property is not to vest it must be exempt from attachment under s 60 CPC at that date. Once it has vested it becomes the property of the receiver and he is entitled to deal with it. *Triloki Prasad v Kunja Behari Lal* 1935 A L J 507 1935 A W R 479 157 IC 986 1935 A I R (All) 448. As soon as the debtor is adjudicated an insolvent the Court takes upon itself the administration of his estate for the benefit of the general body of creditors and for that purpose it will have to take possession of all the property that the debtor held or was possessed of at the time of the presentation of the application or may become possessed of at any time during which the insolvency proceeding may remain pending. This is the first part of sub section (2). The Court taking upon itself the administration of the property of the debtor for the benefit of all the creditors and for the purpose of making an equitable distribution to them it follows that no one creditor should be allowed to attach any property for the realisation of his own dues—creditors. Hence the sub section
Vasudeb Kamath v Lukshminarain
 id Cns 442. An order of adjudication under clause (7) of Section 28 of the Act relates back to the date when the petition for insolvency is admitted by the Court. The effect of clauses (2) and (7) in sec 28 is that the properties of the insolvent wherever they may be and whoever may be in possession of them automatically vests in the Court. It is immaterial whether there is at that time any receiver appointed by the Court or not. The vesting of the property of the insolvent in the Court is not dependent upon there being a receiver. *Tejmal Marwari v (Firm) Jokiram Surajmal* 17 P L T 313 160 IC 146 1936 A I R (P) 112. When a debtor is adjudicated an insolvent whether at his instance or at the instance of a creditor all his assets which he has at the time of the presentation of the application and all assets which he may acquire before his final discharge must come in the hands of the Court in order that the said assets may be administered and his creditors whose debts can be proved in the insolvency proceedings may get *pro rata* from these assets. Hence an

insolvent has no title in the properties in which he had beneficial rights at the date of the presentation of the application or which was acquired subsequently by him at any time before his absolute discharge. All such properties vest in the Court or in the Receiver appointed by the Court. *Arjun Das v. Marchia Telini*, 1936 A I R (C) 434

Property that vests under English law.

Under sec. 38, Bankruptcy Act, 1914 the property of the bankrupt divisible amongst his creditors and in that Act referred to as the property of the bankrupt shall not comprise the following particulars —

- (1) Property held by the bankrupt on trust for any other person,
- (2) The tools, if any, of his trade and the necessary wearing apparel and bedding of himself, his wife and children to a value not exceeding £20 on the whole,

But it shall comprise the following particulars —

- (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge;
- (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and
- (c) All goods being, at the commencement of bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of his section.

Property that vests under sec. 28.

Property has been defined in section 2 (d) of this Act and under section 167 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926. It includes money, goods, things in action, land and every description of property whether real or personal, whether situated in England or elsewhere, also obligations, easements, and every description of estate interest and profits, vested or contingent, present or future, arising out of or incident to property thus defined. In order to constitute property of the insolvent the goods must be in the order or dispositions of the

insolvent The definition of the word property in sec 2 (d) is very comprehensive and includes any property over which or over the profits of which the insolvent has a disposing power which he may exercise for his own benefit All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of his debts including claims in the nature of damages except such as arise from bodily or mental suffering or personal inconvenience of the Bankrupt or from injury to his person or reputation are property which vests in the Official Receiver Under sec 28 (5) the property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment *a* - - - - -

It is to be noted that sec 266 C the various kinds of property of a to be attached and sold in execution as sec 60 of the CPC of 1908 which has replaced that section mention, *inter alia*, the property over which or the profits of which the judgment debtor "has a disposing power which he may exercise for his own benefit" And this is exactly the phraseology which has been used in the Insolvency Act *Behari Lal v Sat Narain*, 3 Lah 329 On the insolvency of a person what vests in the Official Receiver is not the property which the insolvent knows he possesses, but the property which in law he possesses *Khem Chand v Heman Das*, 31 SLR 506 1937 AIR (S) 306

The following is an enumeration of some of the properties which constitute the properties of the insolvent and vest in the Receiver under sec 28 (2) —

(1) Money—Where an order had been made calling upon a certain person to show cause why she should not hand over to the Official Assignee money which it was alleged the insolvent had paid to her shortly before insolvency, under circumstances which might make the transaction void against the creditors, it was held that the transaction was a gift, and under the circumstances, void as against the creditors and that the word "property" includes money, In the matter of *Ambica Nandan Biswas*, 3 Cal 434 1 CLR 561 Money realised in execution of a decree held by the insolvent which was attached by a creditor is part of the insolvent's estate, *Firm of Adamji v Firm of Basrud*, 89 IC 330 1926 AIR (Sind) 77

(2) Personal earnings—Property includes personal earnings *Jumunadas v Vinayak* 10 Ind Crs 698 Property includes salary, *Ram Chandra v Shama Charan* 18 CWN 1052 19 CLJ 83 After-acquired property of an insolvent whether it consists of salary, personal earnings or property of a different kind is property which vests in the Official Assignee, but subject to the provision of unwritten law as to personal earnings sufficient for the maintenance, according

to his position in life of the insolvent and his family, *In the matter of C M F Donaghue* 19 Bom 232. In *In re Roberts*, (1900) 1 Q B 122, the Court of Appeal held that after bankruptcy and before discharge whatever property a bankrupt acquires belongs to his trustee save only what is necessary for his support. There seems to be no material difference between personal earnings and salary in respect of the amount that would vest in the Receiver, *Ranganatha Rao v Ananda Chariar*, 21 M L J 78.

(3) *Salary*—There can be no room for reasonable doubt that 'salary is property' of the insolvent, this view accords with that adopted in England under the Bankruptcy Act, as is evident from the case of *Re Ward* (1897) 1 Q B 266, *Mercer v Vans Colina* (1900) 1 Q B 130n, and *Re Graydon*, (1896) 1 Q B 417. It has been explained that in making an appropriation of income for the benefit of creditors the Court acts on the principle of giving to the creditors, the surplus after allowing sufficient portion thereof for the insolvent's proper maintenance according to his condition in life. The Statute law in this country fixes this amount by sec 60, C P C, 1908, read with sec 28 (2) of the Provincial Insolvency Act, *Ram Chandra v Syama Charan Bose*, 18 C W N 1052. 19 C L J 83. 21 Ind Cas 950, *Devi Prosad v J A N Lewis* 16 A L J 107, *Ranganath Rao v Ananda Chariar*, 2 M L J 78, *In the matter of C M F Donaghue*, 19 Bom 232. In cases in which a question arises as to what sum should be paid out of the insolvent's salary for the benefit of his creditors there being no other assets available, the burden must be shared equitably between the insolvent, the members of his family and the creditors. It is not right that it must always be exclusively the creditors who should suffer. The Court should allocate an adequate sum out of the insolvent's salary for the benefit of his creditors. *In the matter of Maung Tun Aye*, 165 I C 384. 1936 A I R (R) 412.

(4) *Secret Formulas*—Secret formulas invented by a bankrupt for the manufacture of certain special articles were part of the goodwill and assets of his business and therefore his property and he was bound to communicate them to his trustee, *In Re Keene* (1922) 9 Ch D 475.

(5) *Life Insurance Policies*—The trustee takes all policies payable to the bankrupt or to his executors, administrators or assignees. By weight of authority, he also takes all endowment policies payable to the bankrupt at maturity, and in many jurisdictions he also takes endowment policies payable to a beneficiary other than the insured in the event of his death, and this too, occasionally, where a state exemption statute exists for the protection of wife and children. And by a still more general qualification, the trustee takes policies, which would not otherwise get because of the power to change a beneficiary reserved to the bankrupt. In all instances where

the policies the bankrupt may redeem those of them having cash surrender values by paying the amount of the surrender value to the trustee, *For fuller treatment and case laws vide 16 CLJ 19-31 (notes)*

(6) *Copyright*—"Where the property of a bankrupt comprises the copyright in any work or in any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof the trustee shall not be entitled to sell, or authorise the sale of any copies of the work, or to perform or authorise the performance of the work except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt nor shall he without the consent of the author or of the Court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt was liable to pay"—Section 60, *Bankruptcy Act*. This section appears to meet such a case as that of *Re Grant Richards* (1907) 2 KB 33, where an author who had sold a copyright to a publisher on the terms of being paid royalties on the sale was held on the bankruptcy of the publisher only to be entitled to prove for damages for breach of contract

(7) *Goods in the possession order or disposition of the insolvent in his trade or business*—Under section 28 (3) "all Goods being at the date of the presentation of the petition on which the order is made, in the possession order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof shall be deemed to be the property of the insolvent" The effect of this is to transfer to the receiver certain property which does not belong to the insolvent or in which he has only a qualified interest. The doctrine of reputed ownership implies that the owner has unconsciously allowed goods to remain in possession of the insolvent and so enabled him to get more credit in his business than he is entitled to. But where this is not the case the goods will be restored to the owner. In *Re Kadibhoy Ismailji Lotia*, 11 IC 14. *For fuller treatment vide notes under section 28 (3), infra*

(8) *Goods held by commission agent*—If a commission agent has a disposing power which he may exercise for his own benefit over goods entrusted to him for sale such goods are his property for the purposes of the Insolvency Act, and a Receiver can take possession of them as his property in insolvency proceedings against him, In *Re Messrs Kadibhoy Ismailji Lotia*, 11 Ind Cas 14. In *In re Murray an insolvent*, 3 Cal 59, it was held that the goods in the hands of the insolvent discharged of the creditor's lien

and subject only to the terms of the receipt which at the outside only amounts to an agreement to sell goods and apply the proceeds in liquidation of debts due to the creditor, were in the order and disposition of the insolvent as a commission agent and therefore rightly vested in the Official Assignee. In *Re Marshall*, 7 Cal 421, it was held 'where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit the owner who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit'. A Railway receipt is a mercantile document of title to goods and lawful possession as pledge of such receipt enables the holder by virtue of local custom to get possession of the goods and the insolvent's right to get possession of them ceases with the pledge. *Vikarappa v Thippara* 38 Mad 664. In the matter of *Bunsidhar Khettry* 2 Cal 359 it was held that 'the goods were not in the order and disposition of the insolvent which he agreed to part with before the order of adjudication and for which he had received consideration, though the goods were still with the insolvent pending delivery'. Money payable to an auctioneer by purchasers of goods entrusted to him for auction could not be attached by the creditors of the auctioneer except as to such an amount as the judgment debtor had a disposing power over which he could exercise for his own benefit. An auctioneer is entitled to a certain commission on the price of articles sold by him, which belonged to the persons who sent the things to him for auction. There is nothing to prevent the auctioneer contending that he is the trustee or bailee of such property and that it is not liable to attachment. *Smith v Allahabad Bank* 23 All 135. Goods entrusted to a person for sale as commission agent do not vest in the Official Assignee on the insolvency of the agent but remain the property of their owner. If the goods burn down after being insured by the owner in the custody of the agent the insurance money goes to the owner and not to the Official Assignee. Such insurance is main distinguishable from *Hnyin v The Official Assignee* (R) 59 in appeal from the matter of *Dyea Razim deceased* 3 Rang 73.

(9) Property under bailment.—Where the plaintiff, an undischarged insolvent, who had obtained some emeralds for sale from their owner in the ordinary course of his business and had given them to the defendant for sale sued the latter for the price of emeralds and a half share of the profits said to be realised by an alleged sale of the same by the defendant or, if there was no sale, for the recovery of the emeralds or their value. The defendant pleaded *inter alia* that the suit was not maintainable by the plaintiff as he is held that in respect of the sale and the property in the insolventy under sec

Moonrumugamkondan Asari v. Chockalingam Asari, 54 Mad 5 (FB), 59 MLJ 629 1930 AIR (Mad) 913 Where, prior to insolvency, the goods were delivered by sellers to buyers, upon terms which purported to make them trustees for the sellers of the goods and of the proceeds until payment it was held that, on the bankruptcy of the buyers, the goods were in their reputed ownership and hence vested in the Official Assignee *In re Sumeruall Surena*, 59 Cal 818

(10) *Property abroad*—Under sec 167 of the Bankruptcy Act property includes money, goods, things in action, etc., whether situate in England or elsewhere. The English Bankruptcy Act being an Imperial Statute is binding on all British subjects and British Courts both within and without England. Thus for instance, an English discharge is pleadable in bar in any British Court to any action to which it could be pleaded in an English Court, *Gill v Barron*, LR 2 PC 157 (175). The effect of insolvency on the title to property of the insolvent varies according to whether the property be immoveable, notably land, or movable like goods. It is a first principle of what is called Private International Law that the title to immoveables is governed by the law of the country in which they are situated, the *lex loci rei sitae*, as it is called by the learned, whereas the title in tangible movables, as opposed to intangible ones, like debts and other things in action, is in great part governed by the personal law of the owner, which in the view of the English Courts is the law of domicile, and not by the law of the country in which they are situated. Certainly the effect of a so called universal assignment such as take place in bankruptcy, depends upon the personal law, *mobilia sequuntur personam* is the appropriate maxim. As regards immoveable in a foreign country, such as Japan, the views of International Law taken by English and British Indian Courts is that the English and Indian Statutes do not operate unless indeed it is shown that the foreign law will give them effect *Cockerell v Dickens*, (1840) 3 Moo PC 98 (133). As regards movables in a foreign country, the basic principle is *mobilia sequuntur personam* (movables follow the person). *Prima facie*, these are governed by the law of the insolvent's domicile, *Phillips v Hunter*, (1795), 2 H Bl 402, *The Yokohama Specie Bank Ltd v S. Curlander & Co*, 43 CLJ 436.

In *Draupadi Bai v Govind Singh*, 65 IC 334 the question arose whether the property of an insolvent in a foreign country vests in the Court after adjudication. It was held that the village, if not transferred would, as a part of the insolvent's property, have vested in the Court and become divisible among the creditors. There is nothing to prohibit the State from enacting a law directing the vesting of immoveable property in a foreign territory in its own Courts. In fact the English Bankruptcy Act includes such property in the property divisible among the bankrupt's creditors and vesting in the trustee. The law may have no practical effect, for immove-

able property *ci rei sitae* which may not recognise which has the effect of vesting the prop. there may be some practical effect in that, if the property is still in the ownership of the insolvent, the Court may order him under sec. 43 of the Local Act (now sec. 22) to transfer to itself or to the Receiver according to the form required by the law of the country where the property is situated. It was held, therefore, that property of the insolvent, though situated in a foreign country, vests in the Court under sec. 28 (2).

In *Sumer Mull Sirena v. Rai Bahadur Bansilal Abirchand*, 35 C.W.N. 997 : 1932 A.L.R. (Cal.) 310, Rankin, C.J. observed : "Upon the question whether the insolvents' interest in the Bikanir property vested in the Official Assignee, while it is true that the law of British India does not govern immoveable property in foreign states, and that an adjudication order made here (i.e., in the Calcutta High Court) can only have such effect upon the property as the law of the foreign state chooses to give it, nevertheless, as between the insolvent and his creditors, the property *prima facie*, is available to the creditors unless the law of the foreign state interferes with the operation of our own law. If it could be shown that the insolvents, by executing a transfer or by taking registration in Bikanir, could make this property available for the benefit of their creditors, the insolvents, under our law, could be required to do what was necessary to that end [C' sec. 33 (2) (d) of the Presidency Towns Insolvency Act] "

(11) *Partnership assets* —When all the partners of a firm, i.e., the whole firm is adjudicated insolvent the partnership assets are property within the meaning of the definition of sec. 2 (d) and would vest in the Receiver under section (2) and would be distributable among the creditors in the manner laid down in section 61 of the Provincial Insolvency Act. The question arises. Would the share of the insolvent partner or partners in the joint assets of the partnership when only one or some of the members of the firm is or are declared insolvents be considered property of the insolvent so as to vest in the Receiver? Lindley, L.J., in his treatise on Partnership (page 798, 9th edition) says. "When one of several partners is adjudicated bankrupt his trustee becomes entitled to all his separate property, and to all his interest in the joint property but subject to qualifications (as in cases of fraudulent preferences and voluntary settlements) the trustee can claim no more than the bankrupt himself would have been entitled to, had he not become bankrupt; and every lien available for his co-partners against him is equally available for them against his trustee. Consequently the trustee can claim nothing as the bankrupt's share until all the joint creditors have been paid and the partnership accounts have been duly taken and adjusted (see *West v. Ship*, 1 Ves. S. 236, 456). On the

hand the solvent partners have no right to insist on taking the partnership assets to themselves and to pay the trustee the estimated value of the bankrupt's share for the right of the trustee against them as well as their right against the trustee is to have an account and a sale and distribution. *Lucash v Collins* 15 Ves 229)

Under sec 49 of the Indian Partnership Act (IX of 1932) which has taken the place of sec 262 of the Indian Contract Act where there are joint debts due from the firm and also separate debts due from any partner the property of the firm shall be applied in the first instance in payment of the debts of the firm and if there is any surplus then the share of each partner shall be applied in payment of his separate debts or paid to him. There was some divergence of judicial opinion as to whether the share of a bankrupt partner in the partnership assets vests in the Receiver. This has arisen from the use of the expression disposing power in sec 2 (d) Section 31 of the Indian Partnership Act (IX of 1932) which has taken the place of sec 253 (6) of the Indian Contract Act lies down. Subject to contract between the partners no person shall be introduced as a partner into the firm without the consent of all the existing partners. The Judicial Committee of the Privy Council has held in *Din Doyal Lal v Jugdeep Narain Singh* 41 A 247 3 Cal 198 that the partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners. Therefore the assignment of a share in the assets of the firm is the assignment of a bare right to sue (for dissolution and accounts) within the meaning of sec 6 (e) of the Transfer of Property Act which cannot be transferred. In *Wilson v Nathmull* 1930 AIR (Mad) 458 it was held that the insolvent's share in the partnership will vest in the Official Assignee or Receiver. A further difficulty has arisen in view of the provision in Or 21 r 49 CPC that property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such. And this principle was upheld in *Syed Tuffool Hosain v Raghunath Parshad* 14 MIA 40 *Darfa Mahomed v Lakhimoy Dasi* 14 Cal 384 *Bibee Tokenshah v Daul Mahomed* 6 MIA 510 while a contrary view was expressed in *Din Doyal Lal v Jugdeep Narain Singh* 41 A 247 3 Cal 198 *Partiweesam v Bapanna* 13 Mad 447 *Thatt Chaitra Poy v Isur Chaitra Roy* 20 Cal 693 *Ramanath Anar v Nandira Anar* 43 MLJ 827 18 LW 868 1924 AIR (Mad) 273 *Seth Vishwas v Thandras* 80 IC 642 1925 AIR (Sind) 72 and 118.

The above difficulties have been solved by the enactment of sec 34 in the Indian Partnership Act IX of 1932 which lays down that where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made.

cation is made whether or not the firm is thereby dissolved, and where under a contract between the partners the firm is not dissolved by the adjudication of a partner as insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent done after the date on which the order of adjudication is made." The provision previously contained in sec 254 (2) of the Indian Contract Act as to the effect of insolvency of a single partner was to the effect that when a partner was adjudicated insolvent any other partner might sue for the dissolution of the firm. Section 34 of the Indian Partnership Act is similar to sub-section (1) of section 33 of the English Partnership Act, 1890 which provides for the dissolution of the partnership on the death or bankruptcy of any partner. Therefore the law as it stands at the present day is that on the bankruptcy of a partner he ceases to be a partner of the firm and what vests in the Receiver is his profits in the partnership assets, if any, up to the date of his adjudication after payment of the partnership debts. "When a partner or some of the partners become insolvents, the Receiver becomes the tenant in common with the continuing partners from the date of the petition, *Barker v Goodair*, 11 Ves 78. Section 69 of the Indian Partnership Act, 1932, provides that nothing contained therein shall affect the powers of an Official Assignee Receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920 to realise the property of the insolvent partner. Therefore, on the insolvency of a partner the firm is dissolved as regards him and his Receiver does not step into his shoes so as to be a continuing partner. But the property of the insolvent upto the date of his adjudication in the partnership assets vests in the Receiver and he has the right to realise those assets by suit.

(12) *Goodwill*—If the bankrupt has before his bankruptcy carried on a business, the goodwill of the business passes on adjudication to his trustee, and except where the goodwill is personal to the bankrupt as in the case of a professional man, in which case, it seems, it would not pass, *Halsbury's Law of England*, Vol II, page 160, para 263 (1908 edition). The right of the assignee to sell the goodwill is not questioned and so far as it was property the assignee had the right to sell it *Crittwell v Lye*, (1810) 17 Vesey, 335 11 R R 98 (See section 59 Provincial Insolvency Act). But the purchaser of the goodwill has no right, in the absence of a contract to the contrary, to restrain the bankrupt from setting up *bona fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser, *Walker v Mottram* (1881) 17 Ch D 355 (see section 27 of the Indian Contract Act).

(13) *Hindu family firm*—On a reference under sec 98, C P c

it was held in the *Official Receiver, Anantapur v Ram Chandrappa* 52 Mad 246 55 MLJ 721 114 IC 345 1929 AIR (M) 166 that "where in a Hindu joint trading family there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents the power of the manager to dispose of the joint family property for debts incurred for trading purposes passes to and becomes exercisable by the Official Receiver so as to bind the minor's shares." The liability of the minors as the sons of their fathers must be distinguished from the liability as partners of the firm. So far as the latter was concerned, they were under no personal liability and no property of theirs, which was not property of the firm could be touched by the Receiver. The Receiver was entitled to proceed against the interest of the minor sons in the joint family property, and the sons could only obtain exemption by showing that the father's debts were not binding on the sons by reason of immorality and the like. The fact that the minors had not been and could not be adjudicated insolvent would not affect the vesting in the Receiver of the entire assets of the firm including their shares in the family property which had become part of the firm's assets. The minor's share in the family property which was mortgaged for a debt of the family as a partner in the firm could not in any event be saved by them except by showing that the debts for which the fathers were personally liable were contracted for immoral purposes, *Bhola Prasad v Ramkumar Marwari*, 11 Pat 399 1932 AIR (Pat) 231. The whole family property is liable for the payment of the debts incurred by the manager for the purpose of the family business the shares of the minor co-parceners being also liable, and the rights of the widow to maintenance and residence must be postponed to the payments of the debts, *Musstt Champa v Official Receiver, Karachi*, 15 Lah 9.

In a joint family governed by the Dayabhaga school of Hindu law and having an ancestral trade, the share of the minor is not liable for debts contracted for the purposes of a new business started by the karta or manager of the family. On adjudication in insolvency of the adult members, the minor's share does not vest in the Receiver, *Sanyasi Charan v Krishna Dhan*, 49 IA 108 49 Cal 560 (P.C.) 20 ALJ 409 26 CWN 954 43 MLJ 410 35 CLJ 498. The principle enunciated in the above case has been held to be applicable also in the case of a Mitakshara family business. It has been held by the Privy Council in *The Benares Bank Ltd v Hari Narain*, 59 IA 300 36 CWN 826 that the manager of a Hindu joint family, even if he be the father and whether the family be Mitakshara or Dayabhaga, has no power to alienate the interest of a minor member in joint family property for the purposes of a new business started by him as manager. Their Lordships held that "a new business is not within the purview of verses 27 to 29 of Chapter I of the Mitakshara which

defines the powers of a Mitakshara joint family manager to alienate immoveable property belonging to the joint family" Therefore the right to sell the share of a minor in a joint family property for debts incurred in a new business by a father or manager who becomes subsequently insolvent is not property within the meaning of sec 2 (d) of the Provincial Insolvency Act and does not vest in the receiver

(14) *Hindu joint family property in case of the adjudication of the Karta or Manager*.—From the earliest times it has been uniformly held in a long series of decisions that the right, title and interest of a Hindu co parcener in joint family property may be attached and sold in execution of a decree obtained against him personally. Therefore, such right, title and interest is property of the insolvent which vests in the receiver in insolvency and the receiver is entitled to sue for partition thereof, *Suraj Bansi v Sheo Pershad*, 5 Cal 148 (P C), *Purshotam Naidu v Pannuramam*, 1913 M W N 897 15 M L T 92 21 Ind Cas 576, *Lal Bahadur v Paspas Prasad*, 74 I C 301 1923 A I R (O) 154, *H E Howatson v W E Durrant*, 27 Cal 351 4 C W N 610. There was divergence of opinion as to whether on the adjudication of a father of a Mitakshara joint family the entire family property including the shares of the sons should be considered as property so as to vest in the receiver. It was held Mitakshara law a father has a right to in ancestral immoveable property for not tainted with illegality or immorality and such interest is therefore property within the meaning of section 2 (d) and vests in the receiver. The Official Assignee is the representative of the insolvent and is entitled to all the rights including rights of possession of the joint property, *Bawan Dass v O M Chiene*, 44 All 316 20 A L J 155, *Harmukh Roy Munno Lal v Radha Mohan*, 54 I C 931 *Fakirchand v Motichand* 7 Bom 438, *Rangya Chetti v Tanikchella Mudaly*, 19 Mad 74 *Sitaram v Bent Prosad*, 84 I C 790, *Chellaram v Official Receiver*, 1923 A I R (S) 20, *Nursimulu v Basava Sankaram*, 1925 A I R (M) 249, *Narain Dass v Bankim Chandra* 85 I C 396, *Shiogopal v Sukhrui*, 87 I C 957 1925 A I R (N) 418 *Om Prakash v Moti Ram*, 24 A L J 417 94 I C 175 1926 A I R (A) 447, *Amolak Chand v Mansuk Rai Manjanlal* 3 Pat 857, *Behari Lal v Sat Narain*, 3 Lahore 329 (F B), *Jagabhai Lallubhai v Vijbhukandas*, 11 Bom 37, *In re Sellamuthu Sertai*, 47 Mad 87 (F B) 1924 M W N 94, *Soonkaranayana Pillai v Rajamani*, 47 Mad 462 46 M L J 314, *Narayan Ganesh v Sagunabai Gangadhar*, 26 Bom L R 1200, *Kuppusami v Manimuthu*, 82 Ind Cys 438 47 M L J 487 1924 M W N 807

On the other hand it was sometimes held that joint family property is not property within the meaning of section 2 (d) of the Provincial Insolvency Act which vests in the Court or in a receiver under section 28 on the making of an order of adjudication, *Sant*

Prasad Singh v Sheodut Singh 2 Pat 724 *Sahaj Narayan Sahi v Wajid Hussan* 49 IC 848 The difficulty has been solved by the pronouncement of the Judicial Committee in *Sat Narain v Behari Lal* 52 IA 22 6 Lahore 1 29 CWN 797 47 MLJ 857 1925 AIR (PC) 18 (in appeal from *Behari Lal v Sat Narain* 3 Lahore 329) in the following terms

vent passed against a Mitak

undivided son's interest in

Receiver or Assignee The property of an insolvent which under the Act vests in the receiver must mean only the property which is divisible amongst his creditors It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interest in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property But the definition of property in the Act seems to contemplate an absolute and unconditional power of disposal Property is defined as including any property over which the insolvent has a disposing power which he may exercise for his own benefit and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power It is not the intention of the Act that on the insolvency of a father the joint property of his family should at once vest in the assignee It may be that under the provisions of the Act that property may in a proper case be made available for payment of the father's just debts but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee This case although decided under the Presidency Towns Insolvency Act the remarks therein made will apply to cases under the Provincial Insolvency Act *Venkataraman v Kesavan Pattar* 114 IC 425 1929 AIR (M) 773 *Trayan Keshar v Basania Kumar* 6 O WN 977 1930 AIR (Oudh) 26

The above decision in *Sat Narain v Behari Lal* has been followed in subsequent decision which have held that the insolvent's property includes also in the case of a Hindu father his disposing power over his son's interest The power of a Hindu father to dispose of family property for his debts must be deemed to be property within the meaning of the Act and as such it vests in the Court or Receiver On the insolvency of the father of a joint Hindu family it is only his own share of the family property that vests in the Official Receiver The shares of his sons do not vest in the Official Receiver With respect to those shares what vests in the Official Receiver is only the father's power of disposal *Sethurama Chettur v Official Receiver Tanjore* 49 Mad 849 (FB) 51 MLJ 269 97 IC 825 1926 AIR (Mad) 994,

Chairman District Board Monghyr v Sheo Dutt Singh 5 Pat 476
 98 IC 364 1926 AIR (Pat) 438 Allalabad Bank Ltd v
 Bhaguan Johari 48 All 343 24 ALJ 323 1926 AIR (All)
 262 Mr Piani Bai v Firm Tulsidas Sarochan Mal 100 IC 110
 1927 AIR (Lah) 152 Subramaniam Iyer v Krishna Iyer 102 IC
 266 1927 AIR (Mad) 266 () 27
 MLW 430 1928 AIR v
 Chiman Lal 1930 (Lah) IR
 (N) 215 Ar and Prakash 3)
 1931 AIR (All) 162 Ram Ghulam v Kailash Narain 32 All
 493 1931 AIR (All) 59 Official Receiver Coimbatore v
 Arunachalam Chettar 1931 AIR (Mad) 118 Gori Shankar v
 Official Receiver Delhi 13 Lah 464 33 Punj LR 314 1932 AIR
 (Lah) 151 Sita Ram v Receiver of the Estate of Ram Prasad 1932
 AIR (All) 353 1932 ALJ 285 Haridas Himatlal v Lallubhai
 Mulchand 55 Bom 110 32 Bom LR 1362 1931 AIR (Bom)
 50 Bankey Lal v Durga Prasad 53 All 868 FB 1931 AIR (All)
 312 Shankaranarama v The Official Receiver South Kanara 1932
 MWN 1189 Mahabir Prasad v Shivanandan Sahay 15 Pat LT
 503 Sidheshwar Nath v Deokali Dm 10 O W N 1233 FB 1934
 AIR (O) 1 The point again came up for consideration of
 their Lordships of the Judicial Committee in Sat Narain v Sri Kishan
 Das 63 IA 384 17 L 644 17 Pat LT 717 64 CLJ 80 38
 PLR 976 40 C W N 1382 38 Bom LR 1129 44 LW 417
 71 MLJ 812 1936 O W N 681 164 IC 6 1936 AIR (PC)
 277 and their Lordships held that on the insolvency of the father
 managing a Mitakshara joint family the interest of the other
 members in the joint family property does not vest in the Official
 Assignee but the capacity to exercise the insolvent's power to
 sell the joint family properties for his antecedent debts so far as
 not incurred for immoral or illegal purposes vest in the Official
 Assignee under sec 52 (2) (b) of the Presidency Towns Insolvency
 Act (corresponding to sec 28 (2) of the Provincial Insolvency Act).
 Their Lordships have also laid down that such power must be
 exercised subject to its own limitations and sec 17 and 49 (5)
 (corresponding to secs 28 (2) and 61 of the Provincial Insolvency Act)
 laying down the principle of equal treatment of all creditors for whom
 no priority is expressly provided for do not apply. And it has also
 been laid down that the father's power of sale for his debts exists
 only so long as the joint family property is undivided and the
 capacity of the Official Assignee must be similarly limited. But
 when a partition suit has been instituted after the insolvency of
 the father division of the joint family property can only be made
 after providing for satisfaction of the insolvent's antecedent debts
 in so far as the sons fail to show that they are immoral or illegal.
 Antecedent debts of the father so far as they are not illegal or
 immoral are a liability of the joint estate they do not give rise
 a pious obligation on the sons not to object to the alienation of it

joint estate by the father for such debts. In view of the aforesaid decision of the Privy Council, the decision in *Nilkantha Narayan Tewari v Debendra Nath Roy*, 15P 363 15 PL T 39 161 IC 167 1936 AIR (P) 115 which held that the power of a Hindu father to sell the joint family property, including the interest of his son, is not "property" of the insolvent which by s 28 of the Act vests in the Receiver and which by s 59 he is empowered to sell for distributing among the creditors, has been over-ruled by the Full Bench case of *Bishuanath Sao v The Official Receiver* 1 L.R. 16 P. 60 which held that when a Hindu father is adjudicated, the interest of his son or sons in the family property does not vest in the Court or the Receiver, but the Court or the Receiver has power to sell the joint family property, including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes.

Hindu joint family property in case of attachment before adjudication. Where property of a joint family consisting of a father and three sons was attached before judgment in a suit against the father, which was later decreed and the father was adjudicated insolvent after the suit and the properties were brought to sale in execution of the decree, it was held that the Official Receiver had no title to three fourths of the sale proceeds of the shares of the sons and that the same must be paid in satisfaction of the decree. The petition for adjudication being presented after the date of attachment, the father's power of disposal of the sons' shares has been destroyed by the existing attachment of those shares and the Official Receiver cannot get any power to deal with the sons' shares by reason of the order of adjudication. *The Official Receiver, Coimbatore v M R M K A R R M Arunachalam Chettiar*, 1934 MWN 113 39 LW 338 1934 AIR (M) 217. The question *kesuar Banerjee*, 15 1937 AIR of a managing jointly property for joint family purposes vests, on the adjudication of such member

Receiver on his becoming an insolvent ceases once the son's interest in the family property is attached in execution of a decree against him. Once the right of the father is gone, the power of the law to transfer that right to the Official Receiver in insolvency is gone too, because there is nothing to transfer. There is in this respect no difference in principle between a case where the son's interest is attached because he is held to be liable under the pious obligation rule and a case where the son's interest is made liable

because he is himself the principal debtor, *The Official Receiver, East Godavari, Rajmundry v The Imperial Bank of India*, 11 R 59 M 296. The reason for the rule is that when the right title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation has been prohibited by an order of the Court under sec 276 of the Code of Civil Procedure (1882) the father is deprived of the power of alienation of that interest in satisfaction of his own debts. *Subraya v Nagappa*, 11 R 33 Bom 264. If the son's share was attached by a creditor, the Official Receiver has no power to sell the share after attachment but the attaching creditor is entitled to proceed with the execution by selling the son's share. *Gopala Krishnayya v Gopalan*, 11 R 51 M 342.

Hindu joint family property in case of adjudication of a co parcener—In the case of the insolvency of one of the co parceners of a joint Hindu family all that can be sold is the undivided share of the insolvent in the joint family property. It is for the purchaser to claim partition and the question what was the share of the insolvent can only be decided in the partition proceedings. *Nathu Mal v Lala Dina Nath*, 34 P L R 1032 146 I C 840 1933 A I R (L) 651. It is impossible for the Official Receiver to claim any more rights than the father possessed himself. The father's power of disposal would cease to exist as soon as the son's property comes on his insolvency to vest in the Official Receiver. *Thumbalam Gooty Thimmiah v The Official Receiver, Bellary*, (1939) 1 M L J 158.

(15) *After acquired property*—Section 28 (4) lays down that 'all property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver'. The word property does not exclude personal earning over and above what is necessary for the debtor's support and the Court has jurisdiction to pass orders as to his earnings after adjudication but before his discharge, *Jinnadas v Vinayak* 7 N L R 19 10 Ind Cas 698. All properties such as may be acquired by, or have devolved upon the insolvent after the passing of an order of adjudication and before his discharge, forthwith vest in the Court or Receiver, and become divisible amongst the creditors, *Muhammad Fatima v Muhammad Mashuq Ali*, 44 All 617 20 A L J 569. For fuller treatment vide notes under sec 28 (4), *infra*.

(16) *Leasehold interest*—Under sec 111 (g) of the T P Act, in order to have a forfeiture of a lease there should be an express condition to that effect. A lease cannot, therefore come to an end in the absence of a condition to that effect in the lease deed, merely because the lease money is not paid by the lessee or on his insolvency, by the Insolvency Court. Under section 28 (2) the whole of the insolvent's property vests in the Insolvency Court on an order of adjudication being passed. As regards

properties such as leases, the Official Assignee has the right to elect whether he will accept or repudiate the leasehold property belonging to the insolvent and unless he accepts it, such property is not considered to vest in him. The unaccepted property continues to vest in the insolvent, for there is nothing in the Insolvency Act to incapacitate an insolvent from holding separate property provided the persons dealing with him are aware of his insolvency, *Mahadeo v Jainaram* 62 Ind Cas 850

(17) **Statutory Tenancy**—A statutory tenancy is property. The plaintiffs having let to the defendant a dwelling house, the defendant retained possession of it after the expiration of the term. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiff against the defendant bankrupt for possession of the house and mesne profits it was held, that the statutory tenancy to which the defendant became entitled was 'property' within the meaning of section 167 of the Bankruptcy Act, 1914, and passed under sec 53 to his trustee in Bankruptcy, that on disclaimer thereof by the trustee that interest in the property ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment, *Parkinson & Ors v Noel*, (1923) 1 KBD 117. A monthly tenant of certain premises remained in possession thereof after being adjudicated insolvent. The Official Assignee having disclaimed interest, the landlord applied to the Insolvency Court by motion, for an order for possession. It was held following *Parkinson & Ors v Noel*, that the statutory tenancy was the property of the insolvent and the disclaimer of the Official Assignee having put an end to the interest of the insolvent therein the property reverted to the landlord, and the latter was entitled to an order for possession, *In re Abu Buker Haji Abdulla*, 48 Bom 580 26 Bom LR 628. As regards arrears of rent due to the landlord for any period before the bankruptcy of the tenant, it has been provided by sec 35 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, that "the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of bankruptcy, it shall be available only for 6 months' rent, accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the period when the distress was levied, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available." As regards any goods of a debtor that have been taken in execution,

the limit on the amount of rent which the party at whose suit the execution is taken out or which the landlord is entitled to be paid, *vide* sec 35 (2), (3), Bankruptcy Act, 1914, as amended by B (A) Act, 1926. As between the lessor and the lessee the effect of a disclaimer of a lease hold by the Official Assignee under sec 62 of the Presidency Towns Insolvency Act (no corresponding sec in the Pro Ins Act) is that the lease is determined as from the date of such disclaimer and the reversion becomes accelerated, there is no need for a vesting order under sec 66 in favour of the lessor though he may require delivery of possession and prove against the insolvent's estate for such damages if any, as he may sustain by the disclaimer. A mortgage or a sub lease by the lessee would not affect the consequences of a disclaimer as between the lessor and the lessee *inter se* Satya Priya Ghoshal v Barid Baran Mukerjee, 1 L R 63 C 1123 40 C W N 846

(18) *Permanent tenures* In the Agra Tenancy Act III of 1901 section 193 in express terms made Chapter XX of the Civil Procedure Code 1882 (the chapter on insolvency) inapplicable to all suits and proceedings under the Tenancy Act. It was accordingly held by a Full Bench of the Allahabad High Court in *Kalka Das v Gajju Singh* 43 All 510 (FB) 19 A L J 439 62 Ind Cas 897 that the provisions of insolvency law did not apply to revenue cases. The Provincial Insolvency Acts III of 1907 and V of 1920 by virtue of the exception contained in section 193 of the Agra Tenancy Act, 1901, also remained inapplicable to cases in the Revenue Courts. This was the state of the law upto 1926 when the new Tenancy Act III of 1926 came into force and in the new Act that portion of section 193 of the old Act of 1901 which had the effect of making the insolvency law inapplicable to cases under the Tenancy Act has been deleted from the corresponding section 264 of the new Act of 1926 and the bar has been automatically removed. The Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the new Tenancy Act III of 1926. So where in execution of a rent decree the zemindary property belonging to a judgment debtor was attached and sold in spite of his adjudication before such attachment, it was held that the auction sale by the Revenue Court outside the insolvency proceedings did not pass any title to the auction purchaser and the sale proceedings was null and void as against the Official Receiver. *The Official Receiver of Moradabad v Murtaza Ali* 1932 A L J 402. Under sec 22 of the Agra Tenancy Act, III of 1926, the interest of the permanent tenure holder and of a fixed rate tenant being both heritable and transferable, the right of a permanent tenure holder and of a fixed rate tenant is "property" within sec 2 (d) of the Provincial Insolvency Act, and vests in the Receiver.

(19) *Occupancy right* The decision in the Full Bench case of

properties such as leases the Official Assignee has the right to elect whether he will accept or repudiate the leasehold property belonging to the insolvent and unless he accepts it, such property is not considered to vest in him. The unaccepted property continues to vest in the insolvent for there is nothing in the Insolvency Act to incapacitate an insolvent from holding separate property provided the persons dealing with him are aware of his insolvency, *Mahadeo v. Jainaram* 62 Ind Cas 850

(17) *Statutory Tenancy*—A statutory tenancy is property. The plaintiffs having let to the defendant a dwelling house, the defendant retained possession of it after the expiration of the term. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiff against the defendant bankrupt for possession of the house and mesne profits it was held that the statutory tenancy to which the defendant became entitled was 'property' within the meaning of section 167 of the Bankruptcy Act, 1914, and passed under sec 53 to his trustee in Bankruptcy, that on disclaimer thereof by the trustee that interest in the property ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment, *Parkinson & Ors v Noel*, (1923) 1 KBD 117. A monthly tenant of certain premises remained in possession thereof after being adjudicated insolvent. The Official Assignee having disclaimed interest, the landlord applied to the Insolvency Court by motion, for an order for possession. It was held following *Parkinson & Ors v Noel*, that the statutory tenancy was the property of the insolvent and the disclaimer of the Official Assignee having put an end to the interest of the insolvent therein the property reverted to the landlord and the latter was entitled to an order for possession, *In re Abu Buker Haji Abdulla*, 48 Bom 580 26 Bom LR 628. As regards arrears of rent due to the landlord for any period before the bankruptcy of the tenant, it has been provided by sec 35 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, that "the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of bankruptcy, it shall be available only for 6 months' rent, accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the period when the distress was levied but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available." As regards any goods of a debtor that have been taken in execution

the limit on the amount of rent which the party at whose suit the execution is taken out or which the landlord is entitled to be paid vide sec 35 (2) (3) Bankruptcy Act 1914 as amended by B (A) Act 1926. As between the lessor and the lessee the effect of a disclaimer of a lease hold by the Official Assignee under sec 62 of the Presidency Towns Insolvency Act (no corresponding sec in the Pro Ins Act) is that the lease is determined as from the date of such disclaimer and the reversion becomes accelerated. There is no need for a vesting order under sec 66 in favour of the lessor though he may require delivery of possession and prove against the insolvent's estate for such damages if any as he may sustain by the disclaimer. A mortgage or a sub-lease by the lessee would not affect the consequences of a disclaimer as between the lessor and the lessee *inter se* *Sarya Priya Ghoshal v Barid Baran Mukerjee* 1 L R 63 C 1123 40 C W N 846.

(18) *Permanent tenures* In the Agra Tenancy Act 11 of 1901 section 193 in express terms made Chapter XX of the Civil Procedure Code 1882 (the chapter on insolvency) inapplicable to all suits and proceedings under the Tenancy Act. It was accordingly held by a Full Bench of the Allahabad High Court in *Kalka Das v Gajju Singh* 43 All 510 (F B) 19 A L J 439 62 Ind Cas 897 that the provisions of insolvency law did not apply to revenue cases. The Provincial Insolvency Acts III of 1907 and V of 1920 by virtue of the exception contained in section 193 of the Agra Tenancy Act 1901 also remained inapplicable to cases in the Revenue Courts. This was the state of the law upto 1926 when the new Tenancy Act III of 1926 came into force and in the new Act that portion of section 193 of the old Act of 1901 which had the effect of making the insolvency law inapplicable to cases under the Tenancy Act has been deleted from the corresponding section 264 of the new Act of 1926 and the bar has been automatically removed. The Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the new Tenancy Act III of 1926. So where in execution of a rent decree the zemindary property belonging to a judgment debtor was attached and sold in spite of his adjudication before such attachment it was held that the auction sale by the Revenue Court outside the insolvency proceedings did not pass any title to the auction purchaser and the sale proceedings was null and void as against the Official Receiver. *The Official Receiver of Moradabad v Murtaza Ali* 1932 A L J 402. Under sec 22 of the Agra Tenancy Act III of 1926 the interest of the permanent tenant holder of a fixed rate tenant being both heritable and transferable the right of a permanent tenure holder and of a fixed rate tenant vests in the Receiver.

(19) *Occupancy right* The decision in the Full Bench case is

Chandra Benode Kundu v Sheikh Ali Bux Dewan 24 C W N 818 (F B) that the landlord of a raiyat is competent to sell in execution of a money decree against the raiyat his occupancy holding whether the holding be or be not transferable by custom or local usage, has put the matter beyond all dispute that occupancy right is not mere right but property within the meaning of section 2 (d) of the Provincial Insolvency Act. Whatever doubts there might have been the point has now been set at rest by the enactment of section 26B in the Bengal Tenancy Act (IV of 1928) which provides that "the holding of an occupancy raiyat or a share or a portion thereof together with a right of occupancy therein, shall, subject to the provisions of this Act, be capable of being transferred in the same manner and to the same extent as other immoveable property. In Madras under sec 10 of the Madras Estates Land Act (Madras Act I of 1908) all rights of occupancy being heritable and transferable by sale, gift or otherwise, the occupancy right is property within the meaning of sec 2 (d) of the Provincial Insolvency Act and vests in the receiver. As regards the vesting of occupancy rights and agricultural holding in other Provinces, vide Notes under sec 28 (5) *infra*

(20) *Actionable claim* In section 3 of the Transfer of Property Act "actionable claim" has been defined as a claim to any debt other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing conditional or contingent. In *Muchiram v Ishan Chunder*, 21 Cal 568 (F B) it was held that all actionable claims are property. A right to receive a debt is property and vests in the Receiver. *Onkarsa v Baidichand* 73 Ind Cas 1037 1923 A I R (Nag) 293. A held a power of attorney from B to execute a decree for a monthly family allowance obtained by B against C. B subsequently became insolvent. C made certain payments to B subsequent to his adjudication, but they were not certified to the Court executing the decree according to Or 21, r 2 CPC. On execution being taken up by the receiver it was contended by C that he ought to get credit for payments made subsequent to B's insolvency. It was held that the decree having become vested in the receiver as from the date of adjudication none of the payments made subsequent could be recognised as against the receiver if for no other reason than that none of them were certified to the Court under Or 21, r 2, *Nilakanta Subudhi v Sri Sri Ramachandra D o*, 35 L W 161 1932 A I R (Mad) 250.

(21) *Right of action* It was held in *Khelafat Hossain v Ajmal Hossain*, 54 Ind Cis 699, that a person who has been declared an insolvent cannot, while his estate is in the hands of the Receiver,

S 28(2)] PROPERTY THAT VESTS ON ADJUDICATION

maintain a suit in his own name even though the Receiver refused to bring such a suit. The right to set aside a money passed against a person on the ground of fraud passes on insolvency to the Official Assignee. *Rustomji Ardeshir Coorji Byramji Bomanji Talati* 36 Bom LR 79. A person who is discharged insolvent is not competent to file a suit between the date of his petition for discharge and the date of the order of discharge. Where subsequent to the filing of such petition the plaintiff obtains the permission of the insolvency Court, the petition is considered to be properly presented only on the date of the permission and if the suit were barred on that date, the plaintiff's suit would be dismissed. *Venkatasubba Rao v Venkateswarulu Konda Pillai v Didant Ramchandra* 13 LW 616 1921 M 535 62 Ind Cas 854. It has been held that though the words which may be read as making insolvency equivalent to death of the insolvent and taking away his common law right of action still for protecting the rights of creditors in an insolvent property the insolvency of a judgment debtor does not render him incompetent for him to continue the proceedings by suit or by appeal. It does not follow that the insolvent has no *locus* in filing an appeal against a decree or order passed against him. His right of action in respect of a tort or a breach of contract rests in injuries wholly to the person or feelings of the bankrupt and does not pass to the trustee for his creditors but remains in the bankrupt. But a right of action in respect of a tort or breach of contract resulting in injuries wholly to the estate of the bankrupt passes to the trustee for his creditors. See also *Hashim v Koya Moideen Kaka* 145 IC 835 1933 AIR (R) 268. The right to sue is restricted to damages arising from suffering or injury to the person or reputation and is distinguished from injuries to his estate and is vested in the Official Assignee on the adjudication of insolvency under the Presidency Towns and the Provincial Insolvency Acts. *Official Assignee Bombay v Firm of Chandulal & Co* 657 Subbanyar & Bros v J K Munuswami AIR 1932 98 IC 516. An insolvent is entitled to sue for damages whether published before or after his adjudication. Damages as he may recover will not belong to him. *Valuram v The Sunday Times Ltd* 1932 AIR 100. Pending an appeal against a decree for damages if the appellant becomes insolvent the Official Assignee has the right to continue the appeal. Where however a deposit made with the defendant for return of deposit made with the defendant is made to be appropriated in a certain manner by the court, the deposit is not to be appropriated in a certain manner by the court. If the deposit happened in respect of a contract for the return of deposit in the circumstances was the insolvent's property vested in the Receiver under sec 20 and the insolvent is entitled to sue against a decree dismissing the suit to recover the deposit.

J Subbarayar v Muniswami Iyer 98 IC 516 1926 MWN 797
51 MLJ 613

(22) *Claim for damages* The word 'property' under the English Insolvency law includes claims in the nature of damages which have accrued due prior to the date of insolvency, except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation *Brake v Beekham* 60 RR 691 *Rogers v Spencer* 67 RR 736 In an action against a bank by a trading customer who had become bankrupt for damages for breach of contract the jury found that the bank which had agreed with the customer to supervise the financial side of his business during his absence on military service and to take all reasonable steps to maintain his credit and reputation had by its negligence in the discharge of his duties under this agreement caused the bankruptcy of the customer It was held that the right to claim damages for the injury to the bankrupt's credit and reputation did not pass to the trustee in bankruptcy but remained in the bankrupt, *Wilson v United Counties Bank Ltd*, LR (1920) App Cas 102 Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* or by a testamentary instrument can be affected by him with a trust by an instrument *inter vivos* or by a testamentary instrument provided the objects of the trust are lawful—*Halsbury* Vol 28 pages 44 & 45 and sec 4 *Indian Trusts Act* II of 1882 *Raymond v Feich*, (1835) 41 RR 797 Sec 6 (e) of the Transfer of Property Act does not prevent assignment of the whole estate of the assignor with an incidental remedy for its recovery but prohibits the transfer of a bare right to sue *Jeewan Ram v Rattan Chand* 26 CWN 285 A claim for breach of contract which has become due to the insolvent prior to his insolvency and has not been paid to him vests in the Official Receiver *Motharam Dowlatram v Pahlajrai Gopal'das* 80 Ind Cas 141 (1925) AIR (S) 159 A decree for damages and costs awarded to an insolvent during the pendency of the insolvency proceedings in respect of a suit for a personal tort brought by the insolvent is property of the insolvent which vests in the Official Assignee, *S P S Mani Iyer v D K Syed Ebrahim* 12 Rang 428

(23) *Equity of redemption* In respect of properties belonging to an insolvent which are subject to a mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of vesting order is the insolvent's equity of redemption which at the time constitutes 'the whole property of the insolvent,' *Mokshagunam v S V Ramakrishna* 70 Ind Cas 357 Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right in redeem that property can only be his assets available for distribution *Gowinda v Abdul Kadir*, 1923 AIR (Nag) 150 Where a mortgagor has been adjudicated an

insolvent after the preliminary decree but before the final decree, and the Official Receiver has not been impleaded as a party to final decree on mortgage, the right of the Official Receiver to redeem the property is not extinguished by such omission, but it is quite clear that the judgment-debtor cannot get the auction sale set aside on that ground, *Inamullah Khan v. Lala Sambhu Dayal*, 1931 AIR (All) 159

(24) *Vested and contingent interest* Vested and contingent interests are defined respectively in sections 19 and 21 of the Transfer of Property Act. A vested interest does not depend on the fulfilment of a condition and takes effect from the date of the transfer. A contingent interest depends solely upon the fulfilment of a condition, so that in case of non fulfilment of the condition the interest may fall through. In a vested interest there is a present immediate right even when its enjoyment is postponed. In contingent interest there is no present right, there is promise for giving one and is altogether dependent upon the fulfilment of the condition. A vested interest is heritable and transferable but a contingent interest is inalienable and intransmissible as it is a mere chance. Both under section 19 of the T P Act and sec 119 of the Indian Succession Act (39 of 1925) where by the terms of a transfer or bequest the transferee or legatee is not entitled to immediate

Dimodanath, v. Mita 123 vested interest of the insolvent is therefore "property" over which he has a disposing power. "But if upon a construction of a will, it appears that the testator meant the time of payment to be the period at which a legacy should vest, although it be given in terms of immediate bequest, with a direction for payment to the legatee at twenty one, or other definite period, and so far within the rule of vesting, which has been considered, yet the case will form an exception to such rule, and the legatee living to attain the age of majority, or other period of payment is of the essence of the bequest, for, if he previously die, he will have taken no interest in the legacy to transmit to his personal representatives"—*Roper on Legacy*, Vol 1, p 482 (3rd Ed). If the vested interest is of the former class it vests in the receiver as being transferable. But if it is of the latter class, it does not vest as the right to transfer does not accrue until the vesting takes place. The interest of the Hindu sons in property obtained by inheritance on the death of their father is not divested on such property being allotted to their mother on partition. Hence upon the adjudication of the son as insolvent, his interest passes to the Official Assignee although the mothers may be alive at the date of

adjudication *Hira Lal Mondal v Sanker Lal Mondal*, 1 L R (1938) 2 C 250

(25) *Residuary estate* A testator bequeathed a share in his residuary estate to his son. The son died in the testator's life time leaving issue who survived the testator but having been adjudicated bankrupt without obtaining the order of discharge, it was held, that the trustee in bankruptcy was entitled to the son's share in the residuary estate *Smith v Pearson* (1920) L R 1 Ch 247

Property that does not vest.

(1) *Spes successionis* A bare possibility, such as the chance of an heir apparent succeeding to an estate or the chance of a person obtaining a legacy on the death of a relative does not pass to the Official Assignee or Receiver *Curleion v Lighton*, (1805) 3 Mor 667 Under section 6 (a) of the Transfer of Property Act such possibilities cannot be transferred. Hence the insolvent not having a disposing power over them they cannot be his property so as to vest in the receiver. The contingent interest of a reversioner to succeed after the death of a Hindu widow does not vest in the Official Assignee. If at the date of the insolvency the debtor had only a *spes successionis* that would not vest in the Official Assignee, and the purchaser of such interest from the Official Assignee acquires no title to it," *Anaji v Ratnoji*, 21 Bom 319. But if a relative dies during the continuance of the insolvency leaving the legacy to the insolvent the right to it will vest in the receiver, *Johnson v Smiley*, (1853) 17 Beav 223 (230)

(2) *Trust property* The amendment in the definition of 'property' in sec 2 (d) makes it clear that trust property is not to be dealt with under the Act as property of the insolvent—*Notes on Clauses*. If the bankrupt has no beneficial interest in the property which he holds and no rights over it exercisable on his own behalf it is obvious that it is not really his property at all and no possible benefit could accrue to the creditors from its vesting in the trustee. The position is very different where the bankrupt has any beneficial interest in the trust property, e.g., where he holds leaseholds on trusts and is entitled to be indemnified out of them against the covenants in the lease, they will pass to the trustee in bankruptcy on the declared trusts but with the benefit of the indemnity, *St Thomas's v Richardson* (1910) 1 KB 271, *Richardson, in re St Thomas's Hospital*, Ex parte, (1911) 2 KB 705. Trust property cannot be dealt with under the Act as the property of the insolvent inasmuch as he has not the disposing power over it which he may exercise for his own welfare, *In the matter of Vardalaga Charn* 2 Mad 15 *Smith v Coffin* (1795) 2 Hy Bl 444, *Scott v Surman*, 1743 Wiles 400. Nor does it include sovereigns and gold entrusted to a jeweller to be made into ornaments, *Raja Muthasu v Official Assignee, Madras*, 28 M L J

403 29 Ind Cas 37 When once a deed of trust is executed and property conveyed to the trustees for the benefit of the creditors of the author of the trust and for other purposes recited in the deed the author of the trust ceases to have any interest in the property covered by the deed of trust, and on his adjudication as an insolvent, the trust properties do not vest in the receiver in insolvency and cannot be administered by him on behalf of the general body of creditors nor has the receiver in insolvency any right to administer the assets in accordance with the terms of the trust. The persons competent to deal with the trust properties or the rents and profits thereof are trustees or such persons as may be appointed by Court in a suit for administration of the trust. *Bank of Upper India Ltd v Rani Kaniz Abid* 1935 A L J 785 1935 A W R 945 61 C L J 274 40 C W N 33 37 Bom L R 874 68 M L J 744 155 I C 426 1935 A I R (P C) 104 Certain persons were appointed as the selling agents of a Sugar Company and by agreement they made a security deposit of Rs 50 000/ with the Company. It was agreed that the money was to carry interest at the rate of 5% per annum, it was to be returned on the expiry of the period of appointment. There was no agreement that the money was to be kept apart or treated as a separate fund by the Company, on the other hand it was paid into the account of the Company with the company's Bank and was used as the money of the Company for carrying on the business. It was also agreed 'that the amount of security money will be a second charge on the machinery and the goods of the Company. It was held no fiduciary relationship was created between the parties and the money was not trust money in the hands of the Company the only relationship between the parties with respect to this money was that of creditor and debtor and so when the Company went into liquidation these persons ranked only as ordinary creditors of the Company and were not entitled to any preferential or special treatment in respect of the money. The charge created was clearly a floating charge and as such required registration according to sec 109 (e) of the Companies Act 1913 for its validity. *Maheshwari Brothers v Liquidators Indra Sugar Works*, 1 L R (1938) All 896

The equitable principle that a *cestui que trust* can follow the property in the hands of a trustee when the trustee mingles the trust property with his own, applies to the case when the trustee starts a business with his own money and the trust property. Therefore when one of the trustees of a school fund who was entrusted with the money of the fund paid the same into his own business without the knowledge of the co-trustees and was adjudged insolvent and his properties vested in the Official Assignee, it was held that the school fund was entitled to have preference for the full amount of its money over the ordinary creditors, *Official Assignee, Madras v Minakshi Vidyasalai Sang*

52 Mad 919 57 MLJ 99 34 CWN 40 (Notes) Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm Upon the insolvency of the trustees the assets no doubt passed to the Official Assignee but they passed subject to the charge, *The Official Assignee of Madras v Krishnaji Bhat* 60 LA 203 56 Mad 570 (PC) 37 CWN 713 1933 MWN 575 57 CLJ 433 35 Bom LR 756 1933 ALJ 637 37 LW 780 65 MLJ 143 1C 162 1933 AIR (PC) 148 One G sold his property to S and deposited the price with S for the payment of certain specified debts including Rs 800 due to R S had paid off all the debts except one due to R when G was adjudged insolvent The sum of Rs 800 was claimed by the Official Receiver but R contended that a trust was created in his favour and that he was entitled to the sum The deed by which the deposit was made recited that G will have all his creditors paid off by the said vendee and get him receipts from them It was held that the money was at the disposal of G and if he had demanded it after the execution of the document S could not have resisted the demand on the ground that he alone was liable to pay the money to the creditors and that no trust was created in favour of R, *Gurdit Singh v Chini Lal*, 1932 AIR (Lah) 66

In *Official Assignee of Bombay v Moulvi Abdul* 58 Bom 67, the respondent paid a sum of Rs 1,000 to a firm by way of deposit pending the execution of an agreement for sub-agency The agreement was not executed The respondent filed a suit against the firm for return of the deposit and interest thereon During the pendency of the suit the firm was adjudicated insolvent A decree for the amount of the deposit was passed against the firm The respondent claimed to recover the whole amount of the deposit from the assets of the firm in the hands of the Official Assignee It was held that inasmuch as the amount was paid by the respondent as a deposit before the agreement was executed, the moneys were paid to the insolvents for a specific purpose, that is to say, the insolvents held the moneys in trust if the agreement was not executed, to return them to the respondent, and if the agreement was executed to hold them on the terms which might be arranged under the agreement, and that at the time of insolvency the property of the firm vested in the Official Assignee subject to a charge in favour of the respondent for Rs 1 000 and that the respondent having taken a personal judgment for the amount of the deposit without reserving his right to claim the moneys on the ground of the same being held in trust, he had lost his right to enforce the charge on account of the provisions in Or II, r 2, CPC and the

respondent had merely the right to prove in the insolvency for the amount of the decree

(3) *Debutter* Thakurdwara *prima facie* must be held to be endowed property and the insolvent could not have shown it as property belonging to him in the list of his assets *Rasul Bakhsh v Gulab Rai*, 113 I C 20, *Hinga Lal v Jauahir Prasad*, 114 I C 126. A testator by his will directed that his son shall construct a choultry on a site belonging to him and instal therein the picture of his family deity, that the revenue authorities shall transfer the patta for a specified portion of his properties in the name of the deity, that his son and his heirs from generation to generation according to the rule of primogeniture shall, without alienating these properties, enjoy them and conduct the charities which were specified in the schedule and utilise the balance of the income for family purposes" and that his son shall inherit all his other properties. It appeared that the charities which were detailed in the schedule would not consume any considerable portion of the income even if they were conducted on a lavish scale and that a very large amount of the income would be left intact for enjoyment by his family. It was not satisfactorily shown what were the other properties that were given to his son by the last clause of the will. After the death of the testator his son became an insolvent. It was held that the properties covered by the will were not absolutely dedicated to the trust but were only charged with carrying out the trust, as the dominating purpose and intention of the testator in executing the will was to provide for the members of his family and the maintenance and conduct of the charity was only of subsidiary importance, and therefore, the properties vested in the Official Receiver for the benefit of the creditors of the insolvent, *Ramappa Naidu v Lakshmanan Chettiar*, 54 M L J 272 (1928) A I R (M) 190. And when a firm of bankers and money lenders enters in its banks a credit to a temple by way of charity or by way of deposit—the practice being to make such a book entry in respect of some money belonging to the firm but continue to hold and use it along with other monies, only making payments to the temple at the firm's own discretion when occasion may arise—the firm does not create a trust fund in favour of the temple or make itself a trustee nor does it create an endowment for the deity. Accordingly, their Lordships of the Judicial Committee held in *Sooniram Ramniranjandass v Alagu Nachiyar Koil*, 42 C W N 1125 (P C) that assuming that such entries create a legal liability which is doubtful the temple cannot, on the firm's insolvency, claim to get the amount of the entries in full on the footing that the firm was a trustee or the custodian.

for carrying on a butcher's business applied to the Municipality a few days before his adjudication for transfer of the licenses to one of his creditors and the Municipality granted the application the 'vency as undue preference by
Muzhu Mohammado v Rama
 1 C 858 1934 AIR (PC) 1

(5) Property in the hands of a bona fide purchaser without notice Sec 28 sub sec (2) is controlled by sec 51 sub-sec (3) Consequently a bona fide purchaser in good faith of an insolvent's property at an execution sale held after the order of adjudication requires a good title against the Receiver in insolvency even though such purchaser may be the decree holder himself Where the decree holder was not aware of the insolvency proceedings against the judgment debtor an execution sale of the latter's properties after the order of adjudication cannot be held to have been a nullity by reason of non service of notice under Or 21 r 22 CPC
Dinesh Chandra Roy Choudhury v Munshi Jahanali Biswas 39 CWN 424

As regards properties that are exempt from vesting in the Receiver under CPC or any other enactment vide Notes under sec 28 (5) in ra

Shall vest

Under sec 28 vesting only takes place upon adjudication and under sec 29 it is not till then that a Court in which proceedings are pending against a debtor is bound to stay them *Subramania Aiyar v Official Receiver Tanjore* 23 MLW 300 (1926) AIR (M) 432 Sec 18 (2) now sec 56 (1) of the Provincial Insolvency Act contemplates on every adjudication of insolvency an order by the Court appointing receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under sec 19 (2) now sec 57 Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title
Muthuswami Swamiar v Samoo Kandiar 43 Mad 869 39 MLJ 438

The effect of sub sec (2) and (6) of sec 16 [corresponding to sub-sections (2) (5) and (7) of the present section] is that while no vesting of the property of the insolvent in the receiver takes place until an order of adjudication is made and it is the order of adjudication which vests the property nevertheless by legal fiction the vesting of the property of the insolvent in the receiver must be deemed to have taken place when once an order of adjudication has been made at the date of the presentation of the petition or in other words the commencement of the insolvency It follows therefore that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication *Sheonath Singh v Munsif Ram* 42 All 433 55 Ind Cas 941 18 ALJ 449 The property of the

insolvent by virtue of the adjudication vests in the receiver on the date of the petition and a charge whether created by a decree or otherwise on the property of the insolvent after the date of petition is not binding on the receiver. It is not competent to an insolvent to refer to arbitration the matter of a particular creditor without obtaining leave of the Court and an award following such a reference without leave of the Court is a nullity, *Tulsi Ram v Mahomed Ali*, 109 IC 773 (1928) AIR (L) 738. Distinguishing *Kalkadas v Gajji Singh*, 43 A 519, it was held in *Gowind Ram v Kunj Behari Lall*, 22 ALJ 217, that a plaintiff though an insolvent, could not in a Revenue Court maintain a suit for profits and could not therefore, transfer his rights to sue for those rights and the transfer, if any made by the insolvent after adjudication does not confer any right title and interest on the assignee.

Vesting in the Court or in a receiver.

In the absence of the receiver the property or the sale proceeds vest in the Court under s 28. The receiver is only an officer of the Court and until he is appointed, the Court is entitled to represent the insolvent's estate for administration. *Rangappa v Ghanshyam*, 1 LR 1937 N 249 170 IC 383 1937 AIR (N) 193. The alternative in the section applicable to vesting in the Court is inserted to provide for the case of a receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting is suspended until the actual appointment of a receiver. The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the receiver's actual appointment, *Kalachand Banerjee v Jagannath Marwan*, 31 CWN 741 (1937) AIR (PC) 108. Where after an order of adjudication a District Court has not made an order vesting the property of the insolvent in the receiver it is not the receiver but the Court in whom such property vests. But when before an order vesting the property in the receiver has been made, the receiver purports to sell the property and the Court subsequently makes an order vesting the property in the receiver, the title of the property becomes complete either on the principle of ratification or under sec 43 of the TP Act, *Narasimulu v Basava Sankaram*, 1925 AIR (M) 249.

Effect of vesting in receiver

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole property of the insolvent is vested in him and he is owner of the property until he is discharged, *Amrita Lal Ghose v Naran Chandra Chakravarti*, 30 CLJ 515. The Official Receiver does not stand exactly in the same position as an ordinary legal representative. He has powers

and duties very different and very much more extensive than ordinary legal representatives. Therefore the presence of the ordinary legal representatives or some of them of the judgment debtor on the record cannot excuse the decree holder from bringing on the Official Receiver as a party after the adjudication of the judgment debtor in insolvency and a sale of the insolvent's property in execution of a decree of which notice has not been given to the Official Receiver is void. It is perfectly obvious why notice is necessary to the Official Receiver in a special sense because as the whole right title and interest of the insolvent's property has after adjudication become vested in the Official Receiver no title by sale or otherwise can be acquired without his concurrence. *Nainer Routhan v Kuppi Kichai Routhen* (1929) M W N 168 120 1 C 889 (1929) A I R (Mad) 609. Under sec 28 (2) an execution of a decree without leave of Court in respect of property which had already vested in the Official Receiver and without impleading him is not valid. By virtue of Or 22 r 10 CPC the Official Receiver of an insolvent's estate becomes the assignee by operation of law of the insolvent's property. *Ponnuthaye Ammal v Official Receiver Coimbatore* 38 L W 762 65 M L J 833 146 1 C 417 1933 A I R (Mad) 858.

Abandonment of property Vested

The view expressed in *Sheonandan v Koshi* 29 All 223 that where a particular item of property belonging to the insolvent e.g. a mortgage security is abandoned by the Official Assignee or Receiver as being of no value at all and the insolvent obtains his discharge the property belongs to the insolvent and the sale thereof by the insolvent after his discharge will pass a good title to the purchaser has been expressly dissented from in *Tarak Dass Dhar v Santosh Kumar Mullick* 1 L R (1937) 2 C 786 41 C W N 875 in which it has been held that when a property of a person vests in the Official Assignee under sec 17 of the Presidency Towns Insolvency Act (corresponding to sec 28 of the Provincial Insolvency Act) by reason of that person being adjudged insolvent but the property is abandoned by the Official Assignee as worthless such property does not revert in the insolvent either before or after his discharge without any action (i.e. deed of transfer) on the part of the Official Assignee.

Insolvent's right to continue proceedings after adjudication

There is a conflict of opinion as to whether an insolvent after his adjudication can continue proceedings without the receiver being substituted in his place. There is a judgment of the Madras High Court in *Sundayee Ammal v Krishnan Chetti* 51 Mad 858 in which it was held that in an appeal against an order in execution of a decree the legal representative of the deceased appellant can be

brought on the record for proceeding with the appeal." A Full Bench of the same High Court has held in *Subbaraya Goundan v. Virappa Chettiar*, 57 Mad. 89 (F.B.): 1933 M.W.N. 920 (F.B.): 38 L.W. 745: 65 M.L.J. 719: 146 I.C. 521: 1933 A.I.R. (Mad.) 851 that "Or. 22, r. 8, C.P.C. is not applicable to proceedings in execution of a decree or order but applies to an insolvent-plaintiff and is confined to suits when the events mentioned therein happen. So an insolvent whose interests are affected by a sale in execution of a decree can not only file an application under Or. 21, r. 90, C.P.C. but can also file an appeal against an order made in execution of a decree. The same High Court has held in *Shankar Prasad v. Shyam Lal*, 1934 Pat. 101: 1934 M.W.N. 100 (F.B.): 66 M.L.J. 101: 147 I.C. 101: 1934 A.I.R. (Pat.) 101 that "Or. 22, rr. 3 and 4, C.P.C. have no applications to an appeal arising out of execution proceedings by virtue of the provisions of r. 12 of that Order, and an appeal therefore by the insolvent from an order passed under Or. 21, r. 90, C.P.C. is competent." A Full Bench of the Patna High Court in *Hakim Syed Muhammad Taki v. Fateh Bahadur Singh*, 9 Pat. 372 has taken the same view.

A contrary view, however, has been entertained by the High Court of Calcutta in *Shashi Bhushan Maity, 60 Calcutta 101* and *Sanomali Dutta v. Lalit Mohan, 60 Calcutta 101*. It is held that "after the properties of a person vest in the Official Receiver by an order of adjudication of the person as an insolvent, the insolvent can no longer maintain an application under sec. 28 for having a sale in execution of a decree declared void as being held after the order of adjudication." The Allahabad High Court in *Chhanga Mal v. Ram Dulary Lal, 55 All. 509* has also held "With great respect to the learned Judges of the Lahore and Patna High Courts, we are unable to accept their view that rr. 3, 4 and 8 of Or. 22, C. P. C. cannot apply to a pending appeal of this kind. Or. 22, r. 12, C.P.C. does not exempt pending appeals from the operation of r. 8 of that Order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rr 3, 4 and 8 would never apply. So where in a pending appeal by the judgment-debtor against an order in execution the appellant became an insolvent, and the receiver refused to give the security for costs required under Or. 22, r 8 (1), C.P.C. the appeal must be dismissed under r 8 (2) of the Order."

Vesting subject to equities.

In every system of law for the realisation and distribution of a bankrupt's property, there is an official, be he called an assignee or trustee or by any other name, and that official is by force of the

statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens. This is one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. In a custom of pre-emption there is so to speak a debtor side—the debtor side is the obligation of the holder of the share to offer it to a co-sharer, the creditor side is the right of the co-sharer to buy. The property, if fettered, would be presumably somewhat less valuable than if it were free. The bankruptcy of A would not have the double effect of forfeiting something belonging to B and of rendering the property of A more valuable in the hands of the Official Assignee than

L. A. S. Ch. 28, 29 C. L. v. Kulsum un nissa, 54 I A 204
7 (PC) 25 ALJ 617 29 Bom

Receiver is a person claiming under the insolvent, who gets all the interest which the insolvent had, and if the insolvent is under a liability, whether it arises out of an equity or as a matter of law, the receiver cannot have any greater right than the insolvent himself. Consequently, a receiver is bound by covenant in a deed entered into by the insolvent, *Nand Gopal Das v. Batuk Prasad Gupta*, 1932 ALJ 36 133 IC 541 1932 AIR (All) 78

Remedy of creditors on adjudication of the debtor.

The Court taking upon itself the administration of the property of the debtor for the benefit of all the creditors and for the purpose of making an equitable distribution to them, it follows that no one creditor should be allowed to attach any property for the realisation of his own dues—that would be inequitable to other creditors. Hence the subsection provides that "no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, commence any suit or other legal proceeding except with the leave of the Court on such terms as the Court may impose," *Vasudeb Kamath v. Lachminarain*, 42 Mad 684 26 MLJ 453 52 IC. 442

Remedy of creditor in respect of any debt provable under the Act.

A creditor of an insolvent has no remedy against his property in respect of the debt other than that provided by sec 28 of the Act, *Seth Sheolal v. Girdhari Lal*, 78 Ind Cas 140. It should be noted that the word 'debt' used in sec 28 (2) is debt provable under this Act. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of a Civil Court to entertain a suit in

respect of such a debt or liability is not barred by the Provincial Insolvency Act so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under sec 9, C P Code. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under this Act, *Hiralal v Tulsiram* 80 Ind Cas 946 1925 A I R (Nag) 77. For what are 'debts provable under the Act,' vide sec 34, *infra*.

Remedy against the property of the insolvent

After adjudication and before discharge, sec 28 (2) of the Act absolutely prohibits all creditors whether on the schedule or not from taking execution proceedings against the person and property of the insolvent except with the leave of the Court, *Natesa Chettiar v Annamalia Chettiar*, 17 L W 319 32 M L T 157 73 I C 213 (1923) A I R (M) 487. An insolvent ceases to have any interest in his properties as soon as a vesting order is made, and an auction purchaser in an execution sale of the insolvent's interest in certain properties held after the date of the vesting order acquires no interest in the properties, *Sundarappa Aiyar v Arunchella Chettiar* 18 M L J 487. *Anantha Rama Iyer v Vettiah Kuttimalu* 30 M L J 611. Where a judgment debtor applies to be adjudicated insolvent after attachment but before the sale of his property in execution of a decree against him the attaching Court is bound to adjourn the sale and direct the property to be delivered to the receiver. It is not at liberty to allow the sale to proceed and to pay over the sale proceeds to the receiver. *Mahasukh Jhaidardas v Valibhai Fatubhai* 30 Bom L R 455 109 I C 152. Under sec 28 of the Provincial Insolvency Act creditors are prevented from commencing any suit or legal proceeding against their debtor after an order of adjudication has been made and during the pendency of the insolvency proceedings they have no remedy whatsoever against the property of the insolvent in respect of the debt except approaching the Insolvency Court and getting themselves declared as scheduled creditors. If any suit or proceeding is commenced without the leave of the Court then such suit or proceeding is altogether void and leave obtained subsequently would not cure the defect when leave is granted after the period of limitation has expired. *Sarju Prasad v Rajendra Prasad*, 1 L R 1937 (All) 344. Where a person obtains a decree on the understanding that he was getting a decree against certain insolvents and his exclusive remedy would be to go to the Insolvency Court and get rateable distribution he cannot execute the decree independently of the Insolvency Court and attach the property contrary to the provisions of s 28 (2) of the Act. *Bhagwan Das v Lakshmi Chand* 1935 A L J 673 1935 A W 672 155 I C 661 1935 A I R (All) 643.

Pendency of the insolvency proceedings.

An insolvency proceeding will be considered as pending where the receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge, *Jehanji Mamooji v Ghulam Hussain*, 12 SLR 20 47 Ind Cas 771. The primary operation of the words 'during the pendency of the insolvency proceedings' is to govern a provision barring the existence or continuance of remedies on the part of a creditor against the property of the insolvent. One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable estates are still in the hands of the receiver, and in process of realisation for that purpose at the date when the insolvent applies for his final discharge. That being so, it appears to be inconceivable that the Legislature could have intended that any individual unsecured creditor could have the uncontrolled right to attach and in execution realise any moneys or property of the insolvent in possession of the receiver or that he should have the uncontrolled right to enforce such remedies against property still remaining in the possession of the insolvent.

1st for the adopting period prior to the order of the Insolvency Court granting or refusing discharge of the insolvent. The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings, and in spite of such refusal the bar against the commencement of a suit against the insolvent after the adjudication order laid down by sec 28 (2) continues to operate and a creditor of an insolvent is not entitled to commence a suit for the recovery of a debt against the insolvent without leave of the Insolvency Court. The plaint in such a suit must be rejected *Rowe & Co v Tanthean Taik* 2 Rang 643 84 IC 909. Though in *Maung Po Toke v Maung Po Gyi*, 3 R 492 92 IC 142 (1926) AIR (R) 2 it was laid down that 'when the Court under the provisions of sec 42 refuses the discharge of the insolvent, as far as that Court is concerned the proceedings have terminated,' in *Tan Seik Ke v C A M C T Firm*, 6 R 27 109 IC 769 (1928) AIR (R) 109, it has been held that the proceedings were not terminated by the refusal of discharge.

"Commence".

Sec 28 (2) does not prohibit the continuance of the suit or itself, nor does it contain such that after the making of an he insolvent shall not during the pendency of the insolvency proceedings commence a suit or other legal proceeding without the leave of the Court, but not that a creditor cannot go on with a suit or other proceeding

already pending at the date of adjudication, *Ashghari Begum v. Muhammad Yusoof*, 61 Ind Crs 534. Sec 28 (2) prohibits without leave of the Court a creditor from commencing any suit or other legal proceeding which would by its nature hamper or affect prejudicially the administration of the insolvent's estate by the Insolvency Court in the insolvency proceedings. Unless the suit or other legal proceeding thus interferes with the insolvency proceedings, there is no reason why the Insolvency Court should have control over its institution, *Donepudi Subramanyam v Nune Narasimham*, 119 IC 46 (1929) AIR (M) 323.

Commencement of any suit.

The jurisdiction of a Civil Court to entertain a suit in respect of a debt or liability which is not provable under the Act, is not barred by the Provincial Insolvency Act so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under sec 9, CP Code, *Hiralal v Tulsiram*, 80 IC 946 (1929) AIR (Nag) 77. But once a person has been declared insolvent and a vesting order passed no creditor can apply for any remedy against him in respect of any debt provable in bankruptcy without the leave of the Court, *Lingappa Chettiar v Narasinha Chariar*, 27 IC 6. Insolvency proceedings remain pending until the insolvent obtain his order of discharge. Therefore, an undischarged insolvent cannot, without the leave of the Insolvency Court be sued in respect of debt which he mentioned in the list attached to his

order of discharge, if such notice is duly served on the creditor,
100 IC 304 43 IC 262. In case
Ram v Chiman Lal, 100 IC

112 that a firm is not a legal entity, nor is it a person. A firm name is merely a shorthand form for collectively designating all the partners in a firm. Therefore an order of adjudication passed against the firm is an order against the individual partners who constitute the firm and after such an order has been passed a suit cannot be instituted against any of the partners without leave of the Insolvency Court under sec 28 of the Insolvency Act. "A suit by a creditor of an insolvent for a declaration that a decree obtained by another creditor against the insolvent before insolvency is inoperative as against his rights, is not maintainable under sec 53 of the Transfer of Property Act nor under sec 42 of the Specific Relief Act. A suit against an insolvent is not maintainable without obtaining leave to sue under sec 28 (2) of the Provincial Insolvency Act." *Majdan v Chatrimal*, 110 IC 386.

On the insolvency of the manager of a joint Hindu family a creditor to whom the manager had executed a promissory note for purposes binding on the joint family, is entitled to bring a suit and obtain a decree against the other members of the joint family though as against the insolvent manager or the Official F

the debt being provable in insolvency the suit would obviously be unsustainable. The fact that the insolvency of the manager has the effect of vesting the Official Receiver with the power to sell the whole of the family property for satisfaction of the family debts is no bar to the maintainability of the suit as against the other members in respect of the liability of their shares in the family property to the suit debt. *Chinna Veenah v Gurur Reddi*, 39 L W 347

Commencement of other legal proceeding.

(1) *Against the person* Application for execution against the person of the insolvent is the commencement of a legal proceeding and it comes within the mischief of the second part of sec 28 (2) which imposes a disability on the decree holder from taking any step in execution, *Hit Narayan Singh v Brij Nandan Singh*, 10 Pat 422 1931 A I R (Pat) 357. A decree holder in respect of whose judgment debtor an order declaring him insolvent and appointing a receiver has been passed and whose decree has been placed on the list of the judgment debtors scheduled debts cannot *passu passu* with the proceedings in insolvency go on executing his decree in the ordinary way against the judgment debtor, *Gauri Dutta v Shanker Lal* 14 All 358. Though in *Maharaja Hari Ram v Sri Krishna Ram* 49 All 201, and in *Ali Husain v Lachmi Narain*, 54 All 416 1932 A L J 168 140 I C 150 1932 A I R (All) 188, it was held that an undischarged insolvent is not exempt from the execution of a decree against him, in *Firm Partap Singh Jodha Singh* 107 I C 608.

se whether a decree holder is competent to take out execution against the person of an insolvent judgment debtor without obtaining leave of the Insolvency Court, though protection under sec 31 was refused. In discussing the question the Court held that 'under the Provincial Insolvency Act, 1907 when a debtor was adjudged an insolvent he ordinarily became immune from arrest. This immunity was taken away by the Provincial Insolvency Act, 1920 and according to that Act he could be arrested in execution of a decree unless he should obtain a protection order under sec 31 of the Act. But the question is whether a decree holder is competent to take out execution against the person of the insolvent judgment debtor without obtaining leave of the Court. The language of clause (2) sec 28 is almost the same as sec 17, Presidency Towns Insolvency Act 1909. A Division Bench of the Madras High Court held in *C A Easwara Aiyar v K Govindarajulu Naidu* 39 Mad 689 31 I C 192 that in view of the provision of sec 17 Presidency Towns Insolvency Act when a person is adjudicated insolvent, creditors seeking any remedy against him must apply to get leave for that purpose. Another case in point is *Thakurdeen v J Dubay*, 12 Bur LT 218 55 I C 250

where it was held that the words other legal proceedings in section 17 Presidency Towns Insolvency Act include an application for arrest in execution of a decree and that therefore no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Insolvency Court. See also *Suami Katayya v Thunee Guntla Venkata Rangarao* 68 MLJ 148 41 MLW 167 1935 AIR (M) 239 *Pt Sankar Lal v Parcha Ram* 1936 O W N 56 160 IC 33 1936 AIR (O) 177

An application for the arrest of an insolvent is commencing a legal proceeding against the insolvent and leave of the Insolvency Court is necessary before an application for his arrest in execution of a decree for payment of money can be made during the pendency of an insolvency proceeding. An application for the arrest of the insolvent was made without the leave of the Insolvency Court after his application for discharge was refused under sec 42. It was held that as far as that (Insolvency) Court was concerned the proceedings had terminated and so no leave was necessary. *Maung Po Toke v Maung Po Gyi* 3 R 492 92 IC 142 (1926) AIR (R) 2. But this view has been dissented from in *Tan Seik Ke v C A M C T Firm* 6 R 27 109 IC 769 1928 AIR (R) 109. It would therefore appear that the Court was of opinion that leave of the Insolvency Court is necessary for application for the arrest of the insolvent as it amounts to commencing a legal proceeding against the insolvent during the pendency of the insolvency proceedings. The right of an insolvent adjudicated to have execution proceedings stayed unless the Insolvency Court gives leave to prosecute them is a substantive right and is not abrogated by Act V of 1920 and so an order for his arrest without leave of the Insolvency Court is without jurisdiction. *Solayappa Nacker v Shunmugasundaram Pillai* 50 MLJ 237 1926 M W N 281 93 IC 3 (1926) AIR (M) 510. An execution petition filed during the pendency of insolvency proceedings against the judgment debtor is not one in accordance with law where the leave of the Insolvency Court has not been previously obtained therefor under sec 28 (2). *Rarichan v Kunhamu* 39 L W 639.

(2) Against the property. After adjudication and before discharge sec 28 (2) of the Act absolutely prohibits all creditors whether on the schedule or not from taking execution proceedings against the person and property of the insolvent except with the leave of the Court. *Natesa Chettiar v Annamalai Chettiar* 17 L W 319 32 MLT 157 73 IC 213 (1923) AIR (M) 487. *Ponnuthaye Ammal v Official Receiver Coimbatore* 38 L W 762 65 MLJ 833 146 IC 417 1933 AIR (Mad) 858. A sale of the insolvent's property in execution of a decree of which notice has not been given to the Official Receiver is void. *Nainar Routhen v Kuppari Pichai Routhen* 120 IC 889 (1929) M W N 168 (19

AIR (M) 609 An insolvent ceases to have any interest in his properties as soon as a vesting order is made and an auction purchaser in an execution sale of the insolvent's interest in certain properties held after the date of the vesting order acquired no interest in the properties *Sundarappa Aiyar v Arunachelam Chettiar*, 18 M L J 487, *Anantha Rama Iyer v Vettiah Kutumali* 30 M L J 611

Leave of the Court—a condition precedent after adjudication

The intention of sub section (7) of sec 28 is to relate back the title of the Court or Receiver appointed by it to the insolvent's property to the date when the petition for adjudication was filed. It does not make it imperative on the creditor of the insolvent to obtain leave to commence a suit when the insolvent has merely applied to have himself adjudicated. A suit without such leave is, therefore, maintainable although the defendant is subsequently adjudged *Chandmull Sardarmull v Satya Charan Das*, 42 C W N 34. The mere application for insolvency is no bar to the commencement of a suit or legal proceedings. Where, therefore a land holder sues certain tenants for arrears of rent who have applied for insolvency but are not adjudicated insolvents, it was held that the suit was rightly instituted and no leave of the Insolvency Court was necessary *Mohammad Ishaq Khan v Kalloo* 1936 A W R 485. As has been held in *Jagendranath Kundu v Yajneswar Mondal* 1 L R 63 C 176 39 C W N 1289 62 C L J 79 158 I C 436 1935 AIR (C) 612, the mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor.

Sec 16 (now sec 28) has been enacted for the purpose of enabling the Court to keep a proper control over the administration of the estate in the insolvency proceedings. After a judgment debtor has been adjudicated insolvent the decree holder has no longer the right to attach his property or to sue for declaration in respect of it without the leave of the Court, *Louis Dreyfus v Jan Mahomed*, 49 Ind Cas 421. The leave contemplated in this section is a leave which ought to be obtained before commencement of a suit and cannot be granted after the same is filed. It is a condition precedent to the institution of the suit and must be obtained before the institution of the suit failure to do so cannot be cured by obtain

ivil Procedure against a claimant for a declaration that the property attached belongs to his judgment debtor who has in the meantime been adjudicated insolvent without first obtaining leave of the Insolvency Court. Such leave is a condition precedent to the commencement of the suit *Mahomed Adjum Nacoda v E M Chettiar Firm*, 9 Rang 7

128 1C 382 1930 AIR (Rang) 317 The provisions of s 28 (2) are mandatory and after an order of adjudication is made no suit or other proceeding can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action. The want of a previous sanction is a defect fatal to the suit and subsequent leave cannot validate it. *Dauood Mohideen Rowther v Sahabdin Sahib* 1LR 1937 (M) 841 1937 MWN 1063 46 LW 520 (1937) 2 MLJ 760 1937 AIR (M) 667 A suit commenced without the leave of the Insolvency Court in contravention of the provision of section 17 of the Presidency Towns Insolvency Act (corresponding to sec 28 (2) of the Pro Ins Act) has been held to be not maintainable. It has been laid down in *Sarju Prasad Bhagwati Prasad v Rajendra Prasad*, 1LR 1937 (All) 344 1937 ALJ 94 1937 AWR 83 168 1C 939 1937 AIR (All) 271, that even if leave were granted subsequently, it would not cure the defect where such leave was granted after the period of limitation for the suit had expired. If leave were obtained subsequently, but before limitation had expired, the suit might be allowed to be continued inasmuch as it might be considered to have been commenced on the date in which the leave was granted. Where a suit is instituted against a person after his adjudication as insolvent, but without first obtaining leave of the Insolvency Court, any order passed in the suit is *ultra vires* and of no effect. *Mohammad Ishaq Khan v Kallo*, 1936 AWR 485. The grant of leave is a matter within the discretion of the Court, *Tan Seik Ke v C A M C T Firm*, 6 R 27. A suit by a Hindu widow for recovery of her maintenance from the assets of the family firm of her deceased husband which was declared insolvent and for making it a charge on the same is incompetent as having been brought without the permission of the Insolvency Court, *Musst Champa v Official Receiver Karachi* 15 Lah 9.

It will be noticed that the order of adjudication does not effect an absolute stay of suit against the insolvent but only makes it necessary that leave to sue should be obtained from the Court, *Ramaswami Pillai v Gobindaswami Naker*, 42 Mad 319 25 MLT 247 49 Ind Cas. 626. A debt contracted after the presentation of the petition in insolvency but before the order of adjudication is provable in insolvency under sec 34 (2). No suit to recover the debt can therefore, lie before the discharge of the insolvent without leave obtained under sec 28 (2). *Jamshedji v Pestonji*, 34 Bom LR 980. Leave to sue does not cover leave to execute the decree. *Brijai Inder Singh v Charan Singh* 24 ALJ 755 98 1C 525 (1926) AIR (A) 640. There is no rule of law requiring notice to be given to an insolvent before leave to file a suit granted, and whether it is necessary to issue a nounce to the insol

vent or not must be decided on the facts of each particular case
Chettyar Firm v S E Munnay 6 Rang 533 117 IC 570 (1928)
 AIR (R) 326

Cases where no leave is necessary.

The section forbids a creditor to whom the insolvent is indebted in respect of any debt provable under the Act during the pendency of the insolvency proceedings to commence any suit or other legal proceeding except with the leave of the Court. The suit or other legal proceeding contemplated must be one against the insolvent himself or against persons whom it is sought to render liable through him. In a case when the liability of the defendants does not depend on their being sons of the insolvent but on their being grandsons of the father of the insolvent it was held that the section has no application and the suit will be maintainable without the leave of the Court. To such a suit neither the insolvent nor the receiver is a necessary party. *Brijmohan v Mahabhar*, 11 LR 63 C, 194 40 CWN 808. In a suit for partition the debtor is under no obligation contingent or otherwise to the plaintiff before decree for costs. The obligation arises when the order for costs is made in the decree subsequent to the order of adjudication of the debtor as insolvent. The amount of costs is not therefore a debt provable in insolvency within the meaning of s 34(2) of the Provincial Insolvency Act. No leave of the Court to file suit for recovery of such costs was necessary before the institution of the suit as required by s 28(2) of the Act. *Marreddi Sashireddi v Official Receiver, Guntur*, (1937) 2 MLJ 29 1937 MWN 834 46 LW 719 172 IC 251 1937 AIR (M) 725

There is a conflict of opinion as to whether leave of the Insolvency Court is necessary in a suit under Or 21 r 63, CPC which seeks merely a declaration that the property attached by a creditor belongs to the insolvent and is liable to be sold in execution of his decree. In *Nune Narasimham v Donepudi Subramanyam* 98 IC 446 it was held that leave of the Court to file a suit in such a case was necessary but the absence of such leave where no objection was taken would not render a decree passed in such a suit a nullity. In Letters Patent appeal from the above case in *Donepudi Subramanyam v Nune Narasimham*, 56 MLJ 489 119 IC 46 1929 AIR (M) 323 it was laid down that a suit by an attaching creditor under Or 21 r 63, CPC for a declaration that certain property belonging to the judgment debtor who had been adjudicated an insolvent in which no relief is sought against the insolvent debtor but in his favour and to which neither the debtor nor the receiver is a necessary party cannot be held to be a suit falling under sec 28(2) so as to require leave of the Court to be obtained before the institution of the suit.

The view expressed in *Nune Narasimham v Donepudi Subra*

manyam, supra was dissented from in *Mohamed Adjum Nacoda v E M Chettiar Firm*, 9 Rang 7 128 I C 382 1930 A I R (Rang) 317 where it was held that an attaching creditor cannot file a suit under Or 21, r 63, C P C against a claimant for a declaration that the property attached belongs to his judgment debtor who has in the meantime been adjudicated an insolvent without first obtaining leave of the Insolvency Court. Such leave is a condition precedent to the commencement of the suit. In *Harnam Chander v Rup Chand*, 54 All 532 1932 A L J 361 1932 A I R (All) 382 it was held, however that the words "commence any suit or other legal proceeding" must be read in conjunction with 'have any remedy against the property of the insolvent in respect of the debt'. A declaratory suit under Or 21 r 63 C P C or appeal therefrom is not a suit or appeal of that nature. All that the plaintiff or appellant asks is that a declaratory decree should be passed or the decree of the lower Court set aside. That would not be a remedy against the property of the insolvent within the meaning of sec 28. No doubt if the appellant having obtained a decree on appeal proceed to apply for execution then he might possibly be met with the bar of sec 28 (2). Sec 28 (2) does not bar the present appeal.

A firm was adjudged insolvent but no schedule of creditors as required by law was prepared nor was notice of the insolvency proceeding served upon all the creditors. One of the creditors brought a suit against the insolvents to recover the amount of his debts, but the suit was dismissed on the ground that no leave was obtained from the Court under sec 16 (now 28) of the Act. It was held, that the insolvency proceedings were no bar to the suit *Des Raj v Duni Chand* 60 Ind Cas 588. Sec 28 (2) does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Sec 29 of the Act however, contemplates not only a suit filed before an order of adjudication has been made but also one filed after the order, but in real ignorance of it. Therefore when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without the permission of the Insolvency Court, the plaintiff cannot obtain permission of the Insolvency Court to continue the suit under sec 28 of the Act. *Haji Umar Shariff v Juala Prasad*, 21 N L R 9 79 Ind Cas 662 1924 A I R (Nag) 300. But the correctness of this ruling has been doubted and it has not been followed in the recent case of *Firm o Panna Lall v Firm of Hira Nand* 8 Lah 593 (1928) A I R (L) 28, where the Court held "sec 28 is in effect the same as sec 7 of the English Bankruptcy Act, 1914, which expressly prohibits any suit or other legal proceedings being commenced except with the leave of the Court and on such terms as the Court may impose, that is to say, no suit may be brought after adjudication without first obtaining the permission."

the Court to bring that suit. Sec 29 deals with pending suits and provides that on proof of an adjudication order made against the debtor the Court may stay or allow to continue a pending suit upon such terms as it may think fit to impose. The present suit was instituted some 3 years after the adjudication order. No leave of the Court had been obtained to bring these proceedings and consequently they are not maintainable. The suit is not hit by the sub section if at the time when the suit was filed the order of adjudication has not been made and therefore the plaintiff did not require the leave of the Court to commence any suit or other legal proceeding. *Chandmull Sardarmull v Satya Charan Das* 40 CWN 34

The right of a secured creditor to institute a suit or to proceed with a suit already commenced is not taken away by sec 28 (2) by reason of the adjudication of a mortgagor as an insolvent. *Official Receiver Coimbatore v Palanisami Chetti* 48 Mad 750 49 MLJ 203 1925 MWN 672 88 IC 934 (1925) AIR (M) 1051. A secured creditor of an insolvent notwithstanding sec 28 (2) is entitled to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of Court in that behalf. *M K M Chettiar Firm v Maung Thaung* 13 R 37. An application under r 6 Or XXXIV CPC for a personal decree against a mortgagor is not a new proceeding but a continuation of the original suit and does not come under the bar of sec 16 (now sec 28) of the Provincial Insolvency Act. The issue of a personal decree against a mortgagor is not the grant to the mortgagee of a remedy against the mortgagor within the meaning of sec 16 (now sec 28). *Kishan Chand v Sohan Lal* 2 Lahore 95 59 Ind Cas 710. A stranger to the insolvency proceedings is not required to obtain the leave of the Court before bringing an action in respect of a property seized by the receiver on the ground that it belonged to him and not to the estate of the insolvent. *Rura v Official Receiver Amritsar* 125 IC 625 1930 AIR (Lah) 708.

Effect of suit or other legal proceedings without leave

In *Trimbak v Sheoram* 65 IC 941 it was said that the permission of a Court to sue an insolvent under sec 16 (now sec 28) is contingent on the suit being brought and cannot be given afterwards and the proceedings started without such permission are *ultra vires* and do not constitute *res judicata*. This case has been followed in *Mahomed Adjum Nacoda v E M Chettiar Firm* 9 Rang 7 128 IC 382 1930 AIR (Rang) 317 where it is laid down that a suit or other legal proceeding commenced without such leave is not maintainable. In *Panna Lal v Hiranand* 8 Lah 593 a suit was instituted some three years subsequent to the defendant having been adjudicated an insolvent. It was alleged that the suit was brought in ignorance of the fact of the adjudication order and no

leave of the Court to institute the suit had therefore been obtained. It was held that "the suit had been rightly dismissed under the provision of sec. 28 of the Provincial Insolvency Act, according to which no suit can be brought after adjudication without first obtaining the permission of the Insolvency Court to bring the suit and that the provisions of sec. 29 of the Act were not applicable to such a case." In *Nime Namasihari v. Donapudi Subramaniam*, 93 I.C. 446 it was held that the absence of leave where no objection was taken would not render a decree passed in a suit without such leave a nullity. But in Letters Patent appeal from this case in *Donapudi Subramanyam v. Nime Namasihari*, 119 I.C. 46 : 1929 A.I.R. (M.) 323 it was ruled that a suit instituted without leave cannot be validated by obtaining leave subsequently.

Absence of Notice immaterial.

In delivering the judgment in *Pennasami v. Kalaperumal*, 113 I.C. 550 : 1929 A.I.R. (Mad.) 480 Wallace J., after reviewing the authorities on the subject held : "No doubt, this (dismissal of the suit) may work hardship in certain cases, e.g., where the plaintiff is ignorant of the insolvency proceedings altogether. But after all, the gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court. All the creditors could file suits without leave and maintain that the Court should keep these pending until the insolvency proceedings had come to an end on the ground that the initial bar would then be removed. That would be practically overriding sec. 28. The insolvent is entitled to the protection of the Court against the commencement of any such suit..... The only suit which can be maintained is a suit which was instituted on leave given before its commencement. The present suit ought to have been dismissed in time . . . The suit is not therefore maintainable." But this view has been dissented from in *Bhuvan Bhobhural v. Chandal Jhaverchand*, 57 Bom. 623 : 34 Bom. L.R. 683 : 1932 A.I.R. (Bom.) 344 where it was held that where a suit is brought by a creditor without the leave of the Court against a debtor against whom an order of adjudication has been made, the Court need not necessarily dismiss the suit but may either stay it or allow to proceed with it on terms. These powers may be exercised at a stage later than the commencement of the suit, should the suit have already been commenced without leave. With regard to the intention that the provision in s. 28 (2) with regard to the prohibition of bringing suits by creditors without leave, is aimed at creditor to whom notice of insolvency proceedings has been given and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been given, it has been held in *Fern Ganga*

Din Gur Pershad v Jagmohan Singh 1936 O W N 52 161 I C 266 1936 A I R (0) 236 With all respect to the learned Judge who decided this case (*Fida Husain v Collector of Shahjahanpur* 170 C 267 25 I C 708 1914 A I R (0) 222) I find myself unable to agree with his decision. There is nothing in the provisions of S 28 (2) making its application dependent on notice of the insolvent's applications being given to the plaintiff. Moreover S 19 (2) provides that notice of an application for insolvency shall be given to creditors in such manner as may be prescribed. The publication of the notice of order fixing the date of hearing of petition under s 19(2) can be presumed to be notice to all creditors.

Sub section (3), Goods in the possession, order or disposition of the insolvent

This sub section corresponds to sec 38 (c) of the Bankruptcy Act 1914 which runs as follows. All goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent or permission of the true owner under such circumstances that he is the reputed owner thereof provided that things in action other than debts due or growing due to bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section. The property of the bankrupt comprises all goods which at the date of the presentation of the petition were in the order and disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that the insolvent is the reputed owner thereof. This provision is directed by a person carrying on a trade or business in possession of property to which he is entitled. 7) 86 L J C P 189. And its effect is to transfer to the receiver certain property which does not belong to the insolvent or in which he has only a qualified interest. The provision implies that the owner has no interest in the property in possession of the insolvent and is not entitled to it in his business. But where this is not the case the goods will be restored to the owner. *In re Kad bhoy Ism left Lot a* 11 I C 14.

In order that property in the possession, order or disposition of the insolvent must be carrying property must be goods i.e. personal chattels or choses in action and debts due or growing due to the insolvent in the course of his business or trade. *Colonial Bank v Whitney* (1885) 30 Ch D 261. No interest in lands is within the reputed ownership clause but if land and personal chattels are leased together e.g. a furnished house or land with machinery standing thereon as one subject matter and at one entire rent and the receiver disclaims the lease

doctrine of reputed owner-
Ch D 341 And therefore
(1808) 2 Smith's Leading
Cases, 11th Ed 232 (3) The goods or debts must be in the
possession or in the order and disposition of the insolvent or his
agent by the consent and permission of the true owner, *Joy v
Campbell*, (1804) 1 Sch & Lef 328 But if the bankrupt is a trustee
and the goods are trust property the reputed ownership clause has
no application, *Joy v Campbell*, supra See also *Watkins v Customs*,
L R 8 Ch App 520

True owner and reputed owner.

The principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvency Act is in question Hence where certain shares belonging to a debtor were transferred to another person without any deed of transfer and without giving any notice to the company it was held that these shares and the right to receive any distribution of assets in respect of them vested, upon his insolvency in the Official Assignee, *Bhawan Mulji v Kavaji*, 2 Bom 542, followed in *Punithavelu v Bhasyam*, 25 Mad 406 where it was pointed out that the term 'true owner' in the Indian Insolvency Act included equitable owner as well as legal owner Thus if the insolvent assigns a debt and the assignee gives notice of the assignment to the person owing the debt the notice by the assignee will take the debt out of the order and disposition of the insolvent, *Ibid* If the property be in the actual possession and reputed ownership of the debtor it will not cease to be regarded as his property simply because the true owner has kept a guard over it, *In Re Brown*, 12 Cal 629 See also *Macleod v Kikabhoy*, 25 Bom 659, *In Re Duarka Nath Muter*, 3 Cal 58, *In Re Marshall*, 7 Cal 421, *In Re Gubbay Miller*, 6 Cal 633 7 B L R 29

The law, however, has been clearly enunciated in *Re Kaufman Segal v Domb, Ex parte, the Trustee* (1923) 2 Ch D 89 by Lawrence, J in the following terms The respondent in this case has two points The first is that there is a general custom of hiring out articles of furniture so as to prevent the inference by the public that these articles although in the possession of the bankrupt, were the bankrupt's own property The second point is that apart from custom the chattels were in the possession of the bankrupt in circumstances which did not necessarily involve the inference that they were the property of the bankrupt As regards the first point, reliance was placed upon *Ex parte Emerson*, 41 L J (Bcy) 20 The trustee on the other hand relied on *In Re Tabor*, (1920) 1 K B 808 in which it was held that the statement 'that the public at large no longer attributes ownership of furnitures to the persons who are in possession of it,' is extravagant As regards 'it

second point the Court held that the Court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not merely one that may or may not arise but is one that *must arise*. In the absence of any general custom as to the hiring the inference which a reasonable man would necessarily draw from the fact that the articles in question were in possession of the bankrupts and were being used by them in their trade is that the articles belonged to the bankrupts and the inference so drawn is an inference which within the meaning of Vaughan Williams L J's statement of the law *must arise*.

Rights of secured creditor not affected by reputed ownership

It should be noted that section 28 (6) refers to the rights of secured creditors in general and the section 28 (3) is an exception to that general rule applicable only to secured creditors of goods in trade or business where the goods are allowed to be in the order or disposition of the bankrupt in such circumstances which give rise to the irresistible inference in the minds of the public that the goods belong to the insolvent. Sec 28 (6) therefore must be read subject to sec 28 (3) and it is not correct to say that sec 28 (3) has no operation in view of the provision contained in sec 28 (6). It has also been held in *Moti Ram v E H Rodwell* 21 A L J 32 1923 A I R (All) 159 that sub section 6 is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions of sub section 3 which precede it. If the receiver realises the property the debt due to the secured creditor at the date of realisation constitutes a charge payable to the creditor out of the amount so realised. But in a recent case *Shamaldas Kshettry v Phanindranath* 1932 A I R (Cal) 532 72 Ind Cas 467 a trader entered into an agreement with certain bankers under which the latter were to make advances on the security of his jute kept in his godown. The arrangement was that the key of the godown was to be kept with the bankers but the trader was to do the *buying and selling independently* and to have the delivery of the jute. The trader was subsequently declared insolvent and the bankers claimed to be secured creditors in respect of the jute which lay in his godown. It was held that though by the law in England it is true that a mortgagee is the true owner and where he allows the mortgagor to be in possession of the goods mortgaged the principle of reputed ownership has been applied the question is whether this principle is applicable to a case having regard to the provisions of sec 28 (6) of the Provincial Insolvency Act. If a secured creditor can proceed to realise his security or deal with it in the same manner as he would have been entitled to do had sec 28 not been passed we do

not see how the reputed ownership clause in sub-section 3 of section 28 can have any operation. It may be said that this interpretation of this section would be against the spirit and object of the reputed ownership clause in sub-section 3 of the sec 28. But having regard to the express terms of clause (6) of the section we are bound to give effect to the provisions of that sub-section 6" In *Official Assignee of Madras v. The Mercantile Bank of India Ltd* 61 I A 416 39 CWN 209, their Lordships of the Judicial Committee have held that a railway receipt is a document of title to the goods covered by the receipt. Hence pledging or transfer of the railway receipts amounts to the pledging or transfer of the goods covered by the receipts. When railway receipts are pledged with bankers to secure an advance and some of the receipts are handed back to the pledgor, in accordance with the general course of business, for the limited purpose of unloading the goods and depositing them in a ware-house, the goods covered by either the receipts so handed back temporarily or by the remaining receipts are not goods in the possession, order and disposition of the pledgor within the meaning of sec. 52 (2) (c) of the Presidency Towns Insolvency Act, (corresponding to sec. 28 (3) of the Provincial Insolvency Act), still less under such possession, etc., by the consent of the true owner as required by that section, and the circumstances of such a case cannot make the pledgor the reputed owner of the goods in order that the goods may be divisible among his creditors upon his insolvency. The whole question under sec 52 (2) (c) is a question of fact

Goods held in trust.

If goods are left in the hands of another person and there is an undisclosed relation of master and factor, then the goods vest in the Official Assignee. If the situation is such that the public knows that the holder is a factor, then the goods held on an implied trust will not pass to the Official Assignee. Where the parties carry out the forms of a trust for a purpose not directly connected with the creation of the trust itself, but, for an ulterior object, then again the property will fall within the reputed ownership clause, that is to say, if a trust is created to conceal the real ownership of the property or to try and maintain in the sellers a control with which he has already parted. That which appears on the document to be a trust may fall within reputed ownership, either because reputed ownership does apply in cases where a trust is of a secret or fictitious nature or because the Court refuses to recognise such transactions as trusts at any rate as against outsider. Trust receipts taken by a trader "from a trader buyer so far as they purport to create an do not preserve the property from reputed ownership relationship of the parties known to the public. The of the matter is this, that no special words or'

preserve a control where actual control has been abandoned nor maintain a connection with the goods when the connection has been in fact severed or save for the seller property which a seller hands over to a buyer with capacity to deal with it either as against transferees for value or against the Official Assignee. If the exigencies of trade require that the goods must be handed over for sale the seller takes the risk he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner, *In re Sumermull Surana* 59 Cal 818

There are undoubtedly cases in which an apparent exception is made to the general rule, that where there is a *bona fide* trust the trustee does not hold the property in order and disposition with the consent of the true owner, or with such a reputation of ownership as to cause the property to be treated as his own in case of bankruptcy. But the principle of the exceptions in those instances is this, that there being no *bona fide* reason for the creation of any trust, the forms of a trust was gone through in order to conceal the true ownership of the property, *Great Eastern Railway Company v Turner*, (1872) L.R 8 Ch 149 (153 154) In *Moonrumugamkondan*

MLJ 629 (FB) d in the ordinary
to the defendant
for sale and the latter not having returned the articles, or their value, he sued to recover the same. The plaintiff was on the date of suit an undischarged insolvent. He sought to recover from the defendant the value of the articles. An objection was taken that the property was not the property of the insolvent so as to pass to the Official Receiver and the suit, being one filed by the plaintiff in his capacity as bailee, was not rendered unsustainable because of his insolvency. It could not be said under the circumstances, that the emeralds or their value were the reputed property of the insolvent. held insol

Goods held under hire purchase system

In *Lamb v Wright & Co*, (1924) 1 KB 857 an insolvent purchased a pleasure motor car from the plaintiffs on hire and purchase system. After he got possession of the car in question the insolvent used it from time to time in his trade or business. It was plain (1) that the arrangement of bankruptcy in the possession of the car was with the consent and with consideration of the bankrupt. Does the section require, ere a trustee can claim that the consent or permission of the true owner of goods be given not only to the possession by the bankrupt but also to their user in his trade or business? If

this full measure of consent be required, then the defendant here, on behalf of the trustee, fails in his defence. For, it is plain that the plaintiff did not consent to the car being used in the bankrupt's trade or business but that he was not aware that it was so used. The section requires the full consent. The section is limited in its operation to goods in the trade or business of the bankrupt. It does not apply to domestic articles of furniture in a bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another, he knows, or ought to know, that he runs a risk of losing those goods by operation of sec 38 (Bankruptcy Act, 1914). But if he only consents to the use of those goods for private and non business purposes, then is he exposed to the confiscatory provision of sec 38, merely because the bankrupt without his knowledge, had used those goods in and for his trade or business? In *Colonial Bank v Whitney*, (1885) 30 Ch D 261, Cotton L.J. said "I think the true construction is, the goods must be in his (bankrupt's) order or disposition for the purposes of or purposes connected with trade or business." Lindley, L.J., said "the language 'in his trade or business' means not merely visibly employed in his trade or business but acquired for the purposes of the business and used for those purposes." It would seem to follow from these dicta that if a motor car be acquired for private use and be primarily employed for private purposes, then it cannot be said to be a car in the trade or business of the bankrupt.

Facts to be proved in cases of reputed ownership.

The words "true owner" include the owner of an equitable interest and that there can also be a reputed owner of that interest and that reputed owner can be insolvent himself, i.e., the legal owner of the property, *Mercantile Bank of India v Official Assignee, Madras*, 39 Mad 250, following the judgment of Bhashyam Aiyangar, J. in *Punithatelu v Bhashyam* 25 Mad 250. In *C. I. v. D. S.* (1886) A.C.

of shares by . . . the registered shareholder remaining the legal owner the depositor got an equitable interest and that another person could be the reputed owner of that equitable interest. The result is that in the case of a garnishee, he must be taken to be the true owner of the equitable interest in a motor car. But the car being left in the possession of the insolvent with power to use it to all appearances as though it were his own, he had become the reputed owner. It is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner. Now the question is whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner and that is a question of fact. If before commencement of the insolvency of the pledgor, the creditor put an end to the right of the pledgor to use the thing for . . .

preserve a control where actual control has been abandoned nor maintain a connection with the goods when the connection has been in fact severed or save for the seller property which a seller hands over to a buyer with capacity to deal with it either as against transferees for value or against the Official Assignee. If the exigencies of trade require that the goods must be handed over for sale the seller takes the risk, he cannot put that risk upon the public which deals with his buyer ostensibly in possession of those goods as owner, *In re Sumerfull Surana*, 59 Cal 818

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(1886) A C 426, it was held that where there was an equitable mortgage of shares by the deposit of the share certificates and a blank transfer, the registered shareholder remaining the legal owner the depositary got an equitable interest and that another person could be the reputed owner of that equitable interest. The result is that in the case of a garnishee, he must be taken to be the true owner of the equitable interest in a motor car. But the car being left in the possession of the insolvent with power to use it to all appearances as though it were his own, he had become the reputed owner. It is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner. Now the question is whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner and that is a question of fact. If before the commencement of the insolvency of the pledgor, the pledgee put an end to the right of the pledgor to use the thing, then the

demanding its return according to agreement, the thing pledged cannot thereafter be said to be in possession with the consent of the true owner. A letter proved to have been passed to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary, *Aburrahammal v Official Assignee, Madras*, 47 Mad 215. In *Manik Rao v Nur Hasan*, 88 IC 254 (1925) AIR (N) 376, a bond was taken in the name of a minor son of the insolvent who was a broker. It was held in a suit by the minor through his father the insolvent, that there being no evidence that the bond was in existence on date of the order of adjudication so as to lead to any presumption under sec 28 (3) there is no presumption that the plaintiff's father was the reputed owner, and there is no law that an insolvent cannot be the *guardian ad litem* of the infant.

Sub-section (4) ; After-acquired properties

The words of sec 28 clauses (2) and (4) are imperative. The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in clause (4). All the property of the insolvent vests in the Court or receiver as soon as the order of adjudication is made. It follows, therefore, that from the date of the order of adjudication, the insolvent ceases to have any interest in the property. The property is taken away from him and becomes vested in the Court so that after such vesting the insolvent ceases to be the owner of the property in law and dealings by him with respect thereto are void. Any transfer of such property made by him is a nullity and has no existence in the eye of law, *Buddhu Lal v Ram Sahai*, 9 OWN 523 1923 AIR (Oudh) 244. Section 28 (4) relates to property which the insolvent acquires by his own efforts, such as his wages or salary or to property which devolves on him by rule of law, such as by inheritance. The sub-section is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. *Jalaun District Co-operative Bank v The official Receiver, Jhansi*, 1935 ALJ 170 1935 AWR 122. When an insolvent acquires certain property under a will, such property even if personal, forthwith vests in the receiver and is available for distribution among his creditors. *Kamal Lal v Chandrika Charan* 19 PLT 860 177 IC 829 1939 AIR (P) 18.

Sub section (4) lays down that the properties acquired by the insolvent between the order of adjudication and discharge form the property of the insolvent and the receiver is entitled to take possession of the same. The word *property* does not exclude personal earnings over and above what is necessary for the debtor's support and the Court has jurisdiction to pass orders as to his earnings after adjudication but before his discharge, *Jumnadas v.*

Vinayak, 10 Ind Cas 698 7 NLR 19 An order vesting the whole of a man's earnings subsequent to insolvency and after acquired property in the Court, is an order which ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property it has the effect that he has no incentive either to work or to acquire property *In re Shackleton Ex parte Shackleton*, (1890) 61 LT 648 6 Mor 304, *Eusooj Abdul Razak v Messrs Royal Stationery House* 1939 AIR (R) 58 If the mortgage is an assignment of the after acquired property and the mortgagee acquires the property before bankruptcy then the mortgagee's title is good as against the receiver *Tailby v Official Receiver*, (1888), 13 AC 523 But if the property does not fall into the possession of the bankrupt until after bankruptcy then the mortgagee has no right to the property Thus if a debt to fall due at a future date is assigned and the debt only falls due after bankruptcy the assignee has no right to it, *Ex parte Hall, Re Whitting*, (1870) 10 Ch D 615 On the other hand debts due at the date of the assignment but payable at a future time may be validly assigned and if they become payable after bankruptcy they will nonetheless belong to the assignee and not to the receiver, *Ex parte Moss Re Toward*, (1884) 14 QBD 310 A mere license to seize chattels as a security for a debt is determinable in bankruptcy since the effect of bankruptcy is to bar the right to enforce the debt in such a case, *Thomson v Cohen*, (1872) LR 7 QB 527 See also *Hasluck v Clark*, (1899) 1 QB 699, *In Re Sargeant*, (1923) 2 Ch D 302

The receiver has a right to the subsequently acquired property of an insolvent but the right is subject to two qualifications — (1) if the insolvent has acquired the property subject to liens and obligations then any property taken by the Official Assignee under that state of things is taken subject to those charges and equities and (2) if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Insolvent Act in the first instance, the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in the trade in priority to the claim of the Official Assignee under the first insolvency, *Kerakoose v Benjamin Brookes*, 14 MIA 339, *Kristo Comul v Suresh Chandra*, 8 Cal 556 12 CLR 253, *Fatima v Fatima*, 16 Bom 452, following *Hubert v Sayer*, 5 QB 965, *Abdu' Kareem v Official Assignee*, 28 Mad 268, *Roulandson v Champion*, 17 Mad 21 The sums paid into a bank by a bankrupt after the date of the receiving order become the property of the trustee in bankruptcy and the bank was not entitled to credit themselves with the payments made to the bankrupt, as those transactions took place after the date of the receiving order and therefore not protected, *In re Wigzell Ex parte Hart*, (1921) 2 KB 835 Their Lordships of the Judicial Committee in *Kala Chand Banerji v Jagannath Maruati*, 54 IA 190 54 Cal 5 . 'The

moment the inheritance devolved on the insolvent who was still undischarged it vested in the receiver already appointed and he alone was entitled to deal with the equity of redemption.

Sums periodically falling due under a right already acquired such as an annuity or allowance or instalments due on an instalment bond or decree can hardly be treated as after acquired property in respect of instalments falling due after the insolvency. The right under which such instalment is claimed is acquired before the insolvency though some of the instalments fall due after it. A held a power of attorney from B to execute a decree for a monthly family allowance obtained by B against C. B subsequently became insolvent. C made certain payments to B subsequent to his order of adjudication but they were not certified to the Court executing the decree according to Or 21 r 2 CPC. On execution being taken up by the receiver it was contended by C that he ought to get credit for payments made subsequent to B's insolvency. It was held that the decree having become vested in the receiver as from the date of adjudication none of the payments made subsequently could be recognised as against the receiver if for no other reason than that none of them were certified to the Court under Or 21, r 2 CPC. *Nilakanta Subudhi v Sri Sri Ram Chandra* 35 L W 161, 1932 AIR (M) 250. Any payment made by debtors of the insolvent to him subsequent to the date on which the insolvency application is presented is void as against the Official Receiver unless the debtors prove that they had made the payment *bona fide* and without knowledge of the insolvency petition having been filed in Court. *Dharamdas Thauardas v F O Hukumchand Minmal* 1932 AIR (S) 62.

Vesting of after acquired properties under Mahomedan law

All properties such as may be acquired by or have devolved upon the insolvent after the passing of an order of adjudication and before his discharge forthwith vest in the Court or receiver and become divisible amongst the creditors. *Muhammad Fatima v Muhammad Moshuq Ali* 44 All 617, 20 ALJ 569. As regards the right of action of an undischarged insolvent to sue for a share of a dower debt due to his daughter from her husband it was held that the general rule is that the right except for personal injuries and the like passes to the trustee but even where the right passes to the trustee the bankrupt might sue the amount recovered being subject to the right of the trustee to claim the proceeds. *Umar Bahadur v Khaja Muhammal* 79 Ind C 15 56, 1924 AIR (Pat) 667. It is an established principle of Mahomedan law that when the consent of the heirs of a Mahomedan to a bequest in a will in favour of an heir has been signified the legatee takes from the testator and the consent does not operate as a transfer by the heirs of a right which has in the meantime vested in them. There may

be perhaps some conflict between this principle of Mahomedan law and the strict wording of sec 16 (4) [now sec 28 (4)] of the Insolvency Act but the principle of Mahomedan law ought to be applied and that such consent would not be affected by the fact of the consenting heirs being insolvents *Aziz un nissa Bibi v O M Chiene* 42 All 593

Insolvent's right of suit regarding after acquired properties

In *Ramnath Iyer v Nagendra Iyer*, 45 M L J 827 the question arose whether in the case of after acquired property the insolvent is entirely barred from maintaining any suit in respect of it and whether the receiver alone can sue. It was contended that because under sec 28 (2) and 28 (4) all the properties, including the after acquired property of the insolvent, vested in the receiver therefore no right existed in the insolvent himself and he is not entitled to maintain a suit. Following *Sriramulu v Andalammal* 30 Mad 145 17 M L J 14, it was held that in the case of after acquired property the insolvent has a right to maintain a suit subject to the intervention by the Official Receiver or the Official Assignee, and that if the Official Receiver or the Official Assignee did not intervene the insolvent was entitled to go on with the suit. Vide *Webb v Fox*, 7 T R 391

The difference between the bankrupt's estate which vests in the trustee in bankruptcy and after acquired property, which also vests on acquisition, is held to be that the bankrupt can deal with the latter until the trustee intervenes. If he sues in respect of an after acquired chose in action he can obtain a decree, and if the decree is satisfied before the trustee intervenes, the judgment debtor obtains a good discharge. The question remains between the trustee and the bankrupt if the after acquisition is discovered. In other words, persons who deal with an undischarged insolvent, in good faith, for value with regard to after acquired property are protected, *Cohen v Mitchell*, (1890) 25 Q B D 262, *Chote Lal v Kedar Nath*, 84 Ind Cas 289, *Kuppu Ramanatha v Nagendra*, 18 L W 868 45 M L J 827 1924 A I R (Mad) 223 76 Ind Cas 805. It is otherwise with regard to property which actually vests in the trustee at the date of adjudication order. Whether or not the plaintiff knew that he had no right to sue for the money he said he had advanced to the defendant seems immaterial. He must be taken to have known that his outstandings pass to the Official Assignee. It is quite clear that unless the adjudication order is annulled the insolvent cannot execute the decree. A suit will lie to set aside a decree obtained by fraud. *Andreu Rozario v Muhammad Ebrahim Serang* 48 Bom 583 26 Bom L R 695

Right of assignment of after-acquired properties.

A mortgage of subsequently acquired property by an undischarged insolvent was held to be invalid against Official Assignee.

who took the property free from incumbrances, *Roulandson v. Champion*, 17 Mad. 21. In *Sriramulu Naidu v. Andalammal*, 30 Mad. 145. 17 M.L.J. 14 (17 Mad. referred to) an undischarged insolvent was held entitled to recover certain immoveable property which he became entitled to by inheritance. In that case it was held: "No doubt the rule formulated in *Cohen v. Mitchell*, L.R. 25 Q.B.D. 262 does not extend to such an interest. But here there is no question of any contract or transfer by the insolvent relating to his after-acquired immoveable property." In *Ali Muhammad v. Vadi Lal*, 43 Bom. 890: 21 Bom L.R. 849 53 L.C. 197, it was said that the property moveable or immoveable acquired by the insolvent after adjudication but before final discharge can be transferred by him provided it is *bona fide* and for value. So also in *Dastu Mahar v. Official Receiver*, 97 L.C. 900. (1927) A.I.R. (N) 16, it was held that immoveable property acquired by an insolvent or devolving upon him after the adjudication order but before the final discharge can be transferred by him provided the transaction is *bona fide* and for value and is completed before the intervention of the Official Assignee. In *Premchand Mallik v. Neelmani Das*, 61 Cal. 281, a case under the Presidency Town Insolvency Act, it has been held that "an undischarged insolvent has a right to mortgage a property acquired by him after the order of adjudication was passed in the insolvency proceedings." Under sec. 28 (4) of the Provincial Insolvency Act, also, property acquired by inheritance by an insolvent after adjudication but before discharge vests in the Receiver forthwith and any mortgage of it during the insolvency by the insolvent is invalid. But where the Receiver does not claim such property, the mortgagee can enforce his claim against the property after discharge of the mortgagor, *Diwan Chand v. Manak Chand*, 36 P.L.R. 185: 1934 A.I.R. (L) 809.

But the above view has not been accepted as a correct proposition of law in *Ma Phaw v. Maung Ba Thaw*, 4 R 125: 5 Bur. L.J. 98. 97 I.C. 221 (1926) A.I.R. (R.) 179, and the High Court of Rangoon in delivering the judgment held that "the decisions in *Ali Muhammad v. Vadi Lal*, supra, and *Chota Lal v. Kedar Nath* 46 All. 565: (1924) A.I.R. (A.) 703 were under the Insolvent Debtors Act, 1848, sec. 7, and there is a material difference between the wordings of sec. 7 and sec. 28 (4) of the Provincial Insolvency Act. In the two cases abovementioned the Courts, following a long series of English cases, modified the words of the statute on apparent ground of convenience by postponing the vesting in the receiver until he had intervened. It seems to us that the insertion of the words 'forthwith' by the Legislature in sec. 28 (4) was to sweep away the Court's attempt to postpone the vesting. In view of the specific and clear words of the sub-section we are unable to apply the principle of *Cohen v. Mitchell* in the present case, as to do so, in our opinion, would

be to nullify the express direction of the Legislature. Hard cases may, no doubt, arise where the Court or the Receiver has taken no action and property has exchanged hands and been acquired by *bona fide* transferees without notice of the insolvency. But the remedy does not lie with the Courts but rather with the Legislature, and if it thinks well, it can imitate the English Statute of 1914, sec 47."

The view of the Rangoon High Court finds ample support in the decision of the Privy Council in *Kalachand Banerjee v Jagannath Maruani*, 31 CWN 741 (1927) AIR (PC) 108, in the following words: "The Court only acts though a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the receiver's actual appointment." But Ross, J., of the High Court of Patna has held in *Jagdish Narain v Mt Ramsakal Kuer*, 114 IC 465 9 Pat LJ 969 (1929) AIR (Pat) 97: "With all respect I am unable to hold that the language of the present section is stronger than that of the old sec 7. I should hold that this money was not liable to attachment if it had been effectively parted with before the Receiver intervened." Notwithstanding the order of adjudication an insolvent is not incompetent to enter into a contract and there is no statutory provision prohibiting an insolvent from transferring his property. So, where, after a person was adjudicated an insolvent certain property was gifted to him and he executed a mortgage thereof, but the receiver did not raise any objection and did not himself deal with the property, and after an order of discharge had been passed the mortgagee sued to enforce the mortgage, it was held that the mortgage was not void and could be enforced and that sec 43 of the Transfer of Property Act applied, *Rup Narain Singh v Har Gopal Tewari*, 55 All 503.

The point has been briefly summarised by Waller and Kishnan, JJ., in *Nilkanta Subudhi v Sri Sri Ramachandra Deo*, 35 MLW 161 1932 AIR (M) 250 in the following words: "There are several decisions under the Insolvency Act, 1848, which apply to sec 7 of the Act the doctrine enunciated in *Herbert v Sayer*, (1843) 5 QB 965 and *Cohen v Mitchell* 25 QBD 262, *Kerakoose v Brooks*, 8 MIA 339, *Ali Muhamed v Vadilal*, 43 B 890, *Dasarathu Sinha v Mahamuya* 47 C 961, *Chota Lal v Kedar Nath*, 46 All 565, and extend it to immovable property, *Kristocomul Mitter v Suresh Chunder Deb*, 8 C 556, *Srinamulu v Anadalammal*, 30 M 145. The matter is now governed in England by sec 49 (1) of the Bankruptcy Act 1914. There is also a considerable body of judicial opinion not without dissent, that the same extended doctrine holds good under the Provincial Insolvency Act. Both under the old Act of 1907 and under the present Act of 1920 [sec 28], 'after acquired property of an insolvent vests forthwith in Court or receiver. There is no similar expression in the

ding secs 17 and 52 (2) (a) of the Presidency Towns Insolvency Act of 1909 which deals with the vesting of after acquired property. In neither Indian Act is there anything corresponding to sec 47 of the English Act of 1914. Several decisions have however held the doctrine of *Cohen v Mitchell* applicable under the Provincial Insolvency Act also *Nagindas Bhukandas v Gulabdas* 44 B 673, *Jagdish Narain Singh v Mussamat Ramsakal Kuer* 8 Pat 478, *Ramanadha Ayyar v Nagendra Ayyar* 76 IC 805 45 MLJ 827. The Rangoon High Court *v Maung Ba Thau*, 4 Rang 125. In be some difference of opinion, *Rou* 1 *Abdul Kareem v The Official Assignee Madras* 28 Mad 168 17 MLJ 347. Were it necessary to decide the question we would have preferred to send the matter to a Full Bench. But we do not think it necessary to pronounce any opinion on the question argued. From the above it will appear that the law with regard to the vesting of after acquired property under the Provincial Insolvency Act 1920 is different from that under the Bankruptcy Act and the Presidency Towns Insolvency Act. Under sec 52 of the Presidency Towns Insolvency Act property acquired by the insolvent after his adjudication but before his discharge may be dealt with by him unless the Official Assignee intervenes. And a third party may acquire a good title to the same if he is *bona fide* purchaser for value from the insolvent. *Poonamchand Pratapji v Moulal Kapurchand* ILR 60 B 69. Under sec 28 (4) of the Provincial Insolvency Act however the insolvent has no right to deal in any way with the property acquired by him after his adjudication and before discharge whether the receiver intervenes or not. It has been held in *Girikant Shulai Pandia v Vadilal Vrijlal Shah* ILR 60 B 141 that the rule in *Cohen v Mitchell* (1890) 25 QBD 262 to the effect that property acquired by an insolvent after the date of the order of adjudication does not vest in the trustee in bankruptcy unless and until the trustee intervenes does not apply to cases arising under the Provincial Insolvency Act 1920, because section 28 subsection (4) of the Act provides that all property which is acquired by or devolves on an insolvent after the date of an order of adjudication and with vest in the Court or receiver property acquired by an undischarged order can be dealt with by him before the intervention of the Receiver in insolvency does not apply in India. Under S 28 property existing at the time of adjudication as well as property acquired by or devolving on the footing and both *Abdul Rahman v* 709 1935 AWR *Lingayya v Venkata-* 1002 1935 AIR

(M.) 694 ; *Devulipalli Sobhandri Sastrulu v. Dorbala Nagayya Sastry* 1 L.R. 1938 (M) 578. F.B. , *Duan Chand v. Manak Chand*, 1 L.R. 16 L. 392.

Effect of discharge on after-acquired properties.

So far as the debts due from the insolvent at the time of the order of adjudication are concerned he is released from them on an order of discharge. But the power of the Receiver to deal with the property which vests in him at the time of the order of discharge does not cease with the passing of the order of discharge. In *Kanshi Ram v Hari Ram*, 171 I.C. 610. 1937 A.I.R. (L) 87, the Official Receiver under misapprehension made a report that the insolvent's assets were completely disposed of and the order of discharge was passed, but certain property devolved on the insolvent some months before the order of discharge. It was held that the report of the Official Receiver did not affect the question as the assets inherited by the insolvent before order of discharge vested in the Official Receiver and s. 44 (2) did not take away his power to deal with the property inherited by the insolvent and which vested in him at the time of order of discharge even after the order of discharge.

Sub-section (5), Property not liable to attachment are exempted from vesting.

Under sec. 28 (5) all properties which are exempt by reason of sec. 60, C.P.C, or by any other law from liability to attachment and sale in execution of a decree do not vest in the receiver and are therefore, not liable to be sold to satisfy the claims of the creditors. This sub-section is an exception to sub-sections (2) and (4).

The following are some of the properties of the insolvent which are exempted by the C.P.C or by any other enactment from vesting in the Receiver :—

(1) *Tools of trade, etc* Tools of trade and the necessary wearing apparel and bedding of himself, his wife and children are not comprised in the term "property" so as to be divisible among the creditors of the insolvent, sec. 88 (2), *Bankruptcy Act, 1914*, and sec. 60, C.P. Code, V of 1908. Where some books belonging to the insolvent who was a lawyer were taken possession of by the Official Receiver but they were ordered to be released by the Insolvency Court it was held that books belonging to a lawyer were not exempt from liability to attachment and sale either under s 60 C.P. Code or under any other law and they should be deemed to come under s. 28 (2) of the Act and that therefore the order of the return of the books to the insolvent was illegal and was set aside. *Mangali Prasad v. Zafar Husain*, 1937 O.W.N 33 : 166 I.C. 228 : 15 A.I.R. (0) 177.

(2) *House of an agriculturist* A large landed proprietor even though his sole income is from land is not an agriculturist within the meaning of sec 60 (c) CPC and is not entitled to protection thereunder. The exemption from attachment under cl (c) of sec 60 CPC is given in respect of a house or building occupied by an agriculturist i.e. a house dwelt in by the agriculturist as such and necessary for his effectively pursuing his occupation as an agriculturist. *Muthu Venkatarama Reddier v Official Receiver South Arcot* 49 M 227 50 MLJ 98 92 IC 398 (1926) AIR (M) 350. No doubt ordinarily the Official Receiver can sell the equity of redemption but that is because all property of the insolvent vests in him. But in the case of an agriculturist insolvent according to the provision of sec 60 CPC the house of an agriculturist does not vest in the Official Receiver and therefore he cannot sell property which does not vest in him. This is so even with respect to a house wherein the agriculturist insolvent is residing not as an owner but as a lessee. *Rahiman v Nagar Mal* 1933 AIR (L) 1010. The exemption from attachment under proviso (c) to sec 60 (1) CPC is of a house occupied by an agriculturist and this means a house dwelt in or occupied by an agriculturist as such and in good faith for the purpose of agriculture. It does not include other houses belonging to and occupied by an agriculturist otherwise than in connection with his calling. *The Bank of Chetland v Ko San Ok* 11 R 372.

(3) *Occupancy rights* Under the Central Provinces Tenancy Act I of 1920 occupancy tenancy rights are exempt from attachment and when the tenant is declared insolvent those rights do not vest in the receiver. *Sitaram v Sheikh Sadar* 13 NLR 215 42 IC 710. Where a malguar having Sir land is declared insolvent his proprietary rights in the Sir land vest in the Insolvency Court but the occupancy rights which he acquires under sec 49 of the CP Tenancy Act do not vest in the Insolvency Court and the latter has no jurisdiction whatever over him. No one but the proprietor of the Sir land can divest him of his occupancy rights therein. *Sri Kishen v Nagoba* 76 Ind Cas 634. By sec 12 (2) of the CP Tenancy Act the occupancy land of an insolvent does not vest in the Insolvency Court under sec 28 and the Court has no power to lease out such land even for the period of one year. *Ghanasham v Yooaraj* 17 NLR 163 151 IC 889 1934 ALR (Nag) 231.

(4) *Agricultural holdings* *Agra Tenancy Act* There is no doubt that under sec 23 sub sec (1) of the Agra Tenancy Act II of 1901 the interest of an exproprietary tenant was not transferable in execution of a decree or otherwise except in accordance with the provisions of that Act. Section 28 sub section (5) Provincial Insolvency Act provides that the property of the insolvent for the purposes of vesting in the receiver shall not include any property exempted by the Code of Civil Procedure or by any other enact

ment from liability to attachment and sale in execution of a decree. As exproprietary holdings are not saleable it follows that they cannot vest in the Official Receiver. The result of the exproprietary holdings not vesting in the receiver obviously is that the exproprietary tenant will continue to be the tenant and it will not be open to the receiver to substitute any tenant for him, *Bhola Nath v Chinnu Lal*, 1932 A I R (All) 41. In *Raghunandan Singh v Bhupal Gir*, 1937 A L J 405 1937 A W R 342 169 I C 224 1937 A I R (All) 399 it has been held that under s 28 sub sec (5) the property of the insolvent does not include any property which, by any enactment for the time being in force, is free from liability to attachment and sale in execution of a decree. If the insolvent is an exproprietary tenant, and holds several exproprietary plots, such plots are not under s 23 Agr "saleable in execution of a creditor's decree" exproprietary plots do not vest in the receiver. The right to seize possession of them, or to manage them in his own right so as to realise the income and distribute the income among the creditors.

Punjab Alienation of Land Act. Similarly no land of a member of any tribe or community is liable to attachment and sale in execution of any decree of any Civil Court in pursuance of cl (5) of s 28 of the Provincial Insolvency Act and does not vest in the receiver for purposes of sale. *Bahadur Khan v Official Receiver*, 1936 A I R (Pesh) 109. *Official Receiver v Abdulla Khan*, 1937 A I R (Pesh) 51.

Punjab Tenancy Act. Occupancy rights under s 6, Punjab Tenancy Act, do not vest in the Court or in the Receiver under s 28. The diwani rights can vest in the Official Receiver only if they are occupancy rights under s 5, Tenancy Act, or are rights held under some peculiar tenure, outside the Act and are liable to attachment or sale in execution of a decree or order of a Court. *Sohan Singh v Official Receiver*, 40 P L R 8 1937 A I R (L) 782, *Murad v Lala Hans Raj* I L R 1938 (L) 104 1937 A I R (L) 680.

Bundelkhand Alienation of Land Act. "When a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, apply in contravention of that Act even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction purchaser, nor does it make any difference that after the passing of the decree the judgment-debtor has become insolvent, because under the terms of the Act the mortgaged property does not vest in the Receiver in insolvency and cannot therefore be sold by him," *Hanuman Prasad Narain Singh v Harakh Narain* 42 All 142 59 Ind Cas 551. Property which is exempted by virtue of sec 16 of the Bundelkhand Alienation of Land Act (3 of 1903) from liability to be sold,

execution of money decree is exempted from attachment and sale within the meaning of the Provincial Insolvency Act sec 28 (5) and does not vest in the receiver in insolvency. The policy of the Legislature obviously seems to be that properties which cannot be attached and sold do not vest in the receiver. There is no injustice in this for when the creditors cannot recover their debts by sale of the properties they suffer very little if their representative the receiver cannot realise the debt out of such properties. *Net Singh v Receiver of the estate of Gajraj Sing* 47 All 952 89 IC 488 23 ALJ 648 (1925) AIR (A) 467. On the sale of a Zemindari property which is exempted from attachment under the Bundelkhand Land Alienation Act the sale proceeds cannot be said to form the after acquired property of the insolvent and do not vest in the Receiver. *Jalaun District Co-operative Bank v Official Receiver Jhansi* 1935 ALJ 170 1935 AIR (All) 279.

In *Mirza v Jhanda Ram* 12 Lah 367 it was held that the agricultural land belonging to an insolvent vested in the receiver under section 28 (2) of the Provincial Insolvency Act even though the insolvent was a member of a notified agricultural tribe but under section 60 (2) of the Provincial Insolvency Act read with section 16 of the Punjab Alienation of Land Act XII of 1900 the receiver has no power to sell the land of the agriculturist insolvent to another agriculturist. As regards the sale of agricultural holdings vide Notes under sec 60 *infra*.

Dekhan Agriculturists Relief Act Under sections 25 and 26 of the Dekhan Agriculturists Relief Act (Bombay Act XVII of 1879) any agriculturist whose debts (if any) amount to fifty rupees or upwards may apply to any Subordinate Judge within the local limits of whose ordinary jurisdiction he resides to be declared an insolvent though he has not been arrested or imprisoned and though no order of attachment has issued against his property in execution of a decree and the Court shall declare an agriculturist an insolvent if it is satisfied that he is in insolvent circumstances. Under sec 29 of the same Act no immovable property of the insolvent shall vest in the receiver but the Court may direct the Collector to take into his possession for any period not exceeding seven years from the date on which the receiver has been appointed any immovable property to the possession of which the insolvent is entitled and which in the opinion of the Collector is not required for the support of the insolvent and the members of his family dependent on him and subject to any rules the Local Government may from time to time make in this behalf to manage the same for the benefit of the creditors by letting it on lease or otherwise.

(5) **Pensions** Under sec 4 of the Pensions Act XVIII of 1871 pensions are not attachable and therefore do not vest in the receiver. 20 ALJ 172. In *Nauab Bank Ltd* 59 Cal 1

their Lordships of the Judicial Committee held that they "agree with the view expressed in *Lachmi Narain v Makund Singh*, 26 All 617, that the word 'pension' alike in the Pensions Act (XXIII of 1871) and in the Civil Procedure Code, and their Lordships may add also in the Transfer of property Act (IV of 1882), section 6, implies periodical payments of money by Government to the pensioner" The word does not include rents drawn by a person not as pensioner, but as the limited owner of the properties which yield them Sec 11 of the Pensions Act is unqualified and must be strictly construed in favour of the pensioner On the insolvency of a pensioner, therefore, the pension drawn by him for past services is not property which is available for distribution among his creditors under s 28 (5) of the Provincial Insolvency Act, and the Insolvency Court has no power to pass an order directing the insolvent to pay to the Official Receiver any part of his pensions Such an order is erroneous in law *Purusottam Sinha v Satyendra Chandra Ghosh Moulik*, 42 CWN 142 164 IC 747.

(6) *Provident Fund money* The Provident Fund being excluded from attachment under sec 60, CPC, is not attachable and therefore does not vest in the receiver, *C D M Hindley v Joy Narain Maruani*, 24 CWN 288 Under section 3 (1) of the Provident Funds Act, XIX of 1925 'a compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on, any such compulsory deposit' Under sec 28 (5) of the Provincial Insolvency Act, V of 1920, the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of decree Hence the deposits in the provident fund being exempted by enactment from attachment are not 'property' and do not vest in the Receiver, *Jugannath Thirans v Tara-prasanno*, 3 Patna 74 Money to the credit of an undischarged insolvent in the Government Provident Fund is a compulsory deposit within the meaning of sec 2 (a) of the Provident Funds Act, and the Official Assignee has no claim on such deposit under sec 3 of the Act The Official Assignee cannot compel the insolvent to assist him in any way to withdraw the money from Government for the benefit of his creditors on the eve of the retirement of the insolvent from Government service, *In the matter of Walter Eduard Stead* 11 Ring 93 A compulsory deposit within the meaning of sec 2 (a) of the Provident Funds Act, is such deposit only so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood.

execution of money decree is "exempted from attachment and sale" within the meaning of the Provincial Insolvency Act, sec 28 (5) and does not vest in the receiver in insolvency. The policy of the Legislature obviously seems to be that properties which cannot be attached and sold do not vest in the receiver. There is no injustice in this for, when the creditors cannot recover their debts by sale of the properties, they suffer very little if their representative the receiver cannot realise the debt out of such properties. *Net Singh v Receiver of the estate of Gajraj Sing*, 47 All 952 89 I C 488 23 A L J 648. (1925) A I R (A) 467. On the sale of a Zemindari property which is exempted from attachment under the Bundelkhand Land Alienation Act, the sale proceeds cannot be said to form the after-acquired property of the insolvent and do not vest in the Receiver, *Jalaun District Co-operative Bank v Official Receiver, Jhansi*, 1935 A L J 170 1935 A I R (All) 279.

In *Mirza v. Jhanda Ram*, 12 Lah 367, it was held that the agricultural land belonging to an insolvent vested in the receiver under section 28 (2) of the Provincial Insolvency Act even though the insolvent was a member of a notified agricultural tribe, but under section 60 (2) of the Provincial Insolvency Act read with section 16 of the Punjab Alienation of Land Act, XII of 1900, the receiver has no power to sell the land of the agriculturist insolvent to another agriculturist. As regards the sale of agricultural holdings vide Notes under sec 60, *infra*.

Dekhan Agriculturists Relief Act. Under sections 25 and 26 of the Dekhan Agriculturists' Relief Act (Bombay Act XVII of 1879) any agriculturist whose debts (if any) amount to fifty rupees or upwards may apply to any Subordinate Judge within the local limits of whose ordinary jurisdiction he resides to be declared an insolvent though he has not been arrested or imprisoned and though no order of attachment has issued against his property in execution of a decree and the Court shall declare an agriculturist an insolvent if it is satisfied that he is in insolvent circumstances. Under sec 29 of the same Act "no immovable property of the insolvent shall vest in the receiver, but the Court may direct the Collector to take into his possession for any period not exceeding seven years from the date on which the receiver has been appointed, any immovable property to the possession of which the insolvent is entitled, and which, in the opinion of the Collector, is not required for the support of the insolvent and the members of his family dependent on him." The property so taken into possession may be sold for the benefit of the insolvent.

(5) **Pension.** Under sec 4 of the Pensions Act, XVIII of 1871 political pensions are not attachable and therefore do not vest in the Receiver, *Harnam Das v Faryazi Begum*, 20 A L J 172. In *Nauab Bahadur o' Murshidabad v Karnani Industrial Bank Ltd*, 59 Cal 1,

their Lordships of the Judicial Committee held that they "agree with the view expressed in *Lachmi Narain v Makund Singh* 26 All 617, that the word 'pension' alike in the Pensions Act (XXIII of 1871) and in the Civil Procedure Code and their Lordships may add also in the Transfer of property Act (IV of 1882), section 6, implies periodical payments of money by Government to the pensioner' The word does not include rents drawn by a person not as pensioner, but as the limited owner of the properties which yield them Sec 11 of the Pensions Act is unqualified and must be strictly construed in favour of the pensioner On the insolvency of a pensioner, therefore, the pension drawn by him for past services is not property which is available for distribution among his creditors under s 28 (5) of the Provincial Insolvency Act, and the Insolvency Court has no power to pass an order directing the insolvent to pay to the Official Receiver any part of his pensions Such an order is erroneous in law *Purusottam Sinha v Satyendra Chandra Ghosh Moulik* 42 CWN 142 164 IC 747

(6) *Provident Fund money* The Provident Fund being excluded from attachment under sec 60 CPC is not attachable and therefore does not vest in the receiver, *C D M Hindley v Joy Narain Marwan* 24 CWN 288 Under section 3 (1) of the Provident Funds Act XIX of 1925 a compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act 1920 shall be entitled to or have any claim on, any such compulsory deposit Under sec 28 (5) of the Provincial Insolvency Act V of 1920 the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of decree Hence the deposits in the provident fund being exempted by enactment from attachment are not 'property' and do not vest in the Receiver *Jugannath Thirans v Tara prasanno* 3 Patna 74 Money to the credit of an undischarged insolvent in the Government Provident Fund is a compulsory deposit within the meaning of sec 2 (a) of the Provident Funds Act and the Official Assignee has no claim on such deposit under sec 3 of the Act The Official Assignee cannot compel the insolvent to assist him in any way to withdraw the money from Government for the benefit of his creditors on the eve of the retirement of the insolvent from Government service In the matter of *Walter Eduard Stead* 11 Rang 93 A compulsory deposit within the meaning of sec 2 (a) of the Provident Funds Act, is such deposit only so long as it remains in the fund and not after it has been paid over to the person to whose credit it has stood

Therefore a compulsory deposit under the Provident Funds Act after it has been paid out of the funds to an insolvent, is not exempt from attachment, *Gouri Shankar v De Cruze*, 1 Luck 313 92 I.C. 673. 3 O.W.N. 378 1927 AIR (O) 22 In *Walchand Molaji Maruani v Charles A Williams*, ILR 59 B 517 37 Bom L.R. 494 : 159 I.C. 144. 1935 AIR (B) 396, it has been held that as long as a compulsory deposit is in the hands of the Government or the institution which keeps and manages the fund it is exempt from attachment under a decree by reason of s 60 (1) (k), C.P. Code, and it does not vest in the Official Receiver on the insolvency of the subscriber or in a Receiver under Ch XX CPC But after the amount standing to his credit is paid to the subscriber, and comes into his hands, it ceases to retain the character of a compulsory deposit and becomes his property He can then deal with in any manner he likes, and it is liable to be attached in execution of a decree against him For the same reason it vests in the Receiver if he is adjudicated an insolvent either before or after such acquisition by him of the amount, under the provisions of s 28 (4) of the Provincial Insolvency Act In *D. Palaya v T P Sen* 16 Pat LT 167 156 IC 159 1935 AIR (P) 211 the contract between an employer company and its employee as evidenced by the rules contemplated that at all times during all the years of service the amount contributed by the employee would be at his disposal, and whether he resigned or discharged or whether he purported voluntarily or involuntarily, to assign his interest, but he was not free to so assign the proportion contributed by the company It was held that on the insolvency of the employee the amount subscribed by the employee vested in the Receiver as the employee's property and the company could not resist the claim of the receiver Also in *Mrs A T. Martin v. R K Dutt*, 1938 AIR (N) 408, it has been held that "as soon as the amount of the provident fund reaches the insolvent depositor, it is liable to attachment and it becomes the property of the insolvent debtor insolvent and therefore attachable by Court"

The same rule applies to compulsory deposits in a private benefit fund A company created a Benefit Fund Scheme for its employees under which a certain proportion of the salary of the employees was compulsorily deducted as a subscription to the fund and when in the opinion of the directors the net profits justified them the company contributed a sum equal to the aggregate amount of the subscriptions of the members for the year The whole fund was vested in trustees, and the directors in their absolute discretion were entitled to pay or not to pay the sum standing to the credit of a member in the fund on his death or retirement A creditor of a deceased member attached the sum standing to the credit of such member in the fund in execution of his decree against the legal representatives It was held that the sum was not a "debt" within

sec 60 CPC and was not liable to attachment. A debt for the purpose of attachment must be a debt payable to the judgment-debtor but a sum which a person may or may not pay in his uncontrolled discretion is not a debt within sec 60 of the Code, *In re Baboo Jnan Hansraj v Irruadi Flotilla Co*, 11 Bom 116. But in a case under the Presidency Towns Insolvency Act the rules of the Provident Fund of a company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during services he was liable to forfeit his rights for the amount to the company. A member while in service was adjudged insolvent on his own petition and his rights vested in the Official Assignee. It was held that the effect of his petition was to transfer or assign immediately his property to the Official Assignee and that it was equivalent to a voluntary transfer by the debtor to the Official Assignee within the meaning of the Provident Fund rule, *In re Ernest Clarence O'Brien*, 60 Cal 926 37 CWN 1050 1933 AIR (Cal) 701.

(7) *Gratuity*. A gratuity payable to a railway servant at the end of his service and entirely at the discretion of the railway company with reference to which there was no contract or binding obligation to pay is not attachable under sec 60 (h), CPC. It is neither a debt recoverable in the hands of the person who could be compelled to hand it over to the employee nor is it in the nature of a completed gift, *Secy of State v Jumna Das*, 11 Pat 584 140 IC 561 1930 AIR (Pat) 311.

(8) *Security deposit*. "Insolvent's money deposited by him in Court as security for the costs of an appeal can be attached, but the order of attachment must be made subject to the result of the appeal." *Jagdish Narain v Mt Ram Sakal Kuer*, 114 IC 465 9 Pat LJ 959 (1929) AIR (Pat) 97.

Sub-section (6), what vests in the Receiver.

The property the receiver takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens. This is one of the fundamental principles of all arrangements for the realisation and distribution of bankrupt's property, *Sheobaran Singh v Kulsum unnessa*, 49 All 367 (PC) 31 CWN 853. Where any part of the insolvent's property is subject to a mortgage, the mortgagee has the right to redeem that property and can only realise the balance of the property. *Gobinda v Abdul Kadir*. The property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with consent of the mortgagee. Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free of the mortgage in case he did not reply, *Kamiappa Mudaly v.*

Therefore a compulsory deposit under the Provident Funds Act after it has been paid out of the funds to an insolvent is not exempt from attachment. *Gouri Shankar v. De Crespigny* 1 Luck 313 92 IC 673 3 OWN 378 1927 AIR (O) 22. In *Walchand Molaji Maruani v. Charles A. Williams* ILR 59 B 517 37 Bom LR 494 159 IC 144 1935 AIR (B) 396 it has been held that as long as a compulsory deposit is in the hands of the Government or the institution which keeps and manages the fund it is exempt from attachment under a decree by reason of s 60 (1) (k) CP Code and it does not vest in the Official Receiver on the insolvency of the subscriber or in a Receiver under Ch XX CPC. But after the amount standing to his credit is paid to the subscriber and comes in to his hands it ceases to retain the character of a compulsory deposit and becomes his property. He can then deal with in any manner he likes and it is liable to be attached in execution of a decree against him. For the same reason it vests in the Receiver if he is adjudicated an insolvent either before or after such acquisition by him of the amount under the provisions of s 28 (4) of the Provincial Insolvency Act. In *D. Pillay v. T. P. Sen* 16 Pat LT 167 156 IC 159 1935 AIR (P) 211 the contract between an employer company and its employee as evidenced by the rules contemplated that at all times during all the years of service the amount contributed by the employee would be at his disposal and whether he resigned or discharged or whether he purported voluntarily or involuntarily to assign his interest but he was not free to so assign the proportion contributed by the company. It was held that on the insolvency of the employee the amount subscribed by the employee vested in the Receiver as the employee's property and the company could not resist the claim of the receiver. Also in *Mrs. A. T. Martin v. R. A. Dutt* 1935 AIR (N) 408 it has been held that as soon as the amount of the provident fund reaches the hands of the undischarged insolvent depositor it ceases to be compulsory deposit i.e. not liable to attachment and it becomes the absolute property of the judgment debtor insolvent and therefore vests forthwith in the Insolvency Court.

The same rule applies to compulsory deposits in a private benefit fund. A company created a Benefit Fund Scheme for its employees under which a certain proportion of the salary of the employees was compulsorily deducted as a subscription to the fund and when in the opinion of the directors the net profits justified them the company contributed a sum equal to the aggregate amount of the subscriptions of the members for the year. The whole fund was vested in trustees and the directors in their absolute discretion were entitled to pay or not to pay the sum standing to the credit of a member in the fund on his death or retirement. A creditor of a deceased member attached the sum standing to the credit of such member in the fund in execution of his decree against the legal representatives. It was held that the sum was not a debt within

sec 60, C P C, and was not liable to attachment. A debt for the purpose of attachment must be a debt payable to the judgment-debtor but a sum which a person may or may not pay in his uncontrolled discretion is not a debt within sec 60 of the Code, *In re Baboo Jnan Hanraj v Irruadi Flouilla Co*, 11 Bom 116. But in a case under the Presidency Towns Insolvency Act the rules of the Provident Fund of a company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during services he was liable to forfeit his rights for the amount to the company. A member while in service was adjudged insolvent on his own petition and his rights vested in the Official Assignee. It was held that the effect of his petition was to transfer or assign immediately his property to the Official Assignee and that it was equivalent to a voluntary transfer by the debtor to the Official Assignee within the meaning of the Provident Fund rule. *In re Ernest Clarence O'Brien*, 60 Cal 926 37 C W N 1050 1933 A I R (Cal) 701.

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Raju Chettiar, 47 Mad 605 47 M L J 16 79 Ind Cas 850:1924 A I R (M) 761 In *Sridhar Naram v. Krishnaji*, 12 Bom 272, it was held that "the only interest the insolvent had in the mortgaged premises was the equity of redemption and this having vested in the receiver what passed to the purchaser was only the equity of redemption and nothing more, and he would be entitled to redeem the property The mortgaged property could not be sold by the receiver without the consent of the mortgagee or paying him off" It seems clear that in respect of properties which are subject to a mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes the whole of the property of the insolvent in such items This is the consequence of clause (5), section 16 (corresponding to clause (6), section 28 of the present Act) which preserves the right of secured creditors without affecting the Official Receiver's power to administer the encumbered estate, *Mokshagunam Subramania v Ramkrishna Aiyar* 42 M L J 426

Position of secured creditors.

This sub-section is section 7 (2) of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, which runs as follows :—"But this section shall not affect the power of any secured creditor to realise or otherwise deal with the security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed" It would be observed that section 7 (1) of the Bankruptcy Act, 1914, provides that on the making of a receiving orders no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or legal proceedings unless with the leave of the Court The rights of secured creditors to realise their securities are saved under this Act The restriction on right of secured security had sect 28 (2)] which imposes a restriction, not been passed A mortgagee is not prevented by the making of a receiving order from exercising his power of sale, *Ponsford v Union Bank, etc*, (1906) 2 Ch 244 A secured creditor, that is, a person holding a mortgage, charge or lien on the property of the debtor or any part thereof, as a security for a debt due to him from the debtor, is in the position of a person beneficially entitled for the time being to an interest in the bankrupt's property. To the extent of the security the bankrupt is in control of the property, if in control at all, as, in a sense a trustee for the creditor and the property, does not pass to the trustee in bankruptcy because trust property is not divisible among the credi-

tors A mortgagee who is in possession of the mortgaged property with the consent of the mortgagor has, in the event of the mortgagor being adjudicated insolvent the right to sell the property without the intervention of the Insolvent Court, *In re Ahmed Alimahomed Khoja*, 34 Bom L R 1938

For what constitutes a secured creditor, vide Notes under section 2 (1) (e), *supra*

Right of a secured creditor to realise his security is absolute.

It is well established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt with in sec 28 (6) and sec 47 of the Provincial Insolvency Act. Sec 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realise or deal with his security in any way he chooses, unhampered by the provisions of the Provincial Insolvency Act. Speaking broadly, under sec 47 a secured creditor may do one of the three things, he may enforce his security and prove for the balance that may be due to him, or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him, or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend if his security should prove insufficient, *Sant Prasad Singh v Sheo Dutt Sing*, 2 Patna 724. Where a mortgage executed prior to the insolvency of the mortgagor was satisfied after the mortgagor had become insolvent by the execution of a fresh mortgage to a third person it was held that the provisions of sec. 28 (6) protected the transaction in suit and that the latter mortgagee was entitled to possession under his mortgage as against the auction purchaser in insolvency proceedings *Ratan Lal v Govinda*, 90 IC 349 (1926) AIR (N) 29. A discharge does not affect the mortgage debt, and a Receiver, as a condition of dealing with mortgaged property, has in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule, the position of the mortgagee being essentially different from that of the unsecured creditors. *Sridhar Narain v Almaram*, 7 Bom 455. Generally a secured creditor stands outside that bankruptcy. He may rely upon the security and not prove for the whole debt. A secured creditor who comes in under the insolvency has only three courses open to him, viz, (1) that he may realise the security and then prove for the balance, (2) he may surrender the security and prove for the whole debt, (3) he may state the whole valuation at which he has assessed

security and then prove for the balance after deducting the assessed value, *Rajendrachandra Sarkar v Bipinchandra Shaha Bhaumik*, 60 Cal 1298 37 CWN 973 1934 AIR (C) 64. If the mortgagor becomes insolvent it is only the equity of redemption that vests in the Official Receiver, and if during the pendency of the insolvency proceedings, the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgaged amount from the compensation received for the property acquired, *Purushottam Naidu v Ramaswamy* 1925 AIR (Mad) 245.

Rights of a secured creditor in respect of goods pledged.

Where the security is on goods a creditor's power appears to be curtailed, for it is provided by sec 59 of the Bankruptcy Act, 1914 that where any goods of a debtor against whom a receiving order has been made are held by any person by way of pledge pawn or other security, it shall be lawful for the Official Receiver or trustee, after giving notice in writing of his intention to do so to inspect the goods, and, where such notice has been given, such person as aforesaid shall not be entitled to realise his security until he has given the trustee a reasonable opportunity of inspecting the goods and of exercising his right of redemption if he thinks fit to do so." The Receiver of the estate of an insolvent wanted inspection of some ornaments deposited with a bank but the latter refused permission on the ground that these were the security for a loan they had advanced and they were secured creditors. The Judge thereupon directed the bank to prove their claim and granted

It was held
wide powers
he Judge and

jurisdiction to make the orders he did although there had been no enquiry or proceedings under sec 53 or 54 and on formal petition by the Receiver, *The Luxmi Industrial Bank v Dinesh Chandra*, 55 Cal 1053 32 CWN 327. The rights of a mortgagee of moveable property are not in any way inferior to the rights of a mortgagee of immovable property because the mortgagee has the general estate in the property which is mortgaged to him, *Deterges v Sandeman Clark & Co*, (1902) 1 Ch D 579, *In re Ahmed Alimahomed Khoja*, 34 Bom LR 1398.

Court's right of restraint over secured creditors.

The right of the secured creditor to realise or otherwise deal with his security is unaffected by the presentation of a bankruptcy petition or the making of the receiving order [sec 7 (2) of the Bankruptcy Act, 1914]. Thus the Court has no jurisdiction to restrain a mortgagee of the bankrupt's property from selling the property, *Re Etelin, Ex parte General Public Works and Assets Co*, (1894) 2 QB 302, nor will it restrain a mortgagee from proceeding with a suit to enforce his mortgage *Ex parte Hirst, Re Wherly*,

(1879) 11 Ch D 278 A mortgagee of the land who gains possession even after bankruptcy is entitled as against those claiming under the bankruptcy to the crop growing on the land and as against the Official Receiver to the possession of the land *Re Gordon Ex parte Official Receiver* (1889) 6 Morr 115 The rule seems to be that the Court will not restrain an action for a claim from which the bankrupt would not be released by an order of discharge *Ex parte Coker* L R (1875) 10 Ch 652 An alleged bill of sale holder however or other mortgagee whose title there is substantial ground for impeaching will if it is submitted be restrained by the Court not under the powers of the section (sec 9 B Act) but in the exercise of its powers as a Court of Equity in any case where injunction is necessary for the preservation of property *Ex parte Bayley* (1880) 15 Ch D 223 In practice Receivers showing sufficient *prima facie* grounds for impeaching the title of mortgagees have obtained such injunctions—*Williams's Bankruptcy Practice* p 75 (13 Ed)

Under the Provincial Insolvency Act when a person claims to be the secured creditor of an insolvent he has to prove his claim and may be required to do so in the insolvency proceedings For such an order to be made it is not imperative that the Receiver should file a regular petition in the nature of a plaint or that there must be at first an enquiry under secs 53 and 54 Sub section (6) provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions contained in the sub sections which precede it Sec 47 lays down the procedure to be adopted by a secured creditor but his right under the section must necessarily be postponed when the legality of the charge is questioned *Moti Ram v Rodell* 21 ALJ 32 1923 AIR (All) 159

Suit by a secured creditor

Sec 28 (6) which is applicable only to the *mofussil* cannot be said to refer to the right of a mortgagee to effect private sale of the property The word realise must be understood in the ordinary sense of a secured creditor realising his security by a suit The right of a secured creditor to institute a suit or to proceed with a suit already commenced is not taken away by sec 28 (2) by reason of the adjudication of a mortgagor as an insolvent *Official Receiver v Coimbatore v Palaniswami Chetti* 48 M 750 49 MLJ 203 1925 MWN 672 88 IC 934 (1925) AIR (M) 1051 An unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrances did not estop the mortgagee from thereafter filing a suit to enforce his mortgage *Karnappa Miliy v Paju Chettiar* 47 Mad 605 47 MLJ 16 79 Ind Cas 850 1924 AIR (Mad) 761

Proof by a secured creditor The view that it is only after

creditor has proved in insolvency that he is a secured creditor that the provisions of sec 28 (6) apply, is clearly erroneous. A secured creditor owes his position to his security prior to the debtor's insolvency, and not necessarily to any proof in insolvency for his debt. *Kashi Bai v Chinulal Hathusing*, 31 Bom LR 1199 (1930) AIR (B) 11. The Privy Council decision in *Kalachand Banerjee v Jagannath Maruani* 54 Cal 595 relates to the question of a mortgagee and not of a decree. A decree having been passed before the insolvency proceedings, the subsequent insolvency proceedings will not invalidate the decree. By the terms of the decree the decree holder was a secured creditor and it was not necessary for him to prove in insolvency, *Bapuji v Tansa*, 120 IC 218 1930 AIR (N) 17.

Execution of decrees by secured creditors

When the decree holder is a secured creditor and has obtained a decree upon a mortgage bond that decree entitles him to realize the amount due to him from the property specifically hypothecated by that mortgage bond. There is no reasonable ground for saying that because a suit for the administration of the properties of the mortgagor had been pending a secured creditor is to be debarred from enforcing his security until the determination of the administration suit, *Kristomohini Dossee v Bama Churn Nag Choudry* 7 Cal 733. Where a person has got a right and it is contended that that right is taken away by statute the right cannot be held to have been taken away except by express words in the statute or by inference so clear from the terms of the enactment that there can be no doubt about it, *Haro Prita Dabia v Shama Charan Sen* 16 Cal 592. In *Sheoraj Singh v Gouri Sahay*, 21 All 227 it was held following *Sridhar v Atmaram*, supra, that a judgment creditor holding a decree

an insolvent judgment debtor will have been scheduled in the insolvent estate and is entitled to execute the decree. See also

16 *Gopi Nath v Guru Prashad* 15

and Cal 500. A judgment creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment and sale. *Jogendra Nath v Debendra Nath* 26 Cal 127.

Though in *Elizabeth May Toomey v Bhupendra Nath Bose* 7 Pat 520 it was held that "a judgment creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage decree although the Receiver who was appointed subsequently to the institution of the mortgage suit was not made a party to the suit" the observations apply in cases of sales of properties in civil suits in the hands of a Receiver but not in the case of sales of property in the hands of the Receiver in insolvency because a Receiver in

solvency occupies a much higher position than a Receiver in action. It therefore follows that "where during the pendency of insolvency proceedings a property of the insolvent was sold in execution of a decree without bringing the Official Receiver on the record, the sale is void and not binding on the Official Receiver as he had no notice of it. It is perfectly obvious why notice is necessary to the Official Receiver in a special sense because as the whole right, title and interest of the insolvent's property has, after adjudication become vested in the Official Receiver no title by sale or otherwise can be acquired without his concurrence," *Nainar Routhen v Kuppi Pichai Routhen*, (1929) M W N 168 120 1 C 889 (1929) A I R (M) 609

Leave for suit by a secured creditor not necessary.

The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by sec 28 (2) by reason of the adjudication of the mortgagor as an insolvent. The terms of sub sec 6 are quite general and there is no reason to conclude that the section, as a whole, was intended to deprive a secured creditor from enforcing his security. The general policy of the Act does not deal with the secured creditor. He may or may not choose to come on the schedule of creditors. He has the option (see 47) of coming in or enforcing his security and the Receiver is, in the case of a *bona fide* mortgage, bound by it. Therefore sec 28 (2) is subject to sec 28 (6) and that sub section (2) does not in any way affect the right of a secured creditor to proceed with the suit to enforce his security, *Official Receiver, Coimbatore v Palaniswami Chetti*, 48 Mad 750 49 M L J 203 1925 M W N 672 88 1 C 934 (1925) A I R (M) 1051. In *Kashi Bai v Chunilal Hathisingh*, 31 Bom L R 1199 (1930) A I R (B) 11 it was held that having regard to the decision in *Whue v Simmons* (1871) 6 Ch 555 and *Lang v Heptulla Bhai Ismailjee*, 38 Bom 359 15 Bom L R 393 21 1 C 714 a suit by a secured creditor to realise his security is maintainable without the leave of the Court. "A secured creditor of an insolvent is entitled notwithstanding sec 28 (2) to realise the security by filing a suit or obtaining the leave of
Firm v Maung Thaung, 1 leave of Court is required for appointed under the Insolvency
Khandappa, 8 Mys L J 331. No necessary in execution of a decree by a secured creditor against the property of the insolvent, *Rajendrachandra Sarkar v Bipinchandra Shaha Bhaumik*, 60 Cal 1298 37 C W N 973 1934 A I R Cal 64

Receiver a necessary party in a suit by a secured creditor.

Where a person prior to being adjudicated insolvent executes a mortgage, the mortgagee as a secured creditor has by reason of sec. 16 (5) [now 28 (6)], a right to proceed with a suit upon the

mortgage and to realise his security in spite of the fact that the equity of redemption has vested in the Receiver who has no right to transfer the property free of the claim of the mortgagee. In view of the words in the same manner in sec 28 (6) it was doubted whether the Receiver was a necessary party. *Mohammad Moniruddin v Mahmood Baksh* 63 Ind Cas 91 *Shyam Saroop v Nand Ram* 43 All 555 19 A.L.J 511 63 Ind Cas 366

But in *Mokshagunim Subramania v Rani Krishna Aiyar* 42 M.L.J 426 it was held that during the pendency of insolvency proceedings no creditor has any remedy against the property of the insolvent or may commence any suit without the leave of the Court [sec 28 (2)]. Insolvency proceedings commence with the presentation of a petition. A suit commenced thereafter was irregular and the decree and subsequent execution proceedings to which the Receiver was not a party did not bind him. The debt due to the appellant was provable under the Act under sec 47 and therefore he could not claim immunity from the provisions of sec 28 of the Act. The appellant having only an equitable right under the provisions of sec 55 (4) of the T.P. Act to recover the purchase money from the property that he had sold did not obtain the status of a secured creditor until his right was declared by a decree of a Court. The decree that he obtained cannot be pleaded in defence to a claim made by the Official Receiver or the Assignee from him. As pointed out in *Punithavela v Bhashyam Aiyangar* 25 Mad 406 the Official Assignee or Receiver is not affected by the doctrine of *lis pendens* and the party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit under Or XXII r 10 of the CPC. The lien that he had should not in any case prevail against the title of a bona fide purchaser without notice and that the respondent's title is not affected by the proceedings taken by the appellant behind the back of the Official Receiver.

The point arose in *Jagannath Marwar v Kalachand Bannerjee* 41 C.L.J 290 29 C.W.N 771 in which it was contended that in a mortgage suit all persons having an interest in the equity of redemption must be made parties and as the right of the insolvent vested in the Receiver he was a necessary party. It was held by the High Court under sec 58 of the Act the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce the mortgage? That would be clearly absurd. The reasonable construction of sec 28 (6) must therefore be that a secured creditor is not in any way affected by the other provisions of that section and for the purpose of enforcing his mortgage it should be held that the title to the property remained with the mortgagor.

But in appeal the Privy Council in *Kalachand Bannerjee v Jagannath Marwar* 54 Cal 595 31 C.W.N 741 (1927) A.I.R.

(P.C.) 108 overruling the decision held that the 'learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is of course plain but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he and not the insolvent has the sole interest in the subject matter of the suit. To him therefore must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of unsecured creditors of the insolvent with whose interest the Receiver is charged.

In view of the above Privy Council decision the judgment in *Khaanchi Shah v. Nizam Din* 126 I.C. 174 1930 A.I.R. (L.) 791 to the effect that the Receiver is not a necessary party to a mortgage suit instituted by the creditor of an insolvent to enforce a mortgage is hardly correct. *Vide Karim Buksh v. Khessa* 36 P.L.R. 483 1935 A.I.R. (L.) 316. It should be noted that the filing of a suit prior to the adjudication must be regarded outside the purpose of the Insolvency Act with reference to the provisions of sec. 28 (2) of the Act and the bringing in of the Official Receiver as a party to the suit is merely a matter of compliance with such orders as the Court may pass under sec. 29 of the Act. The order of appointment of interim Receiver has not got the same effect as the vesting order or the order of adjudication. *Kalahaperumal Naicker v. Ramachandra Aiyar* 53 M.L.J. 142. It is not open to the heirs of a mortgagor who were neither the creditors nor the insolvent nor in any way representing the Receiver to object to the validity of the mortgage on the basis of sec. 16 (2) now sec. 28 (2). *Shyam Saroop v. Nand Ram* 43 All. 555 19 A.L.J. 511 63 I.C. 366. In *Rajendrachandra Sarkar v. Bipin Chandra Sahi Bhaumik* 60 Cal. 1298 37 C.W.N. 973 1934 A.I.R. (Cal.) 64 it was held that under sec. 17 of the Presidency Towns Insolvency Act the Official Assignee is a necessary party in a suit by a secured creditor to enforce his charge or lien against the property of the insolvent in the hands of the Official Assignee.

Decree null and void—When Receiver is not made party in a suit by secured creditor

When a mortgaged property vests in a Receiver the can not bring or continue a suit for foreclosure without

the Receiver the defendant and a decree obtained in his absence is not *res judicata* against him. In *Punjab National Bank Ltd v Mt Champo*, 39 P L R 627 1937 A I R (L) 402, the mortgagee brought a suit on his mortgage against a joint family firm of which the manager was the only adult member of the family and *Karta* thereof. The mortgagee knew before the institution of the suit that the *Karta* and the family firm were adjudged insolvent but he did not implead as defendant the Official Receiver in whom the property of the firm vested on the insolvency of the firm. It was held that the mortgage decree and the proceedings subsequent to it were null and void as the Official Receiver in whom the property of the firm vested on the insolvency of the firm though necessary party in the mortgage suit was not made a defendant in the suit. The sale, therefore, in connection of his mortgage decree did not pass any title to the decree holder auction purchaser, so as to entitle him to sue for possession.

Notice to Receiver before suit.

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy and the whole of the property of the insolvent is vested in him, and he is the owner of the property until he is discharged. He is an officer of the Court and does not represent either the debtor or the creditor, *Amrit Lal v Naran Chandra*, 30 C L J 515. The Receiver is an officer of the Court and the possession of the Receiver is the possession of the Court, *Hunselaar v Rakhal* 18 C W N 366. A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of sec 2 (17) of the CPC and before an action can be brought against him notice must be served upon him in conformity with the requirements of sec 80 of that Code, *Anna Latesia De Silva v Govind Balasant Parashere*, 22 Bom L R 987 58 Ind Cas 411. The official duties of a Receiver in insolvency fall within the purview of sec 2 (17) of the CP Code, and outside the Insolvency Court which appointed him he is entitled to the protection afforded by sec 80, CP Code. No suit can, therefore, be instituted against him in respect of any act done by him in his capacity as such public officer without a previous notice of the kind prescribed by sec 80, CP Code. A sanction granted by the Insolvency Court to file a suit cannot be taken as tantamount to a notice to a Receiver within the meaning of sec 80, CP Code, *Murarlal v E V David*, 84 Ind Cas 739 22 A L J 1116. Sec 80 of the CPC would not apply to a suit against the Official Receiver, where the suit was really a suit to establish and realise a charge over property and the Official Receiver was impleaded not on account of any special action taken by him in respect of the property concerned but merely because he was for the time being in charge of it, *Skippers & Co, Ltd v E V David*, 48 All 821. No notice under sec. 80 is required unless

the suit is against the Receiver in respect of an act done by him in discharge of his duty. *Anantha Raman v Ramaswami* 11 Mad 317 Though a Receiver appointed under the Provincial Insolvency Act may be a public officer within the meaning of section 80 CPC, yet a suit to recover a mortgage security being not a suit in respect of any act done by the Receiver as such is maintainable without notice under sec 80 *Kashi Bai v Chundal* 31 Bom LR 1199 (1930) AIR (B) 11, see also *Ravi Mohan Das v Jatindra Mohan Ghosh*, 61 1A 171 61 Cal 470 38 CWN 517 (PC) 59 CLJ 252 148 IC 482 1934 AIR PC 96

Sub-sec. (6) is controlled by sub-sec (3)

In *Shamaldas Kshetry v Phanindranath*, 72 Ind Crs 467 1923 AIR (Cal) 532 the Court observed "If a secured creditor can proceed to realise his security or deal with it in the same manner as he would have been entitled to do had sec 28 not been passed, we do not see how the reputed ownership clause in sub-section 3 can have any operation" It has also been held in *Mon Ram v E H Roduell*, 21 ALJ 30 1923 AIR (A) 159, the sub-section (6) is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provision of the sub-sections which precede it, i.e., sub-section (3) So also in *Sant Prasad Singh v. Sheo Dutt Singh*, 2 Patna, 724, it was held that a secured creditor is entitled to realise his security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act

The above rulings practically make sub-section 3 nugatory, contrary to the intention of the Legislature If sub-section 3 had no operation at all, there was no reason why it should have been embodied in the Act itself The anomaly created by the authorities cited above is due to the fact that the distinction between a secured creditor in general and a secured creditor of goods in trade or business allowed to be in the order or disposition of the debtor has not been properly kept in view No doubt a secured creditor is not hampered in any way by the provisions of the Insolvency Act provided his security does not consist of goods in trade or business in the order or disposition of the debtor, as contemplated in sub-section 3 Sub-section 3 is based upon the doctrine of estoppel and is an exception to the general rule laid down in sub-section 6

Sub-section (7), Doctrine of relation back.

Under section 37 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 the bankruptcy of a debtor, whether it takes place on the debtor's own petition or that of a creditor or creditors, shall be deemed to have back to, and to commence at, the time of the act of being committed on which a receiving order is made

against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. The assets of bankrupt under the English Bankruptcy Act, vest in the trustee in bankruptcy from the date of the acts of bankruptcy. Section 28 (7) enunciates the well known doctrine of relation back in insolvency law. The principle underlying the doctrine is that the adjudication has relation to the act of bankruptcy and the property vests by relation, from that time in the trustee in bankruptcy. This is the English rule. Under the English law, the insolvency commences either on the date of presentation of the petition or from the earliest act of insolvency committed within three months before the date of the presentation of the petition and the title of the trustee in bankruptcy relates to that date. Under sec 28 (7), however, the insolvency, commences from the date of the presentation of the petition. The only difference is as to the point of time when the insolvency commences, *Nagara Sambayya v Nagara Pedda Subbayya*, 1937 MWN 929 46 MLW 559 1937-2 MLJ 703 1938 AIR (M) 19

On September 20, 1917, a debtor transferred his assets including certain furniture to a company. On September 27, he committed an act of bankruptcy and a receiving order was made against him on October 24, 1917, on a petition presented on October 8, followed by an adjudication order on December 12. After the date of the receiving order part of the furniture was sold by the company to a *bona fide* purchaser for value without notice. On February 3, 1919, the transfer of September 20, was held to be fraudulent and void and an act of bankruptcy and the company was ordered to deliver to the trustee all the property comprised in that sale or the value thereof. No payment having been made the trustee claimed to recover the furniture or the value from the purchaser. It was held by Lord Sterndale, M R and Warrington, L J, on the authority of *Brinsmead v. Harrison*, (1871) LR 6 Ch Prac 584 (1) that the judgment against the company being unsatisfied, the trustee was not precluded from proceeding against the purchaser to recover the furniture, and (2) that the title of the trustee relates back to the act of bankruptcy of September 20, 1917 and that neither the purchaser nor any subsequent transferee could establish any title as against the trustee, *In re Gunsbourg*, 1920, LR 2 KB 426

There may for various reasons elapse a long time between the presentation of the application and the order of adjudication passed therein under the Provincial Insolvency Act. Under the Presidency Towns Insolvency Act, III of 1909, section 10, an order of adjudication

cation is passed on the presentation of an application for insolvency, and in England order of adjudication takes effect from the date of an act of insolvency, under the Provincial Insolvency Act it takes effect from the date of the presentation of the application for the purpose of making the property of the insolvent liable to claims of the creditors. It follows that from that time the property of the debtor is made available for the payment of the debts. In *Rakhai Chandra Purkait v. Sudhindra Nath Bose* 46 Cal 991 24 C W N 172 it has been held "if the contentions of the appellant were accepted the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than 2 years, for instance, where the matter goes up to the Privy Council on appeal, and in such a case transfers made by the insolvent within 2 years before the date of the presentation of the petition for insolvency but more than 2 years before the order of adjudication would become valid. We don't think that such a result has been contemplated."

The bankruptcy in England is deemed to have relation back to and commence at the time when the act of bankruptcy is committed, *Re Bompus, Ex parte White*, (1908) WN 90. The effect of sub sections (2) and (6) of sec 16, [now (2) and (7) of sec 28], is that, while no vesting of the property of the insolvent in the Receiver takes place until the order of adjudication is made, and it is the order of adjudication which vests the property, nevertheless by a legal fiction the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition, or in other words, the commencement of the insolvency, *Sheonath Singh v. Minsu Ram*, 42 All 435, 55 Ind Cas 941 18 ALJ 449. See also *Bhagwant v. Munim Khan*, 8 Ind. Cas 1115 6 NLR 146. *Sankar Narayan v. Alagiri*, 49 Ind Cas 283 1918 MWN 487 24 MLT 149, 35 MLJ 296, *Rachamadugu Rangiah v. Appaji Rao*, 51 MLJ 719 99 IC 241. *Simhadri Venkatanarsayya v. Official Receiver, Godavary*, 53 MLJ 136.

Effect of adjudication on transfers.

Following *Jokhan Sing v. Deputy Commissioner of Fyzabad*, 23 Ind Cas 924 and *Nagendas v. Gordhan*, 49 Bom 730 the Lahore High Court has held in *Ghulam Mohammed v. Panna Ram*, 72 Ind Cas 433, that sec 16 (6) [now sec 28 (7)] does not govern sec 36 (now section 53), of the Act, and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. "The meaning of a statute is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ." This view was supported in *Official Receiver v. Tirathdas*, 97 IC 321. *Mang Pi v. Maung Po Htein*, 6 Rang 193.

To remove the conflict of authorities accentuated by the Full Bench decision in the case of *Hemraj v Krishna Lall* 10 Lah 106 (FB) 29 PLR 446 (FB) 111 IC 8 (1928) AIR (L) 361 sec 53 has been amended by sec 6 of Act X of 1930 by insertion of the words 'on a petition presented after the words is adjudged insolvent'. The effect of this amendment is that all transfers made more than two years before the order of adjudication but within two years from the date of the presentation of the petition are liable to be annulled.

Effect of adjudication on payments

Any payment made by debtors of the insolvent to him subsequent to the date on which the insolvency petition is presented are void as against the Official Receiver unless the debtors prove that they had made the payments *bona fide* and without knowledge of the insolvency petition. Where the debtors fail to appear before the Court and thus do not raise any such contention the Court is not justified in giving credit to the payments made by them to the insolvent and reducing the claim of the Official Receiver only on the statement of the insolvent that when the debtors made the payments they were not aware of the petition for adjudication and that they made the payments *bona fide*. *Dharamdas Thawardas v Hukumchand Mirmal* 1932 AIR (S) 62 Sec 34 is governed by sub sec (7) of sec 18. Hence if the right to recover a debt has become barred by time on the date when the order of adjudication is made but the right subsists on the date of the presentation of the petition or on the date when the application is admitted the creditor is entitled to prove his debt as the statute of limitation does not affect debts which are within time on the date of the petition. *Nizam v Babu Ram* 34 PLR 464 143 IC 175 1933 AIR (L) 688.

Effect of adjudication on suits or legal proceeding instituted before adjudication without leave

The intention of sub section (7) is that the title of the Court or the Receiver appointed by it to the insolvent's property shall relate back to the date when the petition for adjudication is filed and it is not correct that it is imperative on a creditor to obtain leave to commence a suit when the defendant has merely applied to the Court and it is not known whether the Court will or will not grant leave. *Chandmull Sardarmull v Satya Churn*

29. Any Court in which a suit or other proceeding is pending against a debtor shall on proof that an order of adjudication has been made against him under this Act, either

Stay of pending proceeding

stay the proceeding, or allow it to continue on such terms as such Court may impose

Review.

This section is new. The reason for introducing this new section is explained in the following words—“There is no provision in the Act for the dismissal or stay of suits which are pending against a debtor when an order of adjudication is made against him. We have therefore proposed the addition of a new section on the lines of section 18 (3) of the Presidency Towns Insolvency Act, 1909”—*Select Committee Report*, 24th September 1919. “There seems to be much confusion of mind as regards the proper step to be taken when a defendant is adjudicated insolvent during the pendency of the suit. In any case in which the suit is merely one to establish a claim which in insolvency would be a provable debt or liability, the correct course clearly is to stay the suit in order that the plaintiff's claim may be proved in the insolvency and to give leave to prove for the costs incurred in the suit. It is much better that it should be proved in the insolvency than that a law suit should go on either against the insolvent who has no interest or his Receiver. The only cases in which suits should be allowed to go on against the insolvent or his Receiver are cases in which the insolvent has an interest of his own, or cases in which the plaintiff is insisting upon a right which is not a mere claim to a provable debt, e.g., where the plaintiff is a mortgagee insisting upon his security”—*Civil Justice Committee Report*, 1924-25, pp 235-236, para 20.

Scopes of secs. 29 and 52 contrasted.

Section 29 of the Provincial Insolvency Act, deals with the effect of an order of adjudication, while Section 52 deals with the effect of an order of admitting the petition for adjudication. Under S 52, the material point of time is not the date of the order of adjudication but the date of the admission of the insolvency petition. The point of difference is, that whereas under s 29 on mere proof of an order of adjudication having been made the executing Courts' power is checked, under s 52 no such result automatically follows from the mere fact that notice of the admission of the insolvency petition has been given to the Court, there must also be an application to the Court for delivery of the property. *Muthan Chettiar v Venkitesuami Naicken* 11 LR 59 M 928 1936 MWN 753 44 LW 194 71 MLJ 170 1936 AIR (M) 819.

No leave required for suits filed before adjudication.

It has been provided in sec 28 (2) that on an order of adjudication no creditor to whom the debtor is indebted shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or

any suit or other legal proceeding without the leave of the Court. This does not provide for the suits that are already pending in different Courts against the insolvent. In regard to such suits it is provided by this section that on proof that an order of adjudication has been made these suits if for realisation of money will be stayed and if not for realisation of money may be allowed to continue on such terms as the Court will impose. The Bankruptcy Act 1914 as amended by Bankruptcy (Amendment) Act 1926 in sec 9 (1) contains the following provision namely: The Court may at any time after the presentation of a bankruptcy petition stay any action execution or other legal process against the property or person of the debtor and any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against a debtor either stay the proceedings or allow them to continue on such terms as it may think just. See in this connection sec 52 in *ra*.

By sec 16 (2) [now sec 28 (2)] an order of adjudication operates not as an absolute stay of all proceedings against the insolvent but as a direction that before a suit is brought a condition precedent should be complied with viz leave of the Court should be obtained. *Ramaswami Pillay v Govindaswami Naicker* 25 MLT 247. S 28 (2) does not come into play until an order of adjudication has been made and there is nothing to prevent the creditors from taking proceedings against the debtor's property. S 29 deals with suits or proceedings which are pending when an order of adjudication is made. It is the trying Court and not the Insolvency Court which has jurisdiction to decide whether such suits shall be stayed or not. *G C Chakravarti v E White* 1 LR 63 C 535 40 CWN 836. The provisions of s 28 (2) are mandatory and after an order of adjudication is made no suit or other proceeding can be instituted against the insolvent or his property without the leave of the insolvency Court and such leave is a condition precedent to the right of action. The want of previous sanction is a defect fatal to the suit and subsequent leave cannot validate it. Leave to continue a suit filed after order of adjudication without the leave of the Insolvency Court can not be granted subsequently under s 29 of the Act as it applies to suits which are already pending when the order of adjudication is made. *Dauood Mohideen Rauter v Sahabdeen Sah b* 1 LR 1937 M 841 45 MLW 709 1937 MW N 654 1937 2 MLJ 223 173 IC 286 1937 AIR (M) 667. The filing of a suit prior to the adjudication but after the date of the presentation of the petition must be regarded as outside the purpose of the Provincial Insolvency Act with reference to the provisions of sec 28 (2) of the Act and the bringing in of the Official Receiver as a party to the suit is merely a matter of compliance with such orders as the Court may pass under sec 29 of the Act. *Kalia perumal Naicker v Ramachandra Aiyar* 53 MLJ 142. If during the pendency of a suit a party is adjudicated insolvent he is not dis

qualified by reason of his insolvency from appealing and if his adjudication is annulled during the pendency of the appeal he is entitled to continue the appeal *Rama, handra Genuji v Shripati Sukaji*, 1181 C 252

Insolvency Court has no power to order stay.

Under sec 9 (1) of the Bankruptcy Act, 1914, the Court has power to stay any action, execution, or other legal process against the property or person of the debtor. This power may be exercised at any time after the presentation of a bankruptcy petition, before a receiving order as well as after. If upon the hearing of the petition for committal the debtor satisfies that receiving order had been made against him or that he has been adjudicated insolvent and that the debt was provable in bankruptcy no order for committal can be made and if made and he makes and affidavit that any of these had happened, it cannot be enforced and if he has been arrested, he shall be released, *Re Nuthally*, (1891) WN 55. Sec 18 of the Presidency Towns Insolvency Act provides that "(1) the Court may, at any time after the presentation of a petition, stay any action, execution, or other legal process against the property or person of the debtor before any Judge or Magistrate to the superintendence of the Court." There is no provision in the Provincial Insolvency Act, corresponding to sec 18 of the Presidency Towns Insolvency Act empowering the Insolvency Court to stay proceedings pending against the insolvent before that Court or any other Court. The Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in Or 39, r 6, C P C or any of them is proved to exist. It has no jurisdiction to issue an injunction upon a person who is not a party before it, *Ramsunder Rai v Ram Dhyani Ram*, 3 PLJ 456. CWN Pat (1918) 303 461 C 224. In *G C Chakrabarti v E White*, 1 LR 63C 535 40 CWN 336, it has been held that an Insolvency Court which makes an order for summary administration under s 74 is not entitled to make an order requesting another Court which, in execution of a decree against the debtor has, prior to the presentation of the petition by the debtor, attached his salary, to withdraw such attachment. Such an order is without jurisdiction and s 74 (ii) does not give the Court power to pass such an order either under sec 51 or 52 of the Act. It should be noted that though the Insolvency Court has no power to stay proceedings in any other Court, it has under sec 36 power to stay insolvency proceedings pending before it.

Civil Court has power to order stay.

Sec 29 gives power to the Court before which a suit or other proceeding was pending against a debtor to stay the proceeding or to continue it on such terms as the Court may impose on proof

any suit or other legal proceeding without the leave of the Court. This does not provide for the suits that are already pending in different Courts against the insolvent. In regard to such suits it is provided by this section that on proof that an order of adjudication has been made, these suits, if for realisation of money, will be stayed, and if not for realisation of money, may be allowed to continue on such terms as the Court will impose. The Bankruptcy Act, 1914, as amended by Bankruptcy (Amendment) Act, 1926, in sec 9 (1) contains the following provision, namely, 'The Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against a debtor, either stay the proceedings or allow them to continue on such terms as it may think just.' See in this connection sec 52 *infra*.

"By sec, 16 (2) [now sec 28 (2)] an order of adjudication operates not as an absolute stay of all proceedings against the insolvent but as a direction that before a suit is brought a condition precedent should be complied with, viz' leave of the Court should be obtained." *Ramaswami Pillay v Goundaswami Naicker*, 25 MLT 247. S 28 (2) does not come into play until an order of adjudication has been made and there is nothing to prevent the creditors from taking proceedings against the debtor's property. S 29 deals with suits or proceedings which are pending when an order of adjudication

is made. The Insolvency Court which
such suits shall be stayed or not
ILR 63 C 535 40 CWN 836

The provisions of s 28 (2) are mandatory and after an order of adjudication is made, no suit or other proceeding can be instituted against the insolvent or his property without the leave of the insolvency Court and such leave is a condition precedent to the right of action. The want of previous sanction is a defect fatal to the suit and subsequent leave cannot validate it. Leave to continue a suit filed after order of adjudication without the leave of the Insolvency Court can not be granted subsequently under s 29 of the Act, as it applies to suits which are already pending when

Dauood Mohideen Rauter v
- 45 MLW 709 1937 MW
IC. 286 1937 AIR, (M) 667

The filing of a suit prior to the adjudication but after the date of the presentation of the petition must be regarded as outside the purpose of the Provincial Insolvency Act with reference to the provisions of sec 28 (2) of the Act and the bringing in of the Official Receiver as a party to the suit is merely a matter of compliance with such orders as the Court may pass under sec 29 of the Act. *Kalaperumal Naicker v Ramachandra Aiyar*, 53 MLJ 142. If during the pendency of a suit a party is adjudicated insolvent, he is not dis

qualified by reason of his insolvency from appealing and if his adjudication is annulled during the pendency of the appeal he is entitled to continue the appeal *Rama Krishna Genuji v Shripati Sukaji* 118 IC 252

Insolvency Court has no power to order stay.

Under sec 9 (1) of the Bankruptcy Act 1914 the Court has power to stay any action execution or other legal process against the property or person of the debtor. This power may be exercised at any time after the presentation of a bankruptcy petition before a receiving order as well as after. If upon the hearing of the petition for committal the debtor satisfies that receiving order had been made against him or that he has been adjudicated insolvent and that the debt was provable in bankruptcy no order for committal can be made and if made and he makes and affidavit that any of these had happened it cannot be enforced and if he has been arrested he shall be released *Re Nuthall's* (1891) WN 55. Sec 18 of the Presidency Towns Insolvency Act provides that (1) the Court may at any time after the making of an order of adjudication stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court of any other Court subject to the superintendence of the Court. There is no provision in the Provincial Insolvency Act corresponding to sec 18 of the Presidency Towns Insolvency Act empowering the Insolvency Court to stay proceedings pending against the insolvent before that Court or any other Court. The Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstance enumerated in Or 39 r 6 C P C or any of them is proved to exist. It has no jurisdiction to issue an injunction upon a person who is not a party before it *Ramsunder Rai v Ram Dhyani Ram* 3 PLJ 456 CWN Pat (1918) 303 46 IC 224. In *G C Chakrabarti v E White* ILR 63C 535 40 CWN 336 it has been held that an Insolvency Court which makes an order for summary administration under s 74 is not entitled to make an order requesting another Court which in execution of a decree against the debtor has prior to the presentation of the petition by the debtor attached his salary to withdraw such attachment. Such an order is without jurisdiction and s 74 (1) does not give the Court power to pass such an order either under sec 51 or 52 of the Act. It should be noted that though the Insolvency Court has no power to stay proceedings in any other Court it has under sec 36 power to stay insolvency proceedings pending before it.

Civil Court has power to order stay

Sec 29 gives power to the Court before which a suit or other proceeding was pending against a debtor to stay the proceeding to continue it on such terms as the Court may impose on pr

that an order of adjudication has been made against the debtor, *Official Receiver, Coimbatore v Palanisami* 48 Mad 750 49 MLJ 203 1925 MWN 672 88 IC 934 1925 AIR (M) 1051. The presumption from the use of the word 'stay' is that the suit stayed is not at an end but may be continued until a further order is passed. It should be noted that the section does not provide for perpetual stay which is equivalent to a dismissal and the word 'dismissed' would have been used had it been intended that the suit should abate. The Court may stay a suit for a time e.g. until the order of adjudication is annulled and then may proceed with the hearing of the suit *Motu Lal Kishindas v Ghanshamdas Parmanand*, 120 IC 84 1929 AIR (S) 204, *Marotirao v Gound* 120 IC 735 1929 AIR (N) 256. Under sec 28 vesting only takes place upon adjudication, and it is not till then that a Court, in which proceedings are pending against the debtor, is bound to stay proceedings against the insolvent *Subramania Aiyar v Official Receiver Tanjore*, 93 IC 877 (1926) AIR (M) 432. In *Muhammed Haji Isakh v Abdul Rahman* 41 Bom 312 18 Bom LR 198 33 IC 694 it was contended that section 18 (3) of the Presidency Towns Insolvency Act was the only section which could apply and that only applied where a suit had been instituted before the

But it was held following *Brown's* that corresponding words of section 18 (3) of the Presidency Towns Insolvency Act which are practically identical with those of sec 18 (3) of the Presidency Towns Insolvency Act were wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication.

Stay of suit or other proceedings started after adjudication without leave

There is a conflict of opinion as to whether sec 29 applies to cases where suits or proceedings are commenced without leave against the insolvent after an order of adjudication and in ignorance of it. In *Haji Umar v Jwala Prasad*, 79 Ind Cas 662 1924 AIR (Nag) 300 it has been held that sec 28 does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Section 29 of the Act however contemplates not only a suit filed before an order of adjudication has been made but also one filed after the order but in real ignorance of it. Therefore when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without obtaining the permission of the Insolvency Court to continue the suit under sec 28 of the Act, the Civil Court can under sec 29 either stay the suit or allow it to continue on such terms as it might impose, e.g., that he would not execute the decree against the property of the insolvent whilst the

adjudication order stood though a condition like this is imposed automatically.

In *Cuttaputh v. Balisubla Routh* 53 M.L.J. 412 26 L.W. 318 105 I.C. 109 it has been held that 'the proper remedy of a person who has instituted a suit against the insolvent without obtaining the leave of the Insolvency Court is to apply under sec 29 of the Provincial Insolvency Act to the Court in which he has instituted the suit for leave to continue the suit against the insolvent'. A contrary view however has been taken in *Panna Lal v. Hira Nand* 8 Lah. 593 28 P.L.R. 634 102 I.C. 37 1928 A.I.R. (L) 309 in which a suit was instituted some three years subsequent to the defendant having been adjudicated an insolvent. It was alleged that the suit was brought in ignorance of the fact of the adjudication order and no leave of the Court to institute the suit had therefore been obtained. It was held that the suit had been rightly dismissed under the provisions of sec 28 of the Act according to which no suit can be brought after adjudication without first obtaining the permission of the Insolvency Court to bring the suit and that the provisions of sec 29 of the Act were not applicable to such a case. But the point is—does failure to obtain leave of the Court under sec 28 (2) necessitate that the suit be dismissed? arose for consideration in the recent case of *Bhimaji Bhibutmal v. Chunilal Javerchand* 34 Bom. L.R. 683 1932 A.I.R. (B) 244 in which Tyabjee J. after reviewing the authorities held that where a suit is brought by a creditor without the leave of the Court against an insolvent against whom an order of adjudication has been made the Court need not necessarily dismiss the suit but may under sec 29 either stay it or allow to proceed with it on terms. These powers may be exercised at a stage later than the commencement of the suit should the suit have already been commenced without leave. The powers of the Court are not lost nor are they enlarged nor altered because no leave was obtained. The Court may exercise the powers that the section gives to it at any stage though ordinarily they would be exercised at the commencement of the suit.

Effect of allowing proceedings to continue after adjudication

When a suit for arrears of rent was pending against the insolvents at the time the order of adjudication was made and the insolvents brought it to the notice of the Court and there is no specific order on the record but the Court continued the proceedings it must be deemed to have allowed the suit to be continued without specifying any terms and there can be no bar to the passing of a decree for arrears of rent. *Mohammad Ishaq Khan v. Kallo* 1936 A.W.R. 485. When a plaintiff is allowed to continue his suit after adjudication and he obtains a decree it is on the understanding that he was getting a certain decree against a

that an order of adjudication has been made against the debtor, *Official Receiver, Coimbatore v Palanisami*, 48 Mad 750 49 MLJ 203 1925 MWN 672 88 IC 934 1925 AIR (M) 1051. The presumption from the use of the word 'stay' is that the suit stayed is not at an end but may be continued until a further order is passed. It should be noted that the section does not provide for perpetual stay which is equivalent to a dismissal and the word 'dismissed' would have been used had it been intended that the suit should abate. The Court may stay a suit for a time, e.g., until the order of adjudication is annulled and then may proceed with the hearing of the suit, *Motu Mal Kishundas v Ghanshamdas Parmanand*, 120 IC 84 1929 AIR (S) 204, *Marotirao v Govind*, 120 IC 735 1929 AIR (N) 256. Under sec 28 vesting only takes place upon adjudication, and it is not till then that a Court, in which proceedings are pending against the debtor, is bound to stay proceedings against the insolvent, *Subramaina Aiyar v Official Receiver, Tanjore*, 93 IC 877 (1926) AIR (M) 432. In *Muhammed Haji Isakh v Abdul Rahman*, 41 Bom 312 18 Bom LR 198 33 IC 694 it was contended that section 18 (3) of the Presidency Towns Insolvency Act was the only section which could apply and that only applied where a suit had been instituted before the adjudication order was made. But it was held, following *Brown's combe v Fair*, (1887) 58 LT 105 1, that section 10 [9 (1)] of the English Insolvency Act was practically identical with those of the Indian Insolvency Act and that the provisions of the Indian Insolvency Act were wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication.

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adjudication order stood, though a condition like this is imposed automatically."

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insolvents and his exclusive remedy would be to go to the insolvency Court and get rareable shares in the assets and not that he would proceed separately by way of execution and claim priority as against the Official Receiver *Bhaguan Das v. Lakshmi Chand* 1935 A L J 673 1935 A W R 672 155 I C 661 1935 A I R (All) 643 In the case of execution petitions pending at the time of adjudication there is nothing in the Act to prevent the creditor from proceeding to arrest his debtor unless the latter applies to the Court for protection under S 31 There is, therefore, still scope for the application of S 31 *Suami Kotayya v. Renkata Rangarao* 63 M L J 148 1935 M W N 37 41 L W 167 156 I C 427 1935 A I R (M) 239 Where a judgment debtor applies to be adjudicated insolvent after attachment but before the sale of his property in execution of a decree against him, the attaching Court is bound to adjourn the sale and direct the property to be delivered to the Receiver It is not at liberty to allow the sale to proceed and to pay over the sale proceeds to the Receiver, *Mahasukh Jhavadas v. Valibhai Fatubhai*, 30 Bom. L. R. 455 109 I C 152 Where after a judgment debtor had been adjudged an insolvent and after the property had vested in the Official Receiver, a portion thereof was sold in execution of the decree obtained before the adjudication notwithstanding the objection of the Receiver it was held on the application by the latter to set aside the sale that at the time of the sale the judgment debtor had no right, title or interest which could be sold or vested in a purchaser, and that a purchaser with notice that the judgment debtor had been declared an insolvent acquired no title under the sale, and that the sale was altogether irregular and that the Court in holding the sale after it had been brought to its notice that the judgment debtor had been declared an insolvent acted if not materially irregularly in the meaning of sec 115 CPC 1 M L J 611 An insolvent

ceases to have any interest in his properties as soon as a vesting order is made, and an auction purchaser in an execution sale of the insolvent's interest in certain properties held after the vesting order acquires no interest in the properties, *Sundarappayar v. Ram Hari*, 18 M L J 487

Procedure in suits or proceedings on adjudication.

(1) *Of the plaintiff* The proper procedure for the Court, on being informed of the plaintiff's insolvency, was to call upon the Official Assignee to state whether he intended to continue the suit and on his deciding to continue the suit, to make an order for furnishing security for the costs of the suit within a specified time Without taking such steps, the suit should not have been dismissed And the Court had jurisdiction to set aside the order of dismissal whether under sec 151 of the CPC or under its

inherent jurisdiction and to make such order as might be necessary for the ends of justice. The provisions of Or 9 r 8 do not apply when the plaintiff owing to his adjudication pending suit, does not appear when the suit is called on for hearing. It is wrong to apply O 9 r 8 to a party who has no longer any interest in the proceedings and who does not make default by staying away. *Kissen Gopal Karnani v Suklal Karnani* 31 CWN 22. When pending the hearing of an appeal by the judgment debtor to set aside an auction sale he is adjudged insolvent and the Official Assignee to whom his estates have passed over decides not to proceed with the appeal a person claiming to be a mortgagee of the property who has so far taken no steps to assert his interests has no right to be substituted for the insolvent or the Official Assignee and continue the appeal. *Surendra Nath v Tripura Pada* 32 CWN 304.

(2) *Of the defendant* Sec 29 does not deal with procedure at all. It neither shows how the Court can be moved to stay a suit nor how it can be moved to set aside a stay. For procedure one must go to the Civil Procedure Code for all a plaintiff has to do is to make the application to the Court to take the next step in the proceedings when the Court will consider whether there remains any objection to further proceeding. *Mou Mal Kishindas v Ghanshamdas Parmanand* 120 IC 84 1929 AIR (S) 204. When a party has been adjudicated insolvent the Court will be well advised in directing the other party to the suit to bring on record the Official Receiver as a party and if the Official Receiver is unwilling to become a party then the Court may proceed with the suit on such terms as it may impose upon the party wishing to proceed with the suit but omission to do this does not vitiate the judgment on the merits. *Goindasami Pillai v Ramateerapandian Vetti* 1926 MWN 739 24 LW 287 97 IC 765 (1926, AIR (M) 145. Rule 10 of Order 22 CPC makes it discretionary with the Court to allow an application for substitution in the circumstances of a particular case. When the lower Court struck off the name of one of the defendants on the ground that he was an insolvent and that his interests had vested in the receiver it was held that the order was valid. If the insolvent defendant is allowed to remain on record and fight the suit and if the suit is decreed the plaintiff will be deprived of his costs against the insolvent and the decree which he may obtain will not be binding on the Receiver or trustee of the insolvent. Unless the law casts a duty on the plaintiff to bring the trustee or the Receiver on the record it cannot be said that the insolvent must be represented in the suit. He has no right to remain on the record as a defendant and he cannot insist that he must remain on the record through his trustee. *Prince Victor N Narayan v Kumar Bhairabendra Narain Deb* 34 CWN 53 125 IC 85 191 AIR (C) 388. Where pending an execution petition

an attachment the judgment debtor is adjudicated an insolvent, no question of continuing the execution proceeding with the consent of the Court arises as the adjudication of the judgment-debtor denudes him of any saleable interest in the property, *Chunnilal v Vithal*, 28 NLR 317 1933 AIR (N) 28

Stay of mortgage suit.

The proper course in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under sec 53 would be to have the proceedings in the suit stayed till the disposal of the application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under sec 53. The order of the Insolvency Court under sec 53 would be binding upon the parties, and the ordinary Civil Court would therefore, not be able to execute the mortgage decree passed by it. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under sec 53 takes away the jurisdiction of Civil Court to proceed with the suit of a secured creditor. It does not follow that because a transaction is void under section 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under sec 53 is only voidable and not void. The jurisdiction to set aside a transaction which is good against the mortgagor, but not against the general body of creditors, is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. A mortgage which is voidable under sec 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent, *Official Receiver, Coimbatore v Palaniswami Chetti* 48 M 750 49 MLJ 203 1935 MWN 672 88 IC 934 (1925) AIR (M) 1051

Security for costs.

Mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs under Or 25 r 1, CPC, as a condition precedent to his going on with the suit. The case is, however, different where in addition to his being a pauper he is a mere nominal plaintiff and is carrying on litigation for the sole benefit of another person. Though an insolvent plaintiff can be compelled to hand over the fruits of his suit to the Official Assignee for the benefit of his creditors, he cannot be said to be a nominal plaintiff. The mere fact that a case does not fall within the four corners of Or 25 CPC does not prevent the Court from acting under sec 151, CPC, *ex debito*

justice and to prevent the abuse of its process if there be an occasion for it. It is somewhat difficult to hold that because the Legislature has provided for security being ordered in certain cases, it is intended to deprive the court of power to make similar orders in other cases. *Valiram v. The Sunday Times Ltd* 1932 A I R (Sind) 33

Proceedings which cannot be stayed.

Proceedings of a preventive character will not be restrained. Imprisonment for non-payment of rates is a punitive process and an Insolvency Court has no power to discharge a person so imprisoned. *Re Edgecombe, Ex parte Edgecombe*, (1902) 2 K B 403. Actions or proceedings in respect of a debt or liability which is not provable in Bankruptcy are unaffected by the making of a receiving order. Thus obligation to make payment of alimony may be made and enforced in spite of the receiving order, *Linton v. Linton*, (1885) 15 Q B D 239. The fact that a husband who is in arrears of maintenance has been adjudicated an insolvent under sec 27 of the Provincial Insolvency Act is conclusive as long as the order of adjudication stands, that he is unable to pay the amount due. And he is not, therefore, guilty of wilful neglect within sec 488 (3) of the Criminal Procedure Code, *Hal'hide v. Hal'hide*, 50 Cal 867. Where subsequent to the institution of a suit *in forma pauperis* for maintenance in which the plaintiff prayed for the defendant's properties, it is competent to the court to continue and to decree the suit making the maintenance a charge on the estate as from the date when the suit was commenced, *Official Receiver v. Cuddapah v. Kalawa Subbamma*, 99 I C 564 (1927) A I R (M) 403.

An insolvent is entitled to sue for defamatory words whether published before or after his adjudication, and such damages as he may recover will not belong to his trustees. Though in such a suit for damages of the insolvent a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him, *Chanrai Valiram v. The Sunday Times Ltd* 1932 A I R (Sind) 33.

Appeal.

Under schedule 1 of the Provincial Insolvency Act no appeal lies to the High Court against an order passed under sec 29 but the High Court, in exercise of its Revisional jurisdiction, can set aside or modify orders passed under sec 29, *Prince Victor N. Narayan v. Kumar Bhairabendra Narayan Deb*, 34 C W N 53. An order directing that the receiver of an insolvent's estate should be required to give security for the costs of a suit filed by the

before his insolvency, and continued by a receiver, is not a 'judgment' within clause 13 of the Letters Patent, and is not appealable, *C Jorden v Maung Ba Chit*, 9 Rang 478

30. Notice of an order of adjudication stating the name, address, and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed

Review.

This is section 16 (7) of Act III of 1907 and sec 18 (2) of the Bankruptcy Act, 1914 as amended by B (Amendment) Act, 1926 and sec 20 of the Presidency Towns Insolvency Act, III of 1909

Publication of the order of adjudication.

It is provided by Rule 6 of the Calcutta and Allahabad High Courts and Rules 21 and 24 (1) of the Madras and Bombay High Courts that, notice of an order of adjudication may, in addition to the publication in the local official Gazette required by the Act, be published in such newspapers as the Court may direct. When the debtor is a Government servant a copy of the order shall be sent to the head of the office in which he is employed

Object of publication

The production of a copy of a Gazette containing any notice of a receiving order or of an order adjudging a debtor a bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date, *Hawkins v Duche*, 37 T L R 748 [section 137 (2) of the B Act, 1914]. It was decided under sec 10 of the old Bankruptcy Act of 1869 that the publication in the Gazette of an order of adjudication was conclusive against all the

proceedings cannot be set aside without proof of prejudice, *Ram komal Saha v Bank of Bengal of Akayab*, 5 C W N 91, *Gillmore v Bulaki Lal*, 19 P R 1900, FB. In *Jhanda Singh v Receiver Insolvent's Estate, Amritsar*, 158 I C 94 1935 A I R (L) 412 the contention raised was that no notification in the Gazette was published and that no notices were issued to other creditors of the insolvent. It was

held that the absence of notices, in the circumstances of the case has not led to any failure of justice in view of the finding that the debt was not fictitious, nor was there any evidence to show that the insolvent had sufficient property to pay off his debts. It was therefore held that it could not be said in the circumstances that the adjudication order was not properly made and there has been no prejudice to the petitioner by reason of the absence of notice. Neither the validity of the order of adjudication nor of the proceedings subsequent to it depend on the publication of the notice of the order of adjudication in the local official Gazette. The object of the publication is to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is a mere irregularity and can not vitiate the proceedings. *Bisham Chand v. Kisanlal*, (1939) N.L.J. 96 (1939) A.I.R. (N) 103.

Cost of publication

An order adjudicating a person an insolvent cannot be annulled for failure to deposit costs of publication under section 30. It can only be annulled under the provisions of sec 35 or sec 43. Where costs are not deposited the only remedy for the Court is to recover the costs from the insolvent's property, if the property is sufficient for the purpose or to remit the costs if the property is insufficient, [vide Rule 277 (3) of Oudh] *Harkishore v. Masum Ali Khan* 6 O.W.N. 1093 (1930) A.I.R. (O) 53.

Proceedings consequent on order of adjudication

31. (1) Any insolvent in respect of whom an order of adjudication has been made may apply *Protection order* to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release.

Provided that no such order shall operate to prejudice

the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order

Review.

This section is new and corresponds to sec 25 of the Presidency Towns Insolvency Act, III of 1909. The general principle underlying the law of insolvency is that "if all a man's property be taken from him and made to vest in a Receiver or trustee for the benefit of his creditors, it is hardly reasonable to make him liable to imprisonment for debt as a form of execution"—*Civil Justice Committee Report*, p 255. As has been observed in *Satish Chandra Adda v Firm of Rajnarain Pakhira, etc*, 72 I C 60, "the practice of leaving a man to the mercy of his creditors who with a view of extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is a practice which cannot be too strongly reprehended." According to English law, on the making of a receiving order an Official Receiver is constituted Receiver of the property of the debtor and thereafter, except as directed by the Bankruptcy Act, 1914, no creditor to whom the debtor is indebted in respect of any debt provable in Bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt. [Sec 7 (1) B Act, 1914]

Automatic protection under the old Act.

Under sec 16 (2) (b) of the Provincial Insolvency Act, III of 1907, the insolvent if in prison for debt, was released, and thereafter, except as provided by that Act, no creditor to whom the insolvent was indebted in respect of any debt provable under that Act during the pendency of insolvency proceedings, had any remedy against the property or person of the insolvent in respect of the debt.

This effect of the debt as adjudicated under Act III of 1907 was

v Kopathil Gopalam,
(1925) A I R (M)

denies the abolition of automatic protection in the following terms. "It is certainly anomalous that a man may be adjudicated insolvent and comply with all requirements of insolvency law, be convicted of no criminal offence in connection with insolvency and yet be liable to go to prison for an indefinite number of times at the discretion of the Insolvency Court," it is difficult to follow their reasoning in not recommending any change in the law on account of the "great need to protect creditors and to prevent debtors from abusing the insolvency law in their own interests," Rankin, C J, himself observed

in *Nagoremul v Lachmi Narain*, 48 CLJ 531 113 IC 854. "I would point out that in the circumstances such as the present one the law of India is extremely illogical and the position of the Court would appear to be very embarrassing. Here is a man who so long ago as 26th January of last year was adjudicated an insolvent and so far as we know all his properties would vest either in the Official Assignee or the Receiver who would be appointed by the Court. It is said that he has not disclosed his books and he has been refused the protection order. Nevertheless the object of sending a man to jail for non payment of debts if he is under an obligation to hand over all his assets to the Court of insolvency does not appear to me very convincing, still less does it appear to be consistent with the principle that this should be done by one creditor while the assets are supposed to have been impounded on behalf of all creditors."

No Automatic Protection under the present Act

The difference between Act III of 1907 and this Act in relation to protection granted to the insolvent is, that under Act III of 1907, the debtor if in prison, had, on the making of an order of adjudication to be released automatically and thereafter no creditor to whom the insolvent was indebted could during the pendency of the insolvency proceedings proceed against the person or property of the insolvent. Under Act V of 1920 an order of adjudication does not operate automatically as a protection against execution upon the person of an insolvent. He must apply to the Court to grant him the privilege of protection against arrest which the Court will do only if the circumstances of the case justify it. *P M Hamid v P K Mohamed Shenff*, 1 LR 13 R 623. Under the present Act, on the making of an order of adjudication, if the debtor is in prison his release will not follow as a matter of course. But he will have to apply to the Court for protection and the Court may on such application make an order for protection of the insolvent from arrest or detention or may dismiss the application. It is also in the discretion of the Court to grant the order of protection in respect of all the debts or in respect of any particular debt and to be in force for such time as the Court may direct. If on any objection by a creditor it appears that the insolvent is guilty of fraud, misrepresentation, etc., the Court will take those objections into consideration in passing that order. The immunity from arrest which an adjudication under the Act of 1907 conferred was certainly regarded as a privilege by the persons concerned and indeed a highly valued privilege, so much so that it is notorious that it formed the motive for a large proportion of the application for adjudication which were filed. A person therefore, who was adjudged insolvent under the Provincial Insolvency Act of 1907, and has not been discharged is immune from arrest in execution of a decree and the provisions of the new Act of 1920 do not affect his

position, *Radhey Shyam v Hakim Saryed Md Taqui*, 72 Ind Cas 911 1923 A I R (Oudh) 36

Reasons for the new section.

The reasons for the introduction of this new section are to be found in the following extracts from Sir George Lowndes' speech "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor, he files his petition and if in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. That is sufficient for him, that is all he wants, he does not want to pay his debts, all he wishes is to escape the penalty of jail. In the second place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit." Section 28 (2) of this Act has been drawn up in the line of sec 17 of the Presidency Towns Insolvency Act, III of 1909 which contains not only no provision for the release of debtors on adjudication, if in prison for debt, but also does not affect the rights of creditors against the person of the debtor. The present sec 31 is likewise framed after the model of sec 25 of the Presidency Towns Insolvency Act, III of 1909 with the exception of the clause, *on production of a certificate from the Court, the insolvent shall be released from custody, and, therefore,*

appear that under the Provincial Insolvency Act V of 1920, the position of the insolvents outside the Presidency Towns is worse than that of the insolvents in the Presidency Towns in so far as they have been deprived of the benefits enjoyed by the insolvents under sec 15 of the Presidency Towns Insolvency Act, III of 1909

Scope of the section.

In the case of execution petitions pending at the time of adjudication there is nothing in the Act to prevent the creditor from applying to the Court for protection. The scope for application lies to the Court. 68 M L J 148 A I R (M) 239

This section empowers the Court to grant to a debtor after adjudication if upon the facts and circumstances it appears to be a fit case for granting the protection. Under this section each application must be decided on its own merits. Sec 31 deals with applications for protection only after the order of adjudication is made. The only other provision in the Act which deals expressly with what

may be called protection before adjudication is sec 23. The condition under which the Provincial Insolvency Act allows the Court to interpose between an insolvent and his judgment creditors before adjudication is where a decree holder has arrested him. *Sinnasami v. Aligi Goundan* 74 M.L.J. 530, 1924 M.W.N. 836. 80 Ind. Cas. 938. 1924 A.I.R. (Mad.) 893. *Mariam Bibi v. A. E. Motala* 10 Rang. 71. 1932 A.I.R. (Rang.) 51. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under sec. 34, *Hirala v. Tulsiram*, 80 Ind. Cas. 946. The wording of section 31 is very wide and protection can be obtained by the debtor even when a debt is incurred after adjudication. *Smith v. Duni Chand* 1933 A.I.R. (L.) 261.

Section 31 (1) does not apply to debts due to the Crown or to affect any rights which the Crown has in respect of these debts and that the right of arrest or detention which is given by section 7 (1) (a), Land Improvement Loans Act section 45 Land and Revenue Act and section 55 C.P.C. if these sections are read together, continues, *Collector of Akyab v. Paw Tun* 5 R. 806. 1928 A.I.R. (R.) 81. A protection order of the Insolvency Court of Appeal, though in general terms, must be limited to the debts due to the creditors who had been impleaded as respondents and as against whom the order of the first Court refusing to grant protection was set aside. As between them and the insolvent alone it is operative. But it does not apply to other creditors who were not impleaded as respondents in the Court of appeal and who had no opportunity of contesting the grant of the protection order. As regards them the order of the Court of first instance refusing protection which was made after issue of notice of the application by the insolvent for a protection order to all the creditors becomes final and hence any one of those creditors can in execution of his decree against the insolvent apply for his arrest and imprisonment, *Jitmal Ram Gopal v. Nathu Ram*, 29 A.L.J. 407. 138 I.C. 267. 1932 A.I.R. (All.) 385.

Arrest after adjudication.

By the enactment of sec. 28 (2) no doubt the automatic protection enjoyed by the insolvent on adjudication under sec. 16 (2) of Act III of 1907 has been abolished. In sec. 28 the effect of an order of adjudication is described and protection from arrest in execution is not provided. If it had been the intention of the Legislature to protect insolvents the provisions of sec. 31 which permit an insolvent to apply to the Insolvency Court for a protection order, would have been superfluous. *Hari Ram v. Sri Krishna Ram*, 49 All. 201. 25 A.L.J. 152. 100 I.C. 320. (1927) A.I.R. (A.) 418. Sec. 28 does not operate as any protection from arrest of a judgment debtor who has been adjudicated an insolvent, *Husain v. Lachmi Narain*, 54 All. 416. 1932 A.L.J. 168. 140.

150 1932 A I R (All) 183 But at the same time it has been provided in the latter part of section 28 (2) that 'no creditor shall commence any suit or other legal proceedings, except with the leave of the Court.' Hence it follows, that application for arrest of the judgment debtor in execution of a decree for payment of money being a legal proceeding, leave of the Insolvency Court is necessary before any such application can be made and the creditor is not free to proceed as he chooses, *Maung Po Toke v Maung Po Gyi* 2 R 492 92 I C 142 (1926) A I R (R) 2

Under the Provincial Insolvency Act, III of 1907 when a debtor was adjudged an insolvent, he ordinarily became immune from arrest. This immunity was taken away by the Provincial Insolvency Act V of 1920 and according to that Act he could be arrested in execution of a decree, unless he should obtain a protection order under sec 31 of that Act. But the question is whether a decree holder is competent to take out execution against the person of an insolvent judgment debtor without obtaining the leave of the Insolvency Court, though the Insolvency Court has refused the insolvent's petition for a protection order. It was held following *Easuara Aiyar v Govindarajulu Naidu*, 39 Mad 689 31 I C 192 and *Thakur Deen v J Dubay*, 12 Bur LT 218 55 I C 250 that no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the Insolvency Court and though the protection order has been refused under sec 31, *Firm Partap Singh Pardhan Singh v Firm Bhai Meera Jodha Singh*, 107 I C 608 1928 A I R (L) 258. The fact that no protection order had been made under sec 31 did not affect the disability imposed by sec 28 (2) of the Act, as the latter section entitles the decree holder to apply for execution by arrest of the judgment-debtor only if he obtained leave of the Court to do so, *Hit Narayan Singh v Brij Nandan Singh*, 10 Pat 422 1932 A I R (Pat) 387. The bar against taking legal proceeding against an insolvent contemplated by sec 28 of the Provincial Insolvency Act does not apply to execution proceedings commenced and warrant of arrest ordered before the order of adjudication, *Hateh Ram v The Zaminder Bank* 117 I C 373.

Grant of protection is discretionary.

It is clear that the Court has a discretion in the matter. Each application for protection, whether before or after refusal or suspension of discharge, must be judged on its merits. A protection order, though *prima facie* the insolvent is entitled to, is still a privilege, to be granted or withheld as the Court in its discretion may determine. Sec 31 clearly intends that while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors and should not be rendered liable to pressure whereby one creditor may get undue advantage over another, *In the matter of Meghraj Gangabux*, 35 Bom 47. The

protection order under sec 31 is a privilege to be granted or withheld as the Court in its discretion may determine, and in exercising that discretion it is relevant and proper for the Court to have regard to the character . . .

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for this is extraordinarily a bad case' The policy of the Legislature,

is to provide protection for honest debtor and a protection order

if once granted shall not be cancelled save in exceptional

grounds If an insolvent's conduct has been flagrantly dishonest

or by being suit to jail he is likely to make a full disclosure of

his affairs, the Court should not grant him protection P M

Hamid v P K Mohamed Sheriff, 13 R 623

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before discharge to come to any finding as to the conduct of the

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a matter of course It is pointed out in *In the matter of Meghraj*

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adjudged insolvent, has placed all his assets at the disposal of the Insolvency Court without concealing any material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted. Unless some misconduct or want of good faith can be imputed to an insolvent, a protection order should not be refused on vague and general assumptions. *Beni Prasad v Phula Mal*, 1933 A.L.J. 1051 146 I.C. 819 1933 A.I.R. (All) 591. In *Mohammad Haji Issak v Shaikh Abdul Rahiman* 40 Bom 461 17 Bom L.R. 989 31 Ind. Cas. 507, the Court, in refusing the discharge of the insolvent, came to a finding as a matter of fact that "his indebtedness and insolvency must have been growing and growing continuously as every month of his reckless life progressed, and he must have been conscious long before he filed his petition, that he was living a riotous and extravagant life at the expense of creditors," and the Court after this finding held "here the Insolvency was of a flagrantly culpable kind being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered. That protection should ordinarily be granted, does not signify here for this is extraordinarily a bad case." The policy of the Legislature, is to provide protection for honest debtor and a protection order if once granted shall not be cancelled save in exceptional grounds. If an insolvent's conduct has been flagrantly dishonest or by being suit to jail he is likely to make a full disclosure of his affairs, the Court should not grant him protection. *P M Hamid v P K Mohamed Sheriff*, 13 R 623.

Ordinarily the good faith or bad faith of an insolvent does not come under the scrutiny of the Court until the application for his discharge is heard and the Court has hardly any materials before discharge to come to any finding as to the conduct of the insolvent. It, therefore, follows that after adjudication the insolvent is *prima facie* entitled to an order of protection in the absence of any report against his conduct and the protection is granted as a matter of course. It is pointed out in *In the matter of Meghraj Gangabux*, supra, that sub sec (4) of sec 25 of the Presidency Towns Insolvency Act, 1913, that the insolvent shall be *prima facie* entitled to such order on production of a certificate signed by the Official Assignee that he has so far conformed to the provision that Act, clearly indicate the lines along which discretion s

be exercised when a creditor opposes the grant. In the absence of a similar provision in sec 31 of the Provincial Insolvency Act an insolvent on adjudication is *prima facie* entitled to an order of protection if he has so far conformed to the provisions of the Act. There is a discretion granted to the Court either to make a general protection order or make a limited order or not to make a protection order at all. It is no longer a matter of right for a judgment debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest. *Ali Husam v Luchmi Narain* 54 All 416 1932 A L J 168 140 I C 150 1932 A I R (All) 188.

A previous order refusing protection is no bar to a protection order being made at a subsequent stage. Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a Court in granting an order of protection which has been previously refused. *Beni Prasad v Phula Mal* 1933 A L J 1051 146 I C 819 1933 A I R (All) 591.

Protection order does not apply to an order for maintenance under S 488 Cr P C

The terms arrest or detention used in s 31 cannot include arrest in execution of a Criminal Court process or detention under a sentence of imprisonment passed by a Criminal Court. The arrest or detention must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. For it has been held in *Pt Shyama Charan v Mt Anguri Devi* I L R 1938 All 486 1938 A I R (All) 253 that the mere fact that husband has been adjudicated an insolvent does not show that he is unable to pay for the maintenance of his wife or that constitutes sufficient cause for non payment because under the provision of s 60 CPC as now enacted the salary to the extent of first hundred rupees and one half of the remainder of such salary is exempt from attachment and hence does not vest in the Receiver. The husband would therefore if he is prepared to work and earn a salary be in a position to support his wife.

It is to be noted that there is a conflict of opinion as to whether the order of protection granted by an Insolvency Court protects the insolvent from arrest or imprisonment under a sentence of imprisonment passed by a Criminal Court under s 488 Cr P C. Under the Provincial Insolvency Act it has been held that the order of protection granted either under s 23 or s 31 does not protect an insolvent from being arrested or imprisoned under a sentence of imprisonment under s 488 Cr P C while under the Presidency Towns Insolvency Act the arrears of maintenance have been held to be a provable debt in insolvency and in respect of which a protection order could be given. In *Re Yahia* I L R 1937 Mad 90.

Proviso to sub-sec. (3) ; Protection order ; its effect on limitation.

No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under sec 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against his property movable or immovable, the decree holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force, *Sita Ram v. Kishan Lal* 1951 A L J 39 1261 C 16 1930 AIR (All) 580

Appeal.

Under schedule 1 to the Act, no appeal lies to the High Court against an order passed under this section. But the High Court may exercise Revisional Jurisdiction under sec 115, CPC in addition to an order of the Insolvency Court exercising or refusing to exercise the discretionary power under sec 31.

32. At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act, order a warrant to issue for his arrest, and if he is appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or if such security is not forthcoming, direct that he shall be detained in the civil prison for a period which may extend to three months.

Review.

This section is new and should be read with section 21. The section deals with the power of the Court to arrest after adjudication whereas sec 21 deals with the power to arrest before adjudication. The introduction of this section is explained in Sir George Lowndes' speech quoted in para 31, *supra*. The Select Committee in its Report of September, 1919 also observed 'We have added a new section to arrest a debtor who has absconded after adjudication has been made against him'. This

to give the Court control over the person of the insolvent for the proper administration of his property. According to section 159 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, it is a felony for any bankrupt after presentation of a petition by or against him or within 6 months or attempt to leave English and to the value of £20 which by his creditors unless the jury is satisfied that he had no intention to defraud

Arrest after adjudication

The section authorizes the Insolvency Court to arrest an insolvent at any time after an order of adjudication if it has reason to believe on the application of any creditor or on the report of the Receiver that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been or might be imposed upon him under this Act. This is a penal section and is intended to be put into operation only when it appears to the Court that the insolvent deliberately omits to perform the duties imposed upon him under sec 28 (1). A presumption arises that he has absconded when he fails to attend at such times before the Court or the Receiver execute such instruments and generally do all such acts and things in relation to his property as may be required of him by the Court or the Receiver (Sec 22) with a view to defeat or delay his creditors. The operation of the section cannot be invoked in case of debtors who are prevented by sufficient reason from attending either the Court or the Receiver when required.

Arrest at any time after adjudication

"At any time in this section means at any time during the pendency of the insolvency proceeding. An insolvency proceeding will be considered as pending where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge. *Jeevanji Mamooji v Ghulam Hussain* 12 SLR 20 47 1 C 771 vide Notes under sec 28 (2)

33. (1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such

debts, respectively, and shall frame a schedule of such persons and debts .

Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court-house

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the receiver and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

Review.

This section is mainly section 24 of Act III of 1907 and corresponds to sec 46 (4) proviso of the Presidency Towns Insolvency Act, III of 1909. The addition of the words "who have proved their debts" after "creditors" in sub section (3) has been made "to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceeding"—*Notes on Clauses*

Amendment.

By section 2 of the Provincial Insolvency (Amendment) Act XXXIX of 1926, section 33 has been amended in the following terms "In sub-section (3) of sec 33 of the Provincial Insolvency Act, 1920 (hereinafter referred to as the said Act), for the word 'insolvent,' where it occurs for the last time the word 'receiver' shall be substituted" The amendment has been made in pursuance of the following recommendation of the Civil Justice Committee "The provision of sub-sec (3) of sec 33 is that any creditor may apply for an order directing his name to be entered in the schedule and that the Court, after causing notice to be served on the insolvent and other creditors and hearing their objections, if any, shall comply with or reject the application. This seems to involve that under the Act the insolvent is a person who is to be heard upon the admission of any proof of debt. The result is that an insolvent is a person entitled to litigate with .

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The section authorizes the Insolvency Court to arrest an insolvent at any time after an order of adjudication, if it has reason to believe on the application of any creditor or on the report of the Receiver that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been or might be imposed upon him under this Act. This is a penal section and is intended to be put into operation only when it appears to the Court that the insolvent deliberately omits to perform the duties imposed upon him under sec 28 (1). A presumption arises that he has absconded when he fails to attend at such times before the Court or the Receiver, execute such instruments and generally do all such acts and things in relation to his property as may be required of him by the Court or the Receiver (Sec. 22) *with a view to defeat or delay his creditors*. The operation of the section cannot be invoked in case of debtors who are prevented by sufficient reason from attending either the Court or the Receiver when required.

Arrest at any time after adjudication

"At any time" in this section means at any time "during the pendency of the insolvency proceeding. An insolvency proceeding will be considered as pending where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge, *Jeevanji Mamooji v Ghulam Hussain*, 12 SLR 20 47 IC 771, vide Notes under sec 28 (2)

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Schedule of creditors

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creditors about the amount of their debts is unfortunate. A main principle of bankruptcy in England is that the insolvent goes out of the picture for such purpose altogether, all the property is vested in the Receiver, the Receiver stands in his shoes, the other creditors, not the insolvent, are interested in the distribution of an insufficient fund."

Meaning of provable debt and proof.

When a person has become bankrupt the rights which before the bankruptcy his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable and in their place the creditors acquire a right to share equally and proportionately in the distribution by the trustee in bankruptcy of the assets which have been vested in him, *Re Higginson and Deal*, (1899) 1 Q B 325. The policy of the Insolvency Act is that when a person is indebted, all his debts should be dealt with in insolvency. It does not seem to be right that a creditor who has got a debt provable in insolvency should stand aside when all the other creditors or most of them have their debts dealt with by the Insolvency Court and refuse to come in or take notice of a composition scheme and then as soon as the adjudication is annulled proceed once more to harass the insolvent. The debts and claims in respect of which the creditors become thus entitled are called *provable debts* and the method by which their claims are asserted and established is called *proof*. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act and not otherwise, *Hira Lal v Tuls Ram*, 80 Ind Cas 946 1925 AIR (Nag) 77. A debt may be proved under this Act by delivering or sending by post in a registered letter, to the Court, an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers (sec 49).

Proof of debts.

Section 33 provides the summary method of proving debts by persons alleging themselves as creditors of the insolvent. The proof consists in filing an affidavit only, setting forth the circumstances of the debt and the amount still due thereon and producing documents in proof of the debts as exhibits. The summary method has been provided to avoid costs and delay in obtaining decrees of the Civil Courts and the Insolvency Court has been given the power to decide the validity or otherwise of a claim so proved, and such decision of the Insolvency Court regarding the claim of the creditor shall be final unless appealed against.

No suit lies in a Civil Court against the order passed by the Receiver in framing the schedule. The Receiver is to decide judicially or finally upon the schedule under sec 23 (now 33) and from entertaining an application under 36 of Act III of 1907 (now sec 41) the names of the creditors from the Official Receiver. *Tinnelly* 41 Mad 3 but the Official Receiver has neglected the debt must be deemed to be proved. 1 C. 644 1933 A I R (L) 101

Amendment of proof

In case of an evident mistake see *Ex parte Schofield* (1879) 12 Ch D 337 *Hussain* 51 I C 55 it has been held that the same jurisdiction that the court has under the Civil Procedure Code to allow a clerk or parties themselves upon a mistake is established.

Framing of the Schedule

The framing of the schedule is the duty of the Receiver. Though a report from the Receiver assists the Court it is for the Court to decide on evidence and in the case of conflicting parties. *Beharilal Sikdar v Harsukdas* 1 C. 802 (1926) A I R (C) 160. Under the Act the Court is bound to come to a judicial decision if cause shown against so doing. *Amir* 1 C. 802 (1926) A I R (C) 160. Under the Act it is the duty of the Court by its order to allow who had proved themselves to be creditors and also the amount of such debts and then to frame the schedule. It is not a matter for the Legislature but the Legislature had intended the Court to do so and therefore there should be either a record indicating that the Court had done so or the provisions of sec 33 and the debts must be proved. *Walait Ram v Partap Singh* 1 C. (L) 173

Although a Hindu insolvent governed by the Hindu law has admitted a certain debt to be a good debt, a decree as *benami* on their own behalf at the father and it is the duty of the Insolvent Court to adjudicate as to whether the debt is, at

debt or not *Sreeput Sing v Ram Sarup* 95 I C 463 (1926) A I R (C) 982 A presumption of receipt of full consideration arising from a debtor's signature on a promissory note can only be available against that debtor personally and cannot be invoked against the Official Receiver or a creditor in insolvency proceedings. An Insolvency Court can enquire into the consideration for judgment debt *Ramlal v Kashi Charan* 26 A L J 241 108 I C 147 In *Kanto Mohan Mullick v J C Galstaun* 51 C L J 283 Rankin CJ observed that the Court has a right and duty to go behind any account stated or covenant or judgment and in the interest of other creditors get the real character of the transaction. It does not mean that if a person has lent one lac of rupees upon a promise to pay two lacs he is a person who can only prove for one lac in insolvency. The correct figure at which the proof should be admitted is the figure which would be due according to the term of the real bargain between the parties, that is to say the term that although one lac only was advanced the insolvent was to be liable to repay a sum of two lacs with interest. For purposes of dividend however a different figure has to be computed viz the figure of one lac with interest at 6 per cent per annum to the date of adjudication. The judgment of the Insolvency Court declaring a person as creditor of the insolvent does not confer any legal character on him within the meaning of section 41 of the Evidence Act and hence the declaration does not operate as a judgment in rem. In the *Matter of P C Venkaramanayya Pantulu* 54 Mad 601 61 M L J 229 131 I C 817 1931 A I R (M) 441 In summary administration it is unnecessary to frame a schedule of creditors (*Vide sec 74 infra*)

Framing of the schedule by the Receiver

The Court has no jurisdiction to delegate to the Receiver the function of framing the schedule of creditors unless the Receiver has been specially empowered by the High Court in that behalf under cl (b) sub-sec (1) of section 80 of this Act.

Proviso to sub sec (1), Debts which are to be excluded from the schedule

The schedule is framed of creditors whose debts are provable in bankruptcy under sec 34 of the Act. Debts the value of which is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust are not provable under the Act. Save as above all debts and liabilities present or future certain or contingent to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication shall be deemed to be debts provable under the Act. No one is entitled to be entered in the schedule of creditors

framed under this section if his debt is incapable of being fairly estimated, as for example, deferred dower debt which is payable only on the termination of the marriage by death or divorce. It is not possible to say whether the husband will or will not divorce his wife or whether he will or will not predecease his wife, nor is it possible to say at what date the husband would predecease or divorce his wife if either of those two contingencies did take place. Accordingly it is not possible for the Insolvency Court to estimate what would be the present value of a deferred dower-debt of Rs 5000 which was to be paid if either of those two contingencies took place. Deferred dower debt is thus incapable of being fairly estimated and therefore should not be entered in the schedule of creditors under proviso to sub sec (1) of sec 33, *Sughra Bibi v Gaya Prasad*, 52 All 560 1930 A L J 1038 123 I C 754 1930 A I R (All) 580

Schedule of creditors.

No one can be regarded as creditor for the purpose of distribution until his name is admitted to the schedule or until he establishes it there, *In the matter of Chunilal Osual*, 29 Cal 503. The Insolvency Court has the same power as the ordinary Civil Court to correct mistakes on questions of fact but it has no jurisdiction to entertain an application under this section when the creditor has exhausted all his remedies, *Ram Chander Sarup v Mozahar Hussain* 1 U P L R 69 51 Ind Cas 55. Assignee of debt due by insolvent is entitled to be placed on schedule of creditors irrespective of whether there is consideration for assignment or not *Bihari Lal v Abdul Khaliq* 199 I C 496 1930 A I R (L) 235. Creditors whose names are already in the schedule prepared under sec 24 (now sec 33), are entitled to be heard before the debt of a creditor who comes in at the last minute under section 4 (3) [now sec 33 (3)] is entered in the schedule *Allahabad Bank v Murlidhar*, 34 All 442 9 A L J 577.

It is open to any creditor to challenge the validity of a debt set up by another creditor and if he does so the Judge is bound to the insolvency proceeding to his remedy by suit, under the Civil Procedure Code discharge of the insolvent was not discharge of the debts of the creditor who failed to have his name entered. There was no limitation and prove their claims and property paid out to not to the

v Muttra 11 Mad 1, *Haropriya v Hrafuluddin v Bepin Behari*, 30 C. 227 19 A W N 45, *Amarchand*

Cursetji, 9 Bom L R 466. The scheduling of the decree had the effect of superseding it or creating another decretal

addition to or independent of it and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree, unmaintainable *Abdul Rahman v Behari Puri*, 10 All 194

Amendment of the schedule. f

The Receiver is a proper party to any matters arising between the creditors and third parties. In such cases, the Receiver does, without doubt, properly represent the whole body of creditors, but this proposition is clearly inapplicable to a case of a dispute among the creditors themselves, where the interests of some of the creditors are adverse to the interests of others. In such matters the Receiver is not a proper party, but the creditors concerned are the proper parties. Hence if any creditor wishes to have any amendment made of the schedule as framed by the Court under sec 33 he must of course, cause notice to issue to all the other creditors who would thereby be affected and their objections be heard before any alteration or amendment of the schedule can be ordered by the Court and in an application or appeal in connection with this the Receiver is not a necessary party, *Mg Po Yeik v Pauer*, 1934 A I R (R) 112. The amendment of the schedule by substitution of an assignee of a creditor of the insolvent after service of notice to all other creditors including the assignor operates as *re judicata* against the claim of any person subsequently claiming through the assignor, *Govindaswami Pillai v Sivarama Rao*, 39 L W 486

Effect of framing the schedule.

Under the provisions of sec 352 of the Civil Procedure Code 1882, the framing of a schedule was deemed to be a decree in favour of each of the creditors for their respective debts. "If a schedule had been framed as directed by sec 352 and the appellant's name entered therein as a creditor together with the debt due to him the declaration of insolvency made under sec 351 would operate as a decree regarding the debt. The apparent intention suggested by sec 352 is that there must be a schedule, and that the declaration of insolvency and the insertion of a specific debt, its amount, and of the creditor's name in the schedule are together to have the operation of a decree as regards that debt. The said section 352, CPC and other sections of Ch XX of the CPC 1882 have been repealed by Act III of 1907 and sec 352 re enacted in sec 24 of Act III of 1907 and in sec 33 of Act V of 1920 without the clause 'and the declaration under sec 351 shall be deemed to be a decree in favour of such creditors in respect of their said respective debts'. And under sec 78, *infra* it has been provided that "

" *Arunachala*
4 P R 1907,
66

in suit and to obtain a decree, for his right of suit was a necessary incident of the

obligation created in his favour by the bond in execution. This right having accrued once it must be taken to subsist unless it is either satisfied or exhausted by use or barred by limitation or becomes extinct by operation of law. The section imposes a duty upon the creditors and upon the Court and the proper construction to be placed upon it is that the creditors must prove their debts. Although a duty is imposed upon the Court still under the procedural law it is the party likely to benefit by its performance to see that it is performed. Under the CPC an unscheduled creditor could execute his decree against the insolvent after the insolvent was discharged *Haropriya Debba v Shama Charan Sen* 16 Cal 592 or he may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule [sec 33 (3)]. A creditor who does not have his debt scheduled is not precluded from enforcing his claim against the insolvent after his discharge. A creditor is bound only on the scheduled creditors. *Firm of Virbhandis* 76 Ind Cas 250. A discharge releases from all provable debts whether entered in the schedule or not while composition binds consenting parties only. *Khalilul Rahaman v Ram Saruf* 8 LLJ 286 28 PLR 400 (1926) AIR (L) 489. See also sec 44 (2).

Sub sec (3) Limitation for Proof of debt in Insolvency proceedings

The Insolvency Act is a complete code and prescribes its own period of limitation and the provisions of the Limitation Act do not apply to it. No period of limitation is prescribed in the Insolvency Act for application of the schedule of creditors and such matters were consequently left to the discretion of the Court. *Jan Bahadur v The Bailiff of the District Court of Toulon* 5 R 384 104 IC 816 (1927) AIR (Rang) 263. In *Sivasubramana Pillai v Theethappa Pillai* 47 Mad 120 45 MLJ 166 1923 MWN 895 24 (3) of Act III of 1907 [now sec 44 (2)] the Court held that a creditor is bound to tender proof of his debt before the discharge of the insolvent. The Court held that it is rendering it obligatory upon a creditor to tender proof before the discharge of the insolvent. Under sec 44 (now sec 41) a debtor may at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy. The law of insolvency allows proofs of debts at any time during the administration so long as there are assets to be distributed.

Discharge means final discharge.

So also in *Arjun Das v Marchia Telini* 1936 AIR (C) 434 it has been held that there is no express period of limitation for a creditor, whose debt is provable in insolvency proceedings to prove his debt. A debt is to be proved ordinarily before any dividend is declared. That is necessary in order that the officer of the Court administering the insolvent's estate may have in his possession materials which will enable him to make a *pro rata* and equitable distribution of the assets. The provisions of s 33 (3) are directory and a creditor can come on the schedule of creditors as long as there are any assets available for distribution amongst the creditors and till the final dividends are distributed and till the administration is complete. The same principle finds support in s 64 for that section requires a receiver before declaring a final dividend, to serve notices in the manner prescribed to persons whose claims to be creditors have been notified but not proved and if such persons come and prove their claims within the time limited by the notice they will be entitled to a share in the final distribution. The time of the discharge of an insolvent has no relation to and can have no relation in any case to the time for declaring the final dividend.

The discharge contemplated by sec 33 (3) is the final discharge and not a conditional discharge of the insolvent. The effect of a conditional discharge is not to terminate the insolvency proceedings. The conditional discharge does not debar a creditor from proving his debt in insolvency. A creditor is entitled to render proof of his debt at any time during the administration so long as there were assets to be distributed and no injustice is done to third parties. *Babu Lal Sahu v Krishna Prosad* 4 Pat 128 85 Ind Cas 543. *Nazar Khan Kabuli v JJS Barraclough* 41 CWN 221 167 IC 277 1936 AIR (C) 807. The words of the section 33 (2) are sufficiently wide to include a person who has already proved one or more debts, but wishes to prove a further debt which for some reason or other he has omitted. *Gokul Chunder v Radha Gobinda*, 44 CLJ 108 97 IC 1124 (1926) AIR (C) 1210. S 33 (3) of the Provincial Insolvency Act prevents a creditor from proving his debt after the insolvent has been given a final discharge. S 63 of the Act allows a creditor to prove his debt at any time as long as there is money in the hands of the receiver. But this is not the case of the creditors interest and does "at any time before the discharge" he Act. *The Bank of Chettinad Ltd*

Appeal.

An appeal lies under sec 75 (2), Schedule 1 against orders regarding entries in the schedule.

34. (1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act

(2) Save as provided by sub-section (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act

Review.

This section corresponds to sec 46 (3) of the Presidency Towns Insolvency Act III of 1909 and is mainly section 28 of Act III of 1907 and defines the debts that are provable in bankruptcy Section 30 of the Bankruptcy Act, 1914, lays down

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy
- (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice
- (3) Save as aforesaid, all debts and liabilities present or future certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy

Debts to be provable, must be subsisting.

With certain exceptions the debt provable in bankruptcy include all debts and liabilities, present and future, certain and contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of obligations incurred before the date of

the receiving order *Ex parte Stone* (1873) 8 Ch App 914. The term liability includes any compensation for work done any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant contract agreement or undertaking whether the breach does or does not occur or whether it is or likely to occur or capable of occurring before the discharge of the debtor. Generally it includes any express or implied engagement agreement or undertaking resulting in or capable of resulting in an obligation to pay money or money's worth whether the payment is as respects amounts fixed or unliquidated as respects time present or future certain or contingent as to valuation capable of being ascertained by fixed rules or is a matter of opinion vide sec 37 Bankruptcy Act 1883. To be a provable debt according to the definition of sec 34 it must be a debt to which he has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. The words obligation incurred refer to an obligation incurred by the insolvent himself *Keshoram v Goind Ram* (1923) A I R (Nag) 147.

The rule contained in sec 34 as regards debts provable under the Act is consistent with the rule deducible from English cases. All debts to which the debtor is subject when he is adjudged an insolvent are debts provable under the Act. Under the section therefore it must be debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting it is provable in insolvency *Sitasubramania Pillai v Theethappa Pillai* 45 M L J 166 1923 M W N 895. The language of s 34 (2) is very wide and comprehensive. Where a customer deposits money with a firm from time to time for making purchases and a certain amount is found due to him from the firm before adjudication the amount is a debt provable under the Act within the meaning of s 34 and as such a suit for the recovery of the amount is barred by the provisions of s 28 (2) if no leave of the Court is obtained for its commencement (*Firm) Ganesa Din Gur Pershad v Jagmohan Singh* 1936 O W N 52 160 I C 229 1936 O L R 53 1936 A I R (O) 236. In *Maheshwari Brothers v Liquidator Indra Sugar Works* I L R (1938) All 896 certain persons were appointed as selling agents of a sugar company and by agreement they made a security deposit of Rs 50,000 with the company. It was agreed that the money was to carry interest at 5 per cent per annum it has to be returned on the expiry of the period of appointment. There was no agreement that the money was to be kept apart or treated as a separate fund by the company on the other hand it was paid into the account of the company with the company's Bank and was used as the money of the company per carrying on the business. It was also agreed that the amount of security money will be the second charge on the machinery and the goods of the company. It was held that no fiduciary relationship was created between the parties and the money was not trust money in the hands of the company the only

relationship between the parties with respect to the money was that of creditor and debtor and so when the company went into liquidation these persons ranked only as ordinary creditors of the company and were not entitled to any preferential or special treatment in respect of the money. The charge created was clearly a floating charge and as such required registration according to section 109 (C) of the Companies Act, 1913 for its validity. Annuities for life are debts provable, *Ex parte Jackson*, 20 W R 1023. A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency, *Mt Champa v Official Receiver, Karachi*, 15 Lah 9. 1933 A I R (Lah) 901. It should be noted that there is a clear distinction between order for alimony and decrees for maintenance. Orders granting alimony are always subject to modification and change. When a decree has been passed awarding maintenance that decree ordinarily remains immutable and although the judgment-debtor may take separate proceedings to have it modified it can never be modified retrospectively as the order for alimony can. The result is that at any moment a wife who is a decree holder under a decree of this kind can come to the Insolvency Court and say that her husband is indebted to her in a fixed sum and that therefore S 34 (1) which says that a debt is not provable in insolvency because the debt is incapable of being fairly estimated can not possibly apply to a claim of this kind. *Hanibabeebi Ammal v Syed Munurdeen Sahib*, 1939 A I R (M) 183. Unliquidated damages arising out of breach of contract are debts provable, *In Re Omerto Lal Dau*, 13 B L R App 2. So forward contracts being demands in the nature of unliquidated damages are claims provable under the Act and they are also provable as contingent debts, *In Re Moosaji Loua*, 15 Ind Cas 825. 5 S L R 249, *In the application of Dholan Dass to declare the firm of Walbidas Holaram insolvents*, 56 Ind Cas 158. So also contingent liability of a surety who has not been called upon to pay or has not in fact paid is a provable debt, *In Re Paine*, (1897) 1 Q B 122, *In Re Blackpool Motor Co Ltd* (1901) 1 Ch 77. Money held in deposit with a bank is debt provable, *Kartar Devi v Surasati*, 9 P R 1908, *Official Assignee, Madras v G Smith*, 32 Mad 68. But money held in suspense is trust and not a debt provable, *Official Assignee, Madras v D Rajam Aiyar*, 36 Mad 499. Where there is a tripartite agreement whereby a third person pays the creditor of the debtor the third person is entitled to prove, *Sita Ram v Kartar Singh* 34 P L R 477, 146 I C 239. 1933 A I R (Lah) 416.

Debts incurred after adjudication not provable.

It is an ordinary rule of construction that a statements in a statute or a section should be interpreted according to its natural meaning. As s 34 stands there is nothing to show that it is to be read with s 28 (7) and the doctrine of relation back is not to be imported into s 34. Accordingly a debt contracted by an

between the date of the presentation of an application for his adjudication and the date of the order of adjudication is provable in insolvency. *Venkatachalam Chettyar v. Collector, Bassein* 167 I.C. 493 : 1937 A.I.R. (R.) 50

By implication sec. 34 lays down that if the debt is incurred after adjudication, it is not provable under the Act and the creditor is remitted to his ordinary remedy, *Kulla v Agha Salim*, 2 O.W.N. 659 : 89 I.C. 923 : (1923) A.I.R. (O.) 668 Under sec 34 of the Act, the debt to be provable must accrue before adjudication, but if it accrues after adjudication and before discharge, it is provable only if the obligation giving rise to the debt was incurred before adjudication, *The Official Trustee of Bengal v Kissen Gopal Behani*, 51 C.L.J. 392 : 34 C.W.N. 751. A debt contracted after the presentation of the petition in insolvency but before the order of adjudication is provable in insolvency under sec 34 (2) No suit to recover the debt can, therefore, lie before the discharge of the insolvent without leave obtained under sec 28 (2). After discharge such a suit is barred under sec. 44 of the Act, *Jamshedji v Pestonji*, 34 Bom L.R. 980. In a suit for partition brought by a co-sharer against other co-sharers, one of them was adjudged insolvent during the pendency of the partition suit and after his adjudication the decree in the partition suit was passed against the defendants with costs The plaintiff then filed a suit against the Official Receiver in insolvency claiming half the amount of costs which he had paid It was contended on behalf of the defendant that the suit could not lie as no leave was obtained from the Court to file the suit. It was held that the suit being one for partition the debtor was under no obligation contingent or otherwise towards the plaintiff before decree in partition suit. The obligation arose when the order for costs was made in the decree in the partition suit subsequent to the adjudication of the debtor as insolvent. The amount of costs was not therefore a debt provable in insolvency within the meaning of s 34 (2) of the Act. No leave of the Court was necessary to file suit for recovery of such costs before the institution of the suit as required by s 28 (2) of the Act. *Mareddi Seshireddi v. Official Receiver*, 1937-2 M.L.J. 29 : 1937 M.W.N. 834 : 46 L.W. 719 : 172 I.C. 251 : 1937 A.I.R. (M.) 725.

The transferee of immovable property paying off a debt charged on that property which the transferor was bound to pay becomes a creditor to the insolvent estate of the transferor and his debt can

Sham Sunder Lal, 7 O.W.N. transfer by way of sale by the order sec. 53 but it is found that it does not satisfy the requirements of a prior debt proved to prove in insolvency as the prior debt discharged by

him. Amir Chand v. Monohar Lal, 34 P.L.R. 127 : 141 I.C. 336 : 1933 A.I.R. (L) 211.

Debts to be Provable must be personal.

In the absence of a personal decree under s 52 (2) C P. Code against a person as the legal representative of a deceased debtor, such legal representative cannot be adjudicated as an insolvent under the Provincial Insolvency Act in respect of that decree debt. But where he is adjudicated an insolvent at the instance of a creditor, the debts due under the decree obtained against him as legal representative becomes a debt provable in insolvency under s 34 (2) of the Act. *Official Receiver Tinnetelly v Krishna Pillai*, 1935 M W.N 910 42 L W 707 69 M L J 818 159 I C 88 1935 A I R (M) 1058

Joint-debts provable.

Where a member of joint Hindu family has been declared insolvent the Insolvency Court alone has jurisdiction in the matter of a debt due by him jointly with other members of the family. Such a debt must be proved under sec 28 (now sec 34). It cannot be split up as to render a suit competent for the recovery of a moiety of the debt from the non insolvent members of the family in ordinary course, *Vithal v Ramchandra*, 72 Ind Cas 327

But bankruptcy being essentially a proceeding in *personam*, only the personal debts due by the insolvent can be proved therein. So a creditor could claim no priority over other creditors in respect of the joint-debts of the father and the son in the son's insolvency. But where a creditor had sued the insolvent under sec 52 (2), C P C and made him personally liable for the debts of his father to the extent of the father's estate that had come into his hands and had been disposed of by him, then he could have proved in respect of his liability in the son's insolvency, *P A A Chettyar Firm v T R M. Chettyar Firm*, 12 Rang 602

Barred debts provable.

In *Shivasubramania Pillai v Theethippa Pillai*, 47 Mad 120 45 M L J 166 1923 M W N 895 75 I C 572 1924 A I R (Mad) 163 the argument advanced was that a barred debt could not be proved in insolvency. Venkatasuba Rao, J., held 'I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross*, 2 Gl and Jameson's Bankruptcy Cases, 46, and 330, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re Westby*, (1878) 10 Ch D 776. A very clear statement of the principle is contained in the following passage the judgment of Bacon, C J., in that case, 'when a bank

ensues, there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established in the bankruptcy, and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed.' The authority of these decisions has not, in the slightest degree, been shaken by Benson, J., in *In re Bouer v. Chetwyned*, (1914) 2 Ch. 68. On the contrary, the judgment in it, while holding that the pendency of the bankruptcy proceedings did not save a claim made in the Courts of an administration suit from being barred by the Statute of Limitation carefully distinguished *Ex parte Ross* and other cases similar to it, as being cases where the proof was in the bankruptcy itself. There can be no doubt that in bankruptcy a debt does not become barred by lapse of time if it was not barred at the commencement of the bankruptcy but this is so, only in the bankruptcy. Any debt under the Provincial Insolvency Act whose recovery was not barred by limitation on the date of adjudication of the debtor as an insolvent can be proved in insolvency at any time even after a conditional order of discharge and until a final order of discharge is made. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made, are immaterial, if the decree-debt was capable of execution on the date of adjudication." Debts which are within time on the date of the adjudication of the debtor as an insolvent can be proved in insolvency even though they be time-barred before they are actually proved, *Damodar Das v. Sheikh Hamid Rahaman*, 98 I.C. 74 : (1926) A.I.R. (O) 621. Sec 34 is governed by sec 28 (7). So a creditor is entitled to prove his debt in the insolvency proceedings if the right to recover it subsists on the date of presentation of the application for insolvency even though it becomes time-barred by time the adjudication order is made, *Nizam v. Baburam*, 14 Lah. 730 : 34 P.L.R. 464. For purposes of sec 34 (2) of the Provincial Insolvency Act, the material date is, in view of s 28 (7) of the Act as to "relation back," the date of the presentation of the petition. And a debt which could have been enforced in a Court of law on the date of the presentation of the petition but the remedy by suit in respect of which had become barred by limitation before the date of the order of adjudication, was a debt provable under the Provincial Insolvency Act. *Subramania Ayyar v. Meenakshisundaram Chettiar*, I.L.R. 1937 M. 679 : 1937 M.W.N. 577. 45 L.W. 565 1937-1 M.L.J. 637 : 1937 A.I.R. (M) 577.

Arrears of rent a provable debt.

On the 26th August 1925 one T, as proprietor of a firm applied that the said firm might be adjudged insolvent. One of the scheduled creditors was the Official Trustee of Bengal for the estate of one M, the landlord of the shop of the firm and Rs. 900 was said to be due to him on account of rent for 3 months from May to July 1925 at the rate of Rs 300 a month. On the 28th

August 1925 an interim Receiver was appointed but he was not directed to take possession of the estate of the insolvent. On the 9th December 1925 the Official Trustee in a petition before the Court brought to its notice of the above dues and that since the appointment of interim Receiver rents at the rate of Rs 300 per month was accumulating and he prayed for payment of the entire amount at the rate up to December and further prayed that the premises might be vacated. On the 16th April 1926 he made another petition claiming the entire rent up to date and made similar prayers as before. On the 9th July 1926 the Court ordered him to wait till the order of adjudication was passed and the interim Receiver was appointed Receiver after adjudication and he came into possession of the insolvent's property in the eye of the law. On the 12th March 1927 the said creditor made a petition similar to previous ones and sought for permission to sue the Receiver. On the 3rd September the Court ordered notices to be given to the Official Trustee that the premises would be vacated by the end of the month. In the meantime the insolvent's properties were sold and the Official Trustee applied for payment of his entire dues out of the same. It was held that in this case there was no such antecedent obligation which accrued for the liability to pay rent for the period after the adjudication and the debt in respect of such rent is not a provable debt and that under the circumstances of the case the amount of rent due to the Official Trustee for the period from 17th August 1926 to 30th September 1927 will be treated as *expenses of administration or otherwise* within the meaning of sec 61 (3) and will be given priority while the rent due to him from 1st May 1925 to the 16th August 1926 will rank as a debt provable under the law and in respect of which the landlord will rank *pari passu* with the other creditors who may have proved the debts. *The Official Trustee Bengal v Kissen Gopal Behari* 57 C 1210 51 CLJ 392 34 CWN 751 1930 AIR (C) 459. When the Official Receiver realises rent of the property of the insolvent from the period subsequent to his adjudication such arrears of rent do not amount to provable debt under s 34 of the Act. The Official Receiver cannot claim such amount for the purpose of distribution amongst the creditors of the insolvent. *Sundar Das v Official Receiver* 1937 AIR (L) 790.

Obligation incurred before the date of adjudication

In order that a debt should be provable it must appear that the insolvent was subject to such debt or liability at any time before his discharge by reason of any obligation incurred *before the date of adjudication*. The debt or the liability would not be provable if the debtor becomes subject to it after his discharge or if he becomes subject to it by reason of any obligation incurred after the date of the order of adjudication. *Gustasp v Bhagandas* 55 Bom 649.

134 IC 1161 1931 AIR (B) 554 The "date of adjudication" in sec 28 of the Provincial Insolvency Act means the date on which the adjudication is actually made and not the date of the presentation of the petition on which the adjudication is made. A creditor is, therefore, not debarred from proving a debt incurred by the insolvent subsequent to the date of the presentation of the petition but prior to the date of adjudication, *Chetti v. Ba Tin* 13 Bur LT 117 61 Ind Cas 640, *Jamshedji v. Pestonji*, 34 Bom LR 980. In order that a particular debt contracted after the order of adjudication may be a debt provable in insolvency proceedings, the debt should have existed at the date of order of discharge or if contracted subsequent thereto it should have been based on a liability existing at the time of adjudication, *Sisram v. Ram Chander Mal*, 52 All 439 1930 ALJ 350 126 IC 252 1930 AIR (All) 104. Under sec 34 (2) the date of adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not. When a debt is held to be provable within the meaning of the foregoing section it is still open to the Court to reject the application for entering the name of the creditor in the schedule on grounds other than that of the debt being barred by limitation *Ijaz Husain v. Lachman Das*, 75 Ind Cas 790 (1924) AIR (Oudh) 351.

Private arrangement.

After being adjudicated insolvents the appellants proposed a scheme for composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in Court stating that they had been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into Court of the said sums they should be permitted to prove their claims. It was held 'that in view of the provisions of sections 28 and 38, (now secs 34 and 55) these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication,' *Beharilal Sikdar v. Harsukhdas Chakmal* 25 CWN 137. A private arrangement, by the laws of England, i.e., the Deeds of Arrangement Act, 1914 by which the creditor consents to be paid by the debtor in a certain manner, without being entitled to bring any action against the debtor in respect of the scheduled debts, is void, unless registered, and its terms are not binding upon the creditor. Pollock M R, in delivering the judgment of the Court of Appeal, observed 'it is said to be estopped and for that purpose one must find that there has been some representation made by some person to another with the intention and with the result of inducing the person to

whom the representation was made to act on the faith of that representation and to alter his position to his detriment. Are these features present in this case? The appellant agreed to an assent to a void deed, but the assent becomes equally with the deed a nullity." In *Re. A Bankruptcy notice*, (1924) 2 Ch D 76.

Future and contingent liabilities are provable.

There is a very wide scope given to debts and liabilities provable under the Act in cl. (2) of sec. 34. They include debts and liabilities, present or future, certain or contingent. K was surety for payment of a debt due by G to D. G applies to be declared insolvent and in due course was discharged. D then sued K and obtained a decree against him. Afterwards K sued G for recovery of the amount which he was compelled to pay, but it was held that the order for discharge was a bar to the suit. The learned Judge in giving his judgment relied on the English decision in *Re : Blackpool Motor Car Co.*, (1901) 1 Ch. 77 and said—"There is a very wide scope given to debts and liabilities provable under the Act in cl. (2) of sec. 34. They include debts and liabilities, present or future, certain or contingent" *Gangadhar v. Kanai*, I.L.R. 50 All. 606. Following this case it has been held in *Sudhendra Mohan Bagchi v. Khush Chunder Das Gupta*, 39 C.W.N. 563 that when a debt of the insolvent related to a *hundi* given by the plaintiff, as a security to a Bank for a loan taken by the insolvent and on a suit being brought by the Bank, the plaintiff had undertaken to liquidate the debt by a series of instalments which had not yet been completed, but the plaintiff had not proved his liability in the insolvency proceedings, it was held (in an action brought against the defendant after his discharge) that the plaintiff's claims, based on a revival of the old guarantee by the *Pro note*, was unenforceable inasmuch as the order of discharge of the defendant was a bar to any fresh suit. A liability in futurity or even a contingent liability can be proved in insolvency

Debts not provable.

There are 3 classes of debts and liabilities which are not provable in bankruptcy, viz., (1) demands in the nature of unliquidated damages which arise otherwise than by reason of contract, promise or breach of trust, (2) debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bankruptcy, (3) contingent debts and liabilities which in the opinion of the Court are incapable of being fairly estimated, e.g., alimony to be paid periodically, but which may not last and may be varied, *Linton v. Linton*, (1885) 16 Q.B.D. 239. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of the Civil Court to entertain a suit in respect of such a debt or liability is not barred b

the provisions of the Insolvency Act so as to oust the jurisdiction which vests in the Civil Court to try all suits of a civil nature under sec 9 of the CP Code, *Hira Lal v Tulsu Ram*, 80 Ind Cas 946 (1925) A I R (Nag) 77. The untaxed costs are not debts provable in bankruptcy because it was not a debt or liability, certain or contingent, to which the debtor was subject at the date of the receiving order or to which he might become subject before his discharge by reason of any obligation incurred before that date, *In Re Pitchford* (1924) Ch D 260.

Besides the above there are some other liabilities which though arising out of contract are not provable, and are, so, unaffected by an order of discharge e.g. a promise to marry a covenant not to molest, or to carry on a particular trade, also debts founded on an illegal consideration e.g. stifling of a prosecution, *Ex parte Thomas*, 1 Atk 125. So also debts due for compromising or compounding criminal offences *Ex parte Elliott* (1837) 2 Dea 179. A gaming debt is not provable nor debts barred by limitation *Ex parte Deudny*, (1808) 15 Ves 479 followed in *Baranashi Koer v Bhabadeb Chatterjee*, 34 C L J 169. The amount of deferred dower is not provable. It was held in *Mirza Ali v Quadiri Khanam*, 21 P L R 1919 50 Ind Cas 774 that it was not fair to suspend the discharge of the insolvent on account of an undetermined liability which might never arise and that the Court was not competent to make it a condition of the discharge of the insolvent that the insolvent should furnish security for the amount of the liability." See also *Sughra Bibi v Gaya Prasad* 52 All 560 1930 A L J 1038 123 I C 754 1930 A I R (All) 580. Obligations incurred after the date of adjudication are not debts provable under the Act *Ganga Pershad v Feda Ali*, 48 Ind Cas 913.

Secured debts, not provable.

Generally a secured creditor stands outside the bankruptcy. He may rely upon the security and need not prove for the whole debt. A secured creditor who comes in under the insolvency has only three courses open to him, viz, (1) that he may realise the security and then prove for the balance, (2) he may surrender the security and prove for the whole debt, and (3) he may state the whole valuation at which he has assessed the security and then prove for the balance after deducting the assessed value, *Rajendra Chandra Sarkar v Bipin Chandra Shaha Bhaumik* 60 Cal. 1298 37 C W N 973 1934 A I R (C) 64. Where a mortgagor has been adjudged an insolvent with reference to certain debts which were provable in insolvency, the order of adjudication and the order of discharge do not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency. The order of discharge cannot take away the statutory right of the decree holder to apply for a decree under

Or 34, r 6, C P C, which right accrued subsequently, *Niaz Ahmad v Phul Kunuar*, 54 All 428 1932 A L J 237 138 IC 361 1932 A I R (All) 336

For other debts not provable vide sec 44 and notes thereunder

Enquiry into provable debt.

To the ordinary rule that a matter decided by a decree cannot be re opened, there is an exception in insolvency. The Insolvency Court has the power to go behind a judgment and enquire into the consideration even for a judgment debt, and this although the judgment may have gone by default or by consent or being affirmed on appeal. But the Court will not as a matter of course enquire into the validity of a judgment debt but only when there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice, *Ali Mahomed v Deccan Match Manufacturing Co* 34 Bom L R 411 138 IC 442 1932 A I R (Bom) 253

Annulment of adjudication

Analysis.

There are four sections in the Provincial Insolvency Act under which annulment of adjudication may be ordered secs 35, 36, 39 and 43. An examination of these will show that in a case under sec. 36, the state of insolvency is obviously not put an end to, nor do the insolvency proceedings cease, since these continue in another Court. In cases under secs 35 and 39 the annulment is because the debts have been paid, either in full or because creditors have accepted part payment in full satisfaction. In the case under sec. 43, the adjudication is annulled as a punishment because the debtor has not prosecuted his application for discharge. It is clear that in cases under secs 35 and 39 the state of insolvency ceases because the debts have been paid so far as the insolvent can insure that result, and in the case of sec 43 it ceases because the debts have not been paid and the debtor is to blame for not assisting payment. Sec 43 (2) also clearly implies that the debtor's protection has been taken away that he is again put in the *status quo ante* the insolvency proceedings and he is again at the mercy of his creditors. Under sec 43, therefore, the annulment of adjudication is evidently intended to put an end to the insolvency proceedings as a whole. Sections 35 and 39 do not contain any provision similar to sec. 43 (2) and clearly the annulment of adjudication under those sections is not by way of punishment, *Kamireddi Timmappa v Detasi Harpal*, 56 MLJ 458 115 IC 815 (1929) AIR (M.) 157.

35. Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor. or of any other person interested, by order in writing, annul the adjudication and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10, not entitled to present such petition.

Review.

This is section 29 (1) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, section 42 (1) of Act III of 1907 and section 21 (1) of the Presidency Towns Insolvency Act, 1909.

Amendment.

By section 5 of the Provincial Insolvency (Amendment) Act, XI of 1927, section 35 has been amended in the following terms —

In section 35 of the same Act, after the words 'annul the adjudication' the following words shall be added, namely "and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of sec 10, not entitled to present such petition"

By this amendment the provisions of the Provincial Insolvency Act are brought into line with the amendments made in the Presidency Towns Insolvency Act —Statement of Objects and Reasons

Meaning of annulment.

The only case in which the meaning of the word "annulled" appears to have been considered is *Bailey v Johnson*, L R (1872) 7 Ex 263. In that case it was contended that sec 81 of the Bankruptcy Act under which the property of the debtor reverts to him upon annulment of the adjudication did not relate to a case where the order of adjudication was discharged on appeal but was confined to cases under secs 28 and 84, the only other sections in the Act where the word 'annulled' was used. It was held by Cockburn, C.J. 'It is quite clear that sec 81 of the Statute applies to the case of a bankruptcy being annulled by whatever means and is not limited in the manner suggested in the argument'. Where an order has been made by a Court of competent jurisdiction and that order has been annulled on appeal in which the words 'set aside' and not the words "annulled" were used, it makes no difference. *Amar Singh v The Imperial Bank of India*, Jullundur, 14 Lah 426 34 P L R 812, *Baliram v Gopadosa* 1931 A I R (Nag) 109. To the same effect is the view taken by the Calcutta High Court in *Charu Chandra Muhuri v Ramesh Chandra Sil*, 1 L R (1937) 1 C 628 171 I C 280 1937 A I R (C) 158. It has been held in that case that section 35 contemplates not only order of annulment under sections 35, 36, 39 and 43 of the Act but also annulment by appellate Court of order of adjudication on the ground that a debtor ought not to have been adjudged insolvent and that the order of adjudication is invalid at its inception. The word "annul" means "void in law" and the expression "annulment under the Act" means "annulment by virtue of the powers conferred under the Act". The Act gives right of appeal to High Court against the order of adjudication and if the order is set aside in appeal by High Court, it does so under the Act. There is no difference in the annulment order passed on setting aside the order of adjudication on appeal by High Court and in the annulment order under the other provisions of the Act, so far as limitation is concerned.

Right to annul.

The right to have the adjudication set aside is limited by the procedure prescribed by sec 35. In *In re Hester Exp Hester*, (1889) 22 QBD 632, Cave J, referring to the English Bankruptcy Act said 'I conceive that the Act is intended to be a complete code of bankruptcy, and that the Judge is to set aside an adjudication only in those cases in which the Act authorizes him to do so'. These observations are equally true of the Provincial Insolvency Act. It is only when an appeal against an order of adjudication has been made under sec 75 (1), or secondly, on the application of a person interested' under sec 35 that the Court has authority to set aside or annul an order of adjudication. Where the Act lays down a definite procedure there is no room for having recourse to any other procedure, and a Court has no power to annul the adjudication simply on a plea raised by way of objection to an application to set aside a transfer of property by an insolvent under sec 53 or 54, *Periammal v Official Receiver, Coimbatore* 1930 MWN 651. Both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act the discretion of the Court cannot be limited except in manner of *Kuddus Gazi v Mutual Indemnity Co* CLJ 545. The order of annulment made by the District Judge in the absence of a prayer to that effect by either party is illegal and constitutes an error and an application for review is not maintainable, *China Venkatappayya, v Pi*

Notice before annulment

Action under sec 35 can ordinarily be taken on an application made by the Official Receiver or by the creditors and on proof of circumstances specified in that section and the attention of the insolvent must be drawn to the facts alleged against him by notice or otherwise so that he may be able to meet them. *Dola Ram v Parma Nand Mul Chand*, 1932 AIR (L) 659

Conditions for annulment under section 35

There are two conditions under this section which must be fulfilled before an adjudication can be annulled. First that the Court must come to the conclusion that the debtor ought not to have been adjudged insolvent, Secondly when it is proved to the satisfaction of the Court that the debts have been paid in full

1. Ought not to have been adjudged insolvent.

The natural meaning of the words in the first condition is that on the facts as existing at the time of adjudication, an adjudication could not have been made but it does not apply to any subsequent misconduct on the part of the insolvent leading to the annulment

of adjudication. An adjudication cannot be annulled on the following grounds —(1) that an insolvent could pay his debts in full out of his assets (2) that a part of the property is subject to the Alienation of Land Act XII of 1900 (3) that the debtor has not given produce of his land to the Receiver *Jam Khan v Debi Dutt* 77 P W R 1915 29 Ind Cass 888 152 P L R 1915. In order to obtain an order for annulment it must be shown that the order of adjudication ought not to have been made. If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order of adjudication s 35 clearly empowers the Court to annul the adjudication in revision though the Provincial Insolvency Act does not confer upon this Court the wide powers given by s 8 Presidency Towns Insolvency Act which allows the Court to review rescind or vary any order made by it under its insolvency jurisdiction. *Kumarappa Chettiar v Chidambaram Chettiar* 48 M L W 239 1938 M W N 844 1938 2 M L J 385 1938 A I R (M) 898. In order to show that it must be proved that the act of insolvency on which the order was based did not exist *Kanuthan Chettiar v Raman Chetty* 24 M L W 486 97 I C 590 (1926) A I R (M) 1159 or the decree of the creditor by whom the judgment debtor was adjudged insolvent was a fraudulent and collusive decree void for want of consideration *Koya Mohidin v Hashim Khan* 158 I C 333 1935 A I R (R) 276.

Where none of the circumstances mentioned in sec 42 (now sec 35) had been established the order of the Court annulling adjudication on the petition of the insolvent was erroneous and the fact that the Receiver had been unable to satisfy the debts or that the opposing creditor had at one time consented to a composition or that all the creditors consented are not by themselves sufficient to justify the annulment. The Court had to consider not merely that what they have agreed to is for the benefit of the creditors but that the annulment would not be detrimental to

Ganpat Ram 21 C W N 936 23

Shama Charan Bose 18 C W N

Id there is no room for contro

versy that the order of annulment could not have been made under sec 42 (1). In the case before us the debts of the insolvent have not been paid in full nor has there been any composition or scheme approved by the Court consequently the order can be supported only if it is established that the debtor should not have been adjudged insolvent. The Court can only annul the order of adjudication under sec 21 of the Act (Presidency Towns Insolvency Act) if the Court is of opinion that the debtor ought not to have been adjudicated insolvent or it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full and in the latter case the debts including at least all debts

and properly proved in bankruptcy must have been fully paid in cash, *In Re. Subrati Jan Mahomed*, 38 Bom 200

Annulment for abuse of the process of the Court.

Where the proceedings are founded on a judgment, the Court of bankruptcy may enquire into the validity of that judgment for any sufficient reason, such as, fraud, but the bankrupt cannot bring an action to set aside the judgment while the adjudication stands on the ground that the judgment was obtained by fraud or for any other ground, *Boaler v Pouer* (1910) 2 KB 229. An order made under proceedings which are an abuse of the process of the Court or foreign to the purpose of the Bankruptcy Act should be annulled, *Ex parte Painter, Re Painter*, (1895) 1 QB 85, or an order made under a defective petition which has not been amended before the making of the receiving order or adjudication order, *Ex parte Coombes*, (1887) 5 Ch App 979 or upon evidence stating that the debtor has absconded which turned out to be untrue, *Re Bright*, (1903) 1 KB 735, or where the debtor was dead at the time when the bankruptcy proceedings were taken against him *Ex parte Keisel*, (1882) 22 Ch D 436, or where a minor has been declared insolvent, *Sannyasi v Ashutosh*, 42 Cal 225, *Jagmohan Narain v. Girish Babu*, 42 All 515 58 Ind Cas 557, or where a lunatic has been declared insolvent, *Periammal v The Official Receiver Coimbatore*, 1930 MWN 651, or where the Court had no jurisdiction, or where there were no assets to be distributed, or where the object was to extort money "Where it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon a company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, it is one of the worst abuses to which the statute law upon companies could be perverted" *Tulsidas Lalubhai v The Bharat Khand Cotton Mills Co Ltd*, 39 Bom 47. The Insolvency Court is entitled to go behind a judgment and will ordinarily exercise its discretion to do so when the judgment had been obtained by fraud or collusion, *Hashim Khan v Koya Moudien Kaka*, 145 IC 835 1933 AIR (R) 268

When adjudication is an abuse.

The Court has power to refuse or annul an adjudication order if the insolvent amounts to appellant debtors were tly, they obtained their
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solvency there being no change in their circumstances, the debts and their creditors remaining the same. It was held, that "the presentation of the insolvency petition by the debtors on the 5th March, 1915, under such circumstances was an abuse of the process of the Court and the adjudication order upon it must be annulled," *Malchand v Gopal Chandra Ghosal*, 21 CWN 298. In *Re Ballachand Seroujee*, 27 CWN 739, it was held following *Malchand v Gopal Chandra*, *supra* that the presentation of a second insolvency petition by the debtors on the same facts and on the same materials upon which the first order of adjudication was made was an abuse of the process of the Court and a second adjudication order founded upon it must be annulled.

The cases of *Malchand v Gopal Chandra* and *In Re Ballav Chand Seroujee* are cases under the Presidency Towns Insolvency Act, 1909. Mookerjee, J., in delivering the judgment in *Malchand v Gopal Chandra* observed "Under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This of *In Re Betts* (1901) 2 KB and *In Re Hancock*, (1904) 1 QB and has been applied by all the as applicable to the Provincial Insolvency Act in the case of *Samruddin v Kadumoyee* 15 CWN 244 12 CLJ 445 and has been recently accepted by two Full Benches, one of the Madras High Court and the other of the Allahabad High Court, in the cases of *Ponnuswami Chetti v Narasimha Chetti*, 25 MLJ 545 and *Triloki Nath v Badri Das*, 36 All 250. See also *In Re Sabhapathy* 21 Bom 297. We must take it then well settled that notwithstanding proof of the existence of the conditions mentioned in the statute the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court and it is the duty of the Court to have regard to this aspect of the matter when the question is raised."

When adjudication is not an abuse

If a debtor satisfies the conditions laid down by the Act for the presentation of his insolvency petition, it cannot properly be said that he has abused the process of the Court because he had contracted debts in transactions on which he embarked without any capital and had no assets and his presentation of an insolvency petition was an abuse of the process of the Court and the petitioner ought never to have been adjudged insolvent within the meaning of the section, *Thana Velayudha Nadar v Subramania Pillai* 109 1C 636 (1928) AIR (M) 609. Although it is undo open to the Court to consider whether the transfer of a the insolvent is voidable as against the Receiver under the

sions of sec 53, it is not open to the Court to annul the adjudication in respect of the matter alleged in reference to the decree, *Ramlal v Mahadeo* 3 Luck 323 5 O W N 89 110 IC 113 (1928) AIR (O) 404 Undue preference to one creditor is not a ground for annulment of an adjudication. *Gopal Chand v. Gopal Chand* 111 IC 113 (1928) AIR (O) 404 Undue preference to one creditor is not a ground for annulment of an adjudication.

in sec 35, and the Court has no jurisdiction to annul the adjudication of an insolvent on the ground that he was dishonest, in his dealings, that he was entering recklessly into transactions and incurring debts which he never hoped to repay, that he had destroyed his account books and that he realised the debts due to him, as none of these facts would have furnished a ground for dismissing the insolvency petition, *Mohan Lal v Madhava Prasad*, 53 All 476 131 IC 35 1931 AIR (All) 331

II. Payment in full.

Under the English Law 'payment in full' means payment in cash to the amount of 20 shillings in the £, and the assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute release of their debts will not in itself be sufficient to entitle the bankrupt to have his bankruptcy annulled—sec. 35, *Bankruptcy Act, 1883*, *Re Gill*, (1888) 5 Morr 272 In *Re Burnett*, 1 Mans 89, where W a friend of the bankrupt in his behalf took an assignment of the debts of £1,500 for £140 and another friend on the like behalf paid W the full amount of the debts which were reassigned to the bankrupt, it was held not to be payment in full by the bankrupt See also *Re Kent*, (1905) 2 K.B 666 The words "payment in full" refer not merely to the payment of the creditors at the contract rate up to the date of adjudication and the interest at the statutory rate of 6 per cent from the date of adjudication under sec 61 (6) but also to the payment of the higher rate, if any, stipulated for in the contract with the creditor from the date of adjudication to the date of payment as indicated in sec 48 (2), *China Venkataraju v Lakshmanaswami*, 1931 M W N 937 35 L W 143 134 IC 169 1931 AIR (Mad) 729 A District Judge has no jurisdiction to pass an order of annulment of adjudication under section 35 until all debts due from the insolvent have been paid off, *Bhagwan Singh v Chedi Lall*, 99 IC 277 Even an unconditional release by a creditor cannot amount to a payment in full of the debt within the meaning of sec 35 of Act V of 1920 Before this section can be availed of all the debts of the insolvent must be discharged in full.

an insolvent claimed annulment, under sec 35 on the ground that all debts have been discharged by his relations but it was found that some interest was due to a creditor who has given complete

discharge of his debts, it was held that the insolvent was entitled to an annulment, *Muhammad Ibrahim v. Ram Chandta*, 48 All 272 24 ALJ 244 92 IC 514 (1926) AIR (A) 289

Private arrangement with creditors.

A private arrangement of the insolvent to pay 4 annas in the rupee in full satisfaction of the claims of his creditors, even though made with all the creditors is neither a payment in full nor a composition within the meaning of the Act so as to entitle the insolvent to an annulment of an order of adjudication, *Brij Kessore Laul v. Official Assignee, Madras*, 43 Mad 71 37 MLJ 244 "Where a person who has been adjudicated insolvent applies for the adjudication to be annulled on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment," *Pelayudham Pillai v. Official Receiver, Tinnetelly*, 26 M.L.T. 139 1919 MWN 622 50 Ind Cas 689 It was held also in *Behari Sikdar v. Harsukhdas Chakmud*, 25 CWN 137 61 Ind Cas 904, that a payment of annas eight in the rupee in full satisfaction of the claims of the creditors without the intervention of the Court or the Receiver after a scheme for composition has been rejected could not be recognised in insolvency proceedings

Consent of creditors *per se* no ground for annulment.

The order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sec 35. The Court has no power to annul otherwise than in exercise of the authority vested in it by the statute. It is perfectly plain that even under sec 39 of the Provincial Insolvency Act the consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment. In the case of *In re Hestor*, (1889) 22 QBD 632, Lord Esher, M R, said "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act, it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality or to the interests of the public at large." Fry, LJ, added "It is an idle notion that the Court is bound by the consent of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to rescinding order. We are bound, in the exercise of our jurisdiction in such a matter, and I think, in all matters under this Act, to take a wider view than of the interests of the creditors alone. We are not only bound to regard the interests of the creditors, but also the interests of the public who are sometimes careless of their best interests."

duty with regard to the commercial morality of the country. *Maulal v Ganpat Ram* 21 C W N 936 Under sec 35 an insolvent whose debts have not been paid in full is not entitled to apply for the annulment of his adjudication. The fact that all the creditors give him a complete and full discharge will not entitle him to do so. *Kattapalli Bapayya v Official Receiver Guntur* 57 MLJ 816 30 MLW 948 (1929) M W N 910 (1930) AIR (M) 112 Under s 35 the debts of the insolvent must be paid in full before the adjudication can be annulled. It may be that the debts referred to in the section mean debts proved in the insolvency Court but once a debt is proved it does not cease to be a proved debt simply because the creditor states that he does not wish to be recorded as a scheduled creditor. The consent of or even an unconditional discharge by the creditors will not entitle the Court to annul the adjudication unless the debts have been paid in full in cash. If a debt is not paid off it still subsists in spite of annulment. *Nazukrao v Jaiwantrao* 18 NLJ 145

III Adjudication obtained without leave

In addition to the two conditions enumerated above on proof of any of which the order of adjudication is annulled a third condition has been added by the recent amendment under sec 5 of the Insolvency (Amendment) Act XI of 1927 viz that the Court may annul an order of adjudication when it has been obtained without leave of the Court as contemplated by sec 10 (2) after the annulment of a previous order of adjudication.

No annulment for failure to deposit costs

annulled under
70 Neither sec
sit the costs of
227 (30) of the
Oudh Chief Court Rules gives the Court power to recover the costs from the insolvent's property if the property is sufficient for the purpose or to remit the cost if the property is insufficient. *Har Kishori v Masum Ali Khan* 6 O W N 1093 1930 AIR (O) 53

Effect of annulment under sec 35

In cases under sec 35 the annulment is because the debts have been paid in full. It is therefore that when an adjudication order is annulled under sec 35 the state of insolvency ceases. *Kamireddi Timmappa v Devasi Harpal* 56 MLJ 458 115 IC 815 1929 AIR (M) 157 The consequences of annulment of adjudication are different to those of discharge. On the annulment of adjudication there is nothing to prevent a creditor from pursuing his remedy in a Court of law. *Duni Chand v Jita Ram* 34 PLR 135 141 IC 260 1933 AIR (L) 181 Sec 78 (2) of the Act applies

to the case of an order of adjudication being annulled by whatever means and is not limited to an order of annulment under the Act, *Amar Singh v The Imperial Bank of India, Jullundur*, 14 Lah 426 34 P L R 812

In *John v Mendoza* (1939) 1 K B & P 141, the defendant at the time of a receiving order in bankruptcy against him owed the plaintiff £852 15s 6d. He persuaded the plaintiff to refrain from proving in bankruptcy, and to write to the official receiver that he had given that money to the defendant as present. The defendant gave the plaintiff a letter in these terms "I thank you for your letter of even date which I requested from you, and notwithstanding its contents, I am still indebted to you for the sum of £852 15s 6d."

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Limitation for application of annulment.

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in the matter, this objection taken at this late stage should not be entertained, *Harish Chandra v The East India Coal Co Ltd* 16 CWN 733

Appeal.

An appeal lies under sec 75 (2) schedule 1 against an order annulling adjudication

36. If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon

Review

This is section 17 of Act III of 1907 corresponding to sec. 22 the Presidency Towns Insolvency Act and should be read

section 77, in *ra* By this section a further ground for annulment of the adjudication order has been provided viz., when "insolvency proceedings are pending against the same debtor in another Court and that the property of the debtor can be more conveniently distributed by such other Court

Object of the section

The reason underlying the rule of stay of insolvency proceedings or the annulment of the order of adjudication is as has been observed in *Sridhar Chowdhury v. Mugniram* 3 Pat 357 78 Ind Cas 620 that where concurrent proceedings for similar relief are taken in two different and independent courts no order should be passed which may lead to friction or conflict of jurisdiction

Discretion to annul or stay concurrent proceedings

In *In the Matter of Motilal Premshukdas* 1938 Rang L R 116 178 IC 46 1938 AIR (R) 324 there first occurred the adjudication in Calcutta of seven persons trading under the name of Ramnibas Ram Narain and a month later there was the adjudication in Rangoon of the firm of Motilal Premshuk Das of which six of these seven persons were partners. The Official Assignee of Calcutta applied to have the Rangoon adjudication order annulled or alternatively to have all proceedings thereon stayed. It was held that the jurisdiction of the Court to annul or stay proceedings of an adjudication order under this section is a discretionary jurisdiction. It is a jurisdiction which cannot be invoked as of right though no doubt there are settled principles upon which the discretion is either exercised or not. The dominating factor which decides the Court whether to exercise its discretion or not is *whether the assets can be more conveniently and efficiently administered in the one Court than in the other*. While it may well be that the Calcutta order of adjudication involved the adjudication of the Rangoon firm, it is not quite the same thing as saying that they constitute the 'same debtor' which is the necessary qualification for the exercise of jurisdiction under the section of the Act.

Under section 11 a petition for insolvency by or against a debtor may be presented in any Court within whose jurisdiction he resides or trades or works or has been arrested. If petitions are presented by or against him concurrently in more than one Court, this section gives power to any Court to annul the adjudication made by it on proof that another Court can more conveniently deal with the matter. The annulment of adjudication order under this section is a matter of discretion of the Court and may be refused. Where after an order of adjudication had been made by the Madras High Court a second application for adjudication was presented to the Bombay High Court, it was held, that the

prior order of the Madras High Court did not deprive the Bombay Insolvency Court to adjudicate the appellant an insolvent at the instance of a Bombay creditor. Also the Court had a discretion to refuse the adjudication order if having regard to the circumstances of the case it considered that an adjudication again in Bombay would be a vain and useless proceeding. *In Re Arnayl*, 21 Bom 297. In this case the Court observed: "It would not be just or equitable to allow the proceedings in both Courts to go on concurrently. This would lead to most undesirable conflict of jurisdiction and as the proceedings in Madras were prior in time and all the assets of the insolvent are vested in the Official Assignee there this (Bombay) Court ought to yield to the prior claim of the Court at Madras. The best course we think under the circumstances will be to stay the proceedings here till further orders of the Insolvency Court leaving the Bombay creditors to take such steps in Madras as they may be advised to take. This may appear to be hard upon them but it would be equally hard upon the Madras creditors to be compelled to take steps in Bombay."

In *In the matter of William Watson* 31 Cal 761 8 CWN 553 it has been held that the Insolvency Courts in India have a discretion in making adjudication order notwithstanding a prior adjudication order in another country provided the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary. The presence of large assets within the jurisdiction of those Courts is a strong circumstance in favour of making such an order. The different High Courts in India exercising concurrent jurisdiction may, in the exercise of their discretion, apply the rule but may vary it according to the convenience or equitable to allow the proceedings in all the Courts to go on concurrently.

It has been observed by the Privy Council in *Sastri Kinkar Benerjee v Hursookdas Chagemull* 31 CWN 1002 (PC) that notwithstanding the High Court has jurisdiction over the same debtor when the Insolvency Act Sec. 22 of that Act gives any party who may so desire an opportunity for satisfying the High Court that the proceedings before it should be stayed or the adjudication by it annulled in view of the other proceedings before the District Court. But the High Court has discretion either to exercise its jurisdiction or to restrain its exercise on being satisfied that the matter may be dealt with more conveniently by the District Court. In *Duarkadas Badndas* the proceedings were started at the instance of the Delhi creditors of the debtor had not only to realise a much larger sum than the

Rawalpindi creditors but had also to contest an alienation made by him. The Rawalpindi creditors agreed to accept part payment of their debts out of the sale proceeds of the debtor's property situated at Rawalpindi. It was held that having regard to the peculiar circumstances of the case it would be proper to allow the proceedings to continue in both the Courts leaving it to them to decide ultimately which of them should annul the order of adjudication that it might make.

Effect of annulment under sec 36

In a case under sec 36 the state of insolvency is obviously not put an end to nor do the insolvency proceedings cease since these continue in another Court. *Kamreddi Tammappa v Detasi Harpal* 56 M L J 458 115 I C 815 1929 A I R (M) 157

High Court's power to stay proceedings

(1) *In Courts subject to its superintendence* After it had been held by the Calcutta High Court in the Full Bench Case of *Sarat Chandra Pal v Barlow & Co* 33 C W N 15 48 C L J 298 (F B) and by the Bombay High Court in *In re Manik Chand Virchand* 47 Bom 275 and in *Naginal Maganlal Jaichand* 49 Bom 788 that sec 18 of the Presidency Towns Insolvency Act does not empower a Judge of the High Court sitting in insolvency to stay proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act the law has been amended by sec 3 of the Insolvency Law (Amendment) Act X of 1930 which has inserted sec 18A in the Presidency Towns Insolvency Act empowering the High Court in its Original Jurisdiction to stay any proceedings pending against the debtor in any Court subject to the superintendence of the Court and after the making of an order of adjudication annul the adjudication against the debtor made by any such Court.

Sec 18A of the Presidency Towns Insolvency Act affords no indication as to the grounds on which the High Court can make an order staying proceedings in or annulling adjudication order made by subordinate Courts. When however it appeared that an order of adjudication was made by the District Court on the petition of the debtor and all the creditors were shown as having addresses either of their own or of their agents in Calcutta and the debtor carried on business for some time in Calcutta and a substantial creditor applied to the High Court for having the debtor adjudicated an insolvent and the insolvency proceedings proceeded with

cause the he court stayed. An insolvent debtor is not in the position of a plaintiff as to the right of choice of the Court in which his insolvency should

be conducted, *Re Krishna Paul*, 35 C W N 566 Under sec 36 of the Provincial Insolvency Act, Courts have no jurisdiction to stay proceedings and annul the adjudication order in any other Court having concurrent jurisdiction, but they have only the power of staying the proceedings in their own Courts and to annul the order of adjudication made by themselves if it is proved that insolvency proceedings are pending in another Court against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court

(2) *In Courts not subject to its superintendence* There is no provision which authorizes the High Court in its insolvency jurisdiction to stay proceedings in Courts not subject to its superintendence In *Malik Ram Lal v The Official Assignee of Calcutta*, 59 Cal 1161 36 C W N 546 56 C L J 152 a firm was adjudicated insolvent on the 13th February, 1930 by the District Court of Delhi and the same firm was adjudged insolvent by the High Court of Calcutta on the 15th February, 1930, that is, two days after the date of the adjudication order of the Delhi Court In these circumstances an application was made by the Official Assignee to the Delhi Court for an order under sec 36 of the Provincial Insolvency Act that, that Court should cancel the insolvency proceedings pending before itself or stay those proceedings That application was dismissed by the Delhi Court On an application of the Official Assignee for a direction to sell the Calcutta properties it was held that the properties had already vested in the Receiver of the Delhi Court by reason of the prior adjudication order and when two orders of adjudication are passed by two different Courts, the property of the insolvent vests under the order first passed although the act of insolvency in respect of which the second order is passed is prior in time to the first, (*The Official Assignee of Madras v The official Assignee of Rangoon* 42 Mad 121 followed) In *Mannu Lal v P K Banerjee*, 1 L R 1938 All 800 it was held that the Chief Court of Oudh could not pass an order of stay of a case pending in the Court of the Insolvency Judge, Cawnpore, unless the direction of the Chief Court was confirmed by this Court The Court that had jurisdiction to pass an order of stay was undoubtedly authorised to reopen the proceedings stayed by itself

37. (1) *Where an adjudication is annulled, all sales*

Proceedings on
annulment

and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver,

shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in person as the Court may appoint, or, in default of such appointment, shall revert to the debtor to the

of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare

(2) Notice of every order annulling an adjudication shall be published in the local official Gazette and in such other manner as may be prescribed

Review.

THIS is section 42 (2) & (3) of Act III of 1907 and corresponds to sec 42 (2) & (3) of the Presidency Towns Insolvency Act and sec 29 (2) and (3) of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows ' (2) where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done by the Official Receiver, trustee or other person acting under their authority, or by the Court shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order (3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper '

Effect of annulment.

In *Baily v Johnson* L R 7 Ex 263 Cockburn C J, said "The effect of section 81 [now section 29 (2)] is, subject to any *bona fide* disposition lawfully made by the trustee, prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy, may by its order impose, to remit the party whose bankruptcy is set aside to his original condition " When an order of adjudication is annulled, the debtor reverts to the position as he was before the insolvency, *Jokhiram Surafmal Firm v Chouthmal Bhagirath* 9 Pat 945 1931 AIR (Pat) 70 When an adjudication is annulled under section 43 the insolvency proceedings automatically come to an end except so far as they are kept alive by orders passed under sec 37 Such acts in the insolvency as have not been completed at the annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court directs their continuance *Bhadramma v Paratasam Ayyararu*, 63 MLJ 414 1932 MWN 1105 36 LW 655 139 IC 574 1932 AIR (M) 731 Except where there is an express provision in that behalf the effect of an order annulling an order of adjudication is that there is no longer an insolvent before the Court, and the Court, subject to s 37 of the Provincial Insolvency Act is no longer entitled to pass orders in respect of the debtor's estate in its insolvency jurisdiction Apart for the Insolvency Act the Court has no jurisdiction

nor has a receiver or any other person the right to dispose of the debtor's property except in accordance with ordinary civil law. In *Re Annamalai Chettiar v R K Bannerjee*, 14 R 254 163 IC 217 1936 AIR (R) 284 (FB)

Re-vesting of property on annulment.

A judgment debtor was declared insolvent by the Insolvency Court and a vesting order made. Part of his property was subsequently attached in execution of a decree. Afterwards his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditors' trust-deed was executed of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust-deed. It was held that "the dismissal of the insolvency petition was to retest the debtor's property in him as from the date of the vesting order, subject to all acts done by the assignee or under his authority, during the continuance of the vesting order. Therefore the attachment may properly be held to be capable of operating as from the date of its first issue," *Ramasami v Murugesu*, (*Tawker's Case*) 20 Mad 452 followed in *Kothandaram Ravuth v Murugesu*, 27 Mad 7 13 MLJ 372. When an adjudication order is annulled, it is as though it had never been made with certain exceptions. The acts of the Receiver and of the Court duly done are allowed to stand and subject to that the property vests in the bankrupt retrospectively, that is to say, as it was at the time when adjudication order was first made, *Lachmi Chand Jhawar v Bepin Behari Ghose*, 32 CWN 716.

The words "as the Court may declare" in section 37 govern only the vesting of the property in the debtor. It means that the vesting of the property in him in the absence of a bankruptcy order is declared by the Court, as

in *Kam Suraj-*

the property of

the debtor, if any, subject to any condition attached to the order of annulment shall revert to the debtor to the extent of his right or interest therein and on such conditions as the Court may declare. A claim for breach of contract which became due to the insolvent before adjudication and has not been rendered to him vests in the official Receiver. Under the English law the word "property" includes claim in the nature of damages which have accrued due prior to the date of insolvency, excepting the claims in the nature of a personal action for any tort done to the person, which according to the maxim *actio personalis moritur cum persona*, would be assigned. It would therefore follow that on annulment of order of adjudication the claim for damages for breach of contract would revert either to the debtor or to his trustee as a

the composition deed *Motha Ram Daulat Ram v Phalaj Rai Gopal Das* 1925 A I R (Sind) 159 A suit instituted by the Receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmain-
tainable on the annulment of adjudication but might be carried on by the late insolvent himself *Manu Lal v Nelin Kumar Mukherjee* 41 All 200 16 A L J 938 48 Ind Cas 443 S 37 contemplates that unless the Court has passed an order vesting the property of the insolvent after the adjudication has been annulled in a person appointed by the Court it shall revert to the debtor The mere fact that the property on passing of the adjudication order vested in the Official Receiver does not authorise the receiver to deal with it after the adjudication has been annulled in the absence of an express order to that effect by the Insolvency Judge The effect of annulment of adjudication is that the condition with regard to the property which existed immediately before the passing of the adjudication order is restored unless of course an order under s 37 vesting the property in a person appointed by the insolvency judge has been passed *Shakar Khan v Ishar Das* 38 P L R 273 163 I C 1007 1936 A I R (L) 568 When one member of a joint Hindu Family (Mitakshara) is adjudicated insolvent and his property vests in the Official Receiver the share of the insolvent is in the hands of the Official Receiver not as a joint family property but as separate property available for the benefit of the personal creditors of the insolvent On the annulment of the adjudication on the ground that the creditors have been paid in full the property reverts to the insolvent under s 37 But it goes back to the debtor with the same character in which it was held by the Official Receiver while the bankruptcy continued The annulment would not completely wipe out the effect of a valid order of adjudication The bankruptcy is wiped out to this extent viz. that the property goes to the debtor free from all claims in bankruptcy If the effect of insolvency is to divest the share of the insolvent of its character as joint family property it cannot retain that character when it comes back to the insolvent unless he can by an unequivocal act of his own impress it with the said character Under s 37 it reverts to the debtor as his property that is as his individual property so that if on the date of reversion he is not alive it will go to his heir under the law but not to the co parceners by survivorship *Lakshmanan Cretuar v Srinivasa Jyengar* 1 L R (1937) M 203 1936 M W N 1043 44 L W 657 71 M L J 707

Re vesting subject to acts done

When an order of adjudication of a person as insolvent has been annulled the property of the person who was sought to be adjudicated cannot be distributed by the Official Receiver amongst the creditors He can only take out of the amounts realised by him

such amount as he has spent and his costs and also the commission on the amounts realised and the rest of the amount should remain in his hands for the benefit of the debtor who was sought to be adjudicated as insolvent *Aruna Gini Mudaliar v Official Receiver North Arcot* 1926 M W N 950 98 I C 1060 Where before the order of annulment a debt owing to the debtor by a third person was sold up it was held that the only property of the debtor at the date of annulment was the sale proceeds and not the original debt and that therefore all that vested in the Receiver was the sale proceeds and not the debt *Jokhiram Surajmal Firm v Chouthmal Bhagirath* 9 Pat 945 1931 A I R (Par) 70

Re vesting subject to *lis pendens*

On the 1st April 1933 a Chettyar firm was adjudicated insolvent on a creditor's petition. On the 2nd June 1933 the adjudication was annulled. On the 8th July 1933 the creditor filed an appeal against the order annulling the order of adjudication. On the 21st August 1933 the appeal was allowed and the annulment order was set aside. Meanwhile on the 1st August 1933 the firm had paid to another creditor certain sums of money in liquidation of their debts. The creditor who was paid was aware of the insolvency proceedings but after the order of annulment and at the time of receiving payment he made no enquiries as to whether an appeal had been filed against the order. The trustee claimed that the money paid to the latter creditor by the firm should be refunded. The creditor who was paid relied on the absence of notice of the appeal. It was held that the title of the trustee related back to the first available act of insolvency upon which the insolvency petition was based and therefore *prima facie* the payments by the insolvent firm on the 1st August 1933 were void as against the trustee. In the circumstances obtaining on the 1st August 1933 the insolvent firm had no title or right to transfer the money to the latter creditor. The principles underlying the doctrine of *lis pendens* are not dissimilar from the principles which are to be applied in construing sec 57 (sec 55 of the Provincial Insolvency Act) of the Presidency Towns Insolvency Act. *The Official Assignee v The Mercantile Bank of India Ltd* 12 Rang 577. After the making of an order of adjudication the insolvent has no right or title left to him in his property in view of the provisions of s 28(2) of the Act and a transfer by an undischarged insolvent is therefore void such a transfer cannot be made valid by annulment of adjudication. When a transaction is void *ab initio* nothing that can happen afterwards can validate or revise it *Triloka v Ganga Prasad* 1937 O W N 94

Vesting of property in such person as the Court may appoint on annulment

The object of the legislature in enacting s 37 was to brake upon the ex insolvent's activities by giving the Court

cretion If it thought fit to do so, not to hand back to the debtor his property unconditionally or at once, but either to do so after imposing a condition upon him in a proper case which would give the creditors an opportunity to make good their claims in the ordinary course of law against the debtor, or to vest the debtor's estate in some person appointed by it, presumably for a reasonable period, so that if the creditors thereafter acted with reasonable diligence they would be able by attachment or otherwise to liquidate any decree that they might obtain against the debtor out of the assets in the hands of the appointee. In *re Annamalai Chettiar v R K Banerjee*, 11 LR 14 R 254 1936 AIR (R) 284 On the annulment of an adjudication order the property reverts in the debtor who was adjudged insolvent inasmuch as the Insolvency Court having seisin only over the property of the insolvent, the debtor ceases to be an insolvent as soon as the order of adjudication is annulled. Hence, "an order vesting the property in some person other than the bankrupt may be necessary for the purpose of securing or bringing about the fulfilment of any condition on which the annulment is based," *Flower v The Mayor of Lyme Regis*, (1921) 1 KB 488 Where the insolvent fails to apply for an order of discharge the Insolvency Court has no option but to annul his adjudication. But in order to protect the creditors under sec 37 the proper order of the Court should be that the property of the debtor shall vest in a person appointed by the Court. *Roop Narain v King & Co*, 94 IC 234 (1926) AIR (L) 370 The course open to the Court on annulment is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law or pending such security or for some other reason the Court may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. Such vesting is only for the purpose, apparently, of making the property available to creditors to proceed through the Civil Court, *Panna Lal v The Official Receiver*, 53 All 313 1931 AIR (All) 71 Sec 37 was intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent, *Seliam Chettiar v Venkatachalam Chettiar*, 59 MLJ 710 1930 MWN 673 129 IC 36 1931 AIR (M) 10 Section 37 lays down that on annulment of adjudication the property of the debtor shall vest in such person as the Court may appoint, or in default shall revert to the debtor on conditions which the Court may declare. Consequently an alienation made by the debtor of property which by order of Court has vested in a third person is wholly ineffective, *Kidar Nath v Md Ibrahim*, 1934 AIR (L) 394 150 IC 74

Property that does not vest on annulment.

The word 'property' as used in sec 37 does not include the 'right

to sue' for cancellation of a transfer which had accrued to the Official Assignee. This right to sue is a personal right and cannot be subject of transfer. Being a personal right specially granted by law it cannot be an interest that devolves under Or 22, r 10, C P Code. Therefore where an Official Assignee has become *functus officio* on account of the property of the insolvent having been vested in the trustees under sec 38 in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a certain Court and the Court dismisses it under Or 9, r 8, C P C the trustees cannot apply to be made the legal representatives of the Official Assignee and ask for the restoration of the suit, *Sajjan Mal v Bodh Raj* 1934 A I R (Peshawar) 89.

Powers of the Court on annulment.

There is a conflict of opinion as to whether on annulment of adjudication the Insolvency Court has any seisin over the property of the insolvent. It has been held in *Jeihaji Peraji Firm v Krishnayya*, 52 Mad 648 57 M L J 116 that "on an annulment of adjudication under sec 43 owing to the insolvent's failure to apply for his discharge the insolvency proceedings do not necessarily come to an end and his property does not *ipso facto* revert to the insolvent. The Court may in proper cases, vest it in some other person as provided by sec 37 of the Act. But if before the annulment, the Official Receiver had applied to set aside a mortgage under sec 54 of the Act, as an act of fraudulent preference, he can prosecute the application after the annulment." The same view has been expressed in *Somasundaram Chettiar v Periakaruppan Chettiar* 58 M L J 658 1930 A I R (M) 520, in which it has been held that "on annulling an adjudication under sec 43 of the Act, on the ground that the insolvent did not apply for discharge within the time specified in the order of adjudication, the Insolvency Court has, under sec 37 of the Act, ample jurisdiction to make an order vesting the property of the insolvent in the hands of the Receiver or any other person for distributing the assets among the creditors of the insolvent. Though the annulment puts an end to the insolvency proceedings against the insolvent, the Insolvency Court still has jurisdiction over the insolvent's assets to pass the necessary orders in favour of the creditors." Where the Insolvency Court annuls an adjudication under s 43 of the Act, and passes an order under s 37 vesting the property of the quondam insolvent in an appointee (Official Receiver or other person) the administration in insolvency can be continued for the realisation and distribution of the assets of the insolvent notwithstanding the annulment. The insolvency Court in such a case has full power to give directions to the appointee as to the distribution and realisation and disposal of the debtor's assets. The power, however, should not be used arbitrarily, and should be used not in the interest of this or that creditor, but in the interest of the body of creditors in other words the only proper order for

Court to pass is that the appointee should continue to realise and distribute the debtor's property in accordance with the provisions of the Act. Though a person appointed under s 37 of the Act is competent to continue applications under ss 53 and 54 which are pending at the time of the order of annulment is made under s 43 he cannot initiate similar proceeding after the annulment. *Moturi Veerayya v Rao Bahadur P V Sreenivasa Rao* 11 LR 58 M 908 1935 MWN 886 42 LW 386 69 MLJ 364 158 IC 1060 1935 AIR (M) 826 (FB). Once an adjudication is annulled the receiver or a creditor or the Insolvency Court cannot either institute or continue proceedings under s 53 or s 54. Where therefore the creditors of an insolvent apply for an annulment of a transfer made by the insolvent during the insolvency and the adjudication of the insolvent is annulled the creditors are not entitled to pursue the application and obtain an annulment of the transfer after the annulment of the adjudication. No question of validating the proceedings under s 37 arises and the property transferred having ceased to be the property of the debtor the Court has no power to deal with it under s 37. *Suleman Laif Hasam Kachi v Laxman* 177 IC 160 1938 AIR (N) 312. The unconditional annulment of the adjudication pending a creditor's application to set aside a sale of the insolvent's property by the Official Receiver does not deprive the Insolvency Court of its jurisdiction to hear and determine the application. The effect of s 37 is that the order of annulment will not invalidate the acts of the Court or of the Official Receiver theretofore done but they do not acquire a degree of sacrosanctity or immunity from attack by way of appeal which the
 of annulment
 MWN 494 4

here been no order
 Cuddappah 1935
 AIR (M) 433

To the same effect is the decision in the case of *Chouthmal Bhagirath v Jokhu Ram Suraj* 12 P 163 13 PLT 775 1930 AIR (P) 84 where it has been held that it is not correct to say that after the order of annulment the insolvency proceeding comes to an end *ipso facto*. Though the effect of passing an order of annulment without any condition is to vest the property in the debtor there is nothing in the Insolvency Act to prevent the Court subsequently from giving suitable directions or vesting the property in the Receiver for the protection of the creditors. Such an order is not a review of the order of annulment but is supplementary to it and can be passed under the inherent powers of the Court under section 151 CPC attracted by sec 5 (1) of the Provincial Insolvency Act. No doubt if subsequent to annulment and before vesting order the insolvent has transferred property to a *bona fide* purchaser such purchaser may not be affected but the parties to the insolvency proceedings will be bound by the order.

A contrary view has been expressed by the Allahabad High

Court There it has been held that the Insolvency Court has seisin over the property of the insolvent so long as he remains insolvent. He ceases to be an insolvent as soon as the order of adjudication is annulled. The Insolvency Court ceases to have any jurisdiction over the property of the insolvent on annulment of the order of adjudication. Section 37 does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. *Panna Lal v The Official Receiver* 53 All 313 1931 AIR (All) 71. On the annulment of adjudication the Court has no power to order the distribution of the assets to the creditors by the Receiver. All that could be done under section 37 is either to restore the property to the debtor or to order the property to vest in some specified person. *Panna Lal Sham Lal v Abdullah Usman* 1932 ALJ 1095 143 IC 330 1933 AIR (All) 117. The question 'when an insolvency has been annulled under the provisions of sec 43 of the Act and the Receiver has before the order of annulment applied to the Court to have a transfer of property set aside under the provisions of sec 53 or sec 54 of the Act has the Court jurisdiction after the order of annulment of the insolvency proceeding to continue the proceedings under sec 53 or sec 54 of the Act?' was referred to a Full Bench in the case of *Jaing Bir Singh v The Official Receiver* 11 Rang 287. Dissenting from the views held by the Madras High Court in the cases cited above the answer of the Full Bench was that on an order of annulment being passed under sec 43 the Court ceases to have jurisdiction to entertain hear or determine an application by the Receiver to have a transfer of property set aside under section 53 or section 54 of the Act whether such application was presented before or after the order of annulment. In making a vesting order under section 37 the Court may impose conditions relating to the property of the debtor but not of any other person. In vesting the property of the debtor in any appointee the Court cannot order that he should continue the liquidation of the debtor's assets on the same terms and conditions as those on which the Receiver in insolvency would have been entitled to carry out the liquidation of his estate if the insolvency had still been subsisting.

When vesting order need not be simultaneous with annulment

Where the Court passes an order annulling an adjudication for failure in the part of the insolvent to apply for his discharge it is not necessary that the vesting order under s 37 should be made then and there. There is nothing in s 37 or s 43 of the Act which requires that the order vesting the property of insolvent under s 37 in a person appointed by the Court be made at the time of the order of annulment. Such a

order may be made subsequently is neither illegal nor without jurisdiction. In any case the Court omitting to pass a vesting order at the time of the annulment of the adjudication has power to supply the omission later on for the ends of justice to prevent abuse of process of the Court and pass a vesting order under the inherent powers under s 151 CPC. The powers defined in s 151 CP Code have been conferred on the Insolvency Court by s 5(1) of the Provincial Insolvency Act. *Abdul Latiff v J. R. Percival*, 40 CWN 1229 1936 AIR (C) 573. In *Balusuami Naidu v. Official Receiver, Madura* 47 MLW 587 1938 MW.N 455 1938-1 MLJ 824 1938 AIR (M) 752 the order of adjudication was annulled on 11th Nov 1927 and a vesting order under s 37 was made on 8th Dec 1927. It was held "It was not seriously contended that the order of 8th Dec 1927 was without jurisdiction, because it was passed not simultaneously with the order of annulment but sometime later. The point was not pressed seriously because of at least three decisions against any such contention, namely *Chouthmal Bhagirat v. Jokhiram*, 12 P. 163, *Ishar Das v. Mt. Fatima Bibi*, 15 L 698, and *Abdul Latiff v J R Percival*, 1 LR (1937) 1 C 264 40 CWN 1229. In view of the fact that this point has been dealt with in at least three decided cases referred to above, it is in my opinion, unnecessary for me to say more on the point than that I agree with the decisions in these cases and find that the order of the subordinate Judge was perfectly valid."

Power of the Receiver on annulment.

It cannot be said that in all cases where an adjudication order is annulled the Receiver *ipso facto* relieved of all future duties, but when the estate is allowed to revert to the insolvent unconditionally it cannot have been the intention of the Act, that the Receiver should continue to act as if he still represented the estate and to prosecute for the insolvent's benefit applications which the insolvent himself could not prosecute and which are based on an adjudication which has ceased to exist. Where an appointment was made by the Court and no condition was imposed it would seem that the property would revert to the insolvent unconditionally. A Receiver has no power to prosecute an application under sec 53 after the adjudication has been annulled, *Maung Hme v U Po Seik*, 3 Rang 201 86 IC 324 (1925) AIR (R) 301, *Sho Idon Lachmi Narain v. Bahadur Chand*, 100 IC 137.

Contrary to the above view it has been held that where on an annulment of adjudication the property is ordered to be vested in the Receiver, he has full power to deal with the property vested in him, *Baji Ram v. Chanan Mal*, 10 LLJ 180 108 IC 603, 1928 AIR (L) 453. The Madras High Court has held that section 37 was intended to permit and does permit a Court to direct as

one of the conditions of annulment that proceedings begun with its permission under section 53 or 54 shall not automatically cease because of the annulment but may be continued. What is necessary is a specific direction permitting the proceedings instituted to continue. *Bhadramma v Parateesam* 63 MLJ 414 139 IC 574 1932 A 1 R (M) 731. But in a case where an application under section 53 in relation to an alleged fraudulent transfer of property was pending the Court before annulling the insolvent's order of adjudication for failure to apply for discharge within the appointed time should issue specified notice of the course proposed to be adopted to any interested creditor to show cause against such course being adopted. *S V A R Firm v Maing Pau* 101 IC 589.

Power of the Appointee on annulment

It follows that the property which is vested in the appointee under s 37 is the property of the debtor and not the estate of the insolvent and the possession of the appointee is possession for and on behalf of the debtor and not of the creditors. They can have resort to it only by way of execution of decrees that they may have against the debtor or otherwise in due course of law. The appointee is under a duty to take steps to preserve assets vested in him but he has no right under the Insolvency Act to distribute them to the general body of creditors or to any body else. *In Re Annamalai Chettiar v R K Banerjee* 14 R 254. After the adjudication order has been annulled an appointee under s 37 can institute and maintain an execution proceeding against a transferee of the insolvent's property when the order annulling the transfer was passed prior to the annulment of adjudication. The words in s 37 all acts theretofore done are applicable to an order setting aside a transfer by the insolvent even though the receiver has not recovered the property from the transferee before he ceases to act as such on account of the annulment of adjudication and the property has become vested in the appointee. The term property in s 37 includes a right to collect money. *The Official Receiver Mandalay v Succaram* 14 R 63.

Rights of Creditors on annulment

The rule in section 34 of the Act that only debts which are subsisting at the time of adjudication are provable in the insolvency can have no further application when the adjudication has been annulled. The scheme of section 37 of the Act is to enable an orderly distribution of the assets of the insolvent which under the provisions of the section the Court has vested in the appointee and to place those assets at the disposal of all those creditors who would be able to proceed against the debtor if the assets had reverted to him by reason of the annulment. *Official Receiver v Secretary of State for India* 1 LR 58 M 1014 1935 733. As has been observed in *In re Annamalai Chettiar*

Bannerjee 1 L R 14 R 254 1936 A I R (R) 284 the object of the legislature in enacting s 37 was to put a brake upon the insolvent's activities by giving the Court a discretion. If it thought fit to do so not to hand back to the debtor his property unconditionally or at once but either to do so after imposing a condition upon him in a proper case which would give the creditors an opportunity to make good their claims in the ordinary course of law against the debtor or to vest the debtor's estate in some person appointed by it presumably for a reasonable period so that if the creditors thereafter acted with reasonable diligence they would be able by attachment or otherwise to liquidate any decree that they might obtain against the debtor out of the assets in the hands of the appointee.

Limitation of rights on annulment

Section 78 (2) lays down that where an order of adjudication has been annulled under this Act in computing the period of limitation prescribed for any suit or application for the execution of a decree other than a suit or application in respect of which the leave of the Court was obtained under sub section (2) of section (28) which might have been brought or made but for the making of an order of adjudication under this Act period from the date of the order of adjudication to the date of the order of annulment shall be excluded provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act. If during the continuance of a bankruptcy the trustee takes no steps to enforce a claim which consequently becomes barred by the Statute of Limitation such claim will continue to be barred if the bankruptcy is annulled *Markwick v Hardingham* (1880) 15 Ch D 339. Insolvency is not a disability under the Limitation Act and there is no reason to hold that the Official Assignee would have had a longer time within which to apply than the insolvent himself *Sirur v Mythili Ammal* 61 M L J 688 1932 A I R (M) 170.

In the absence of a formal order proving debts or at any rate of some proceedings on the record which by necessary implication are tantamount to such an order the debts cannot be said to be proved and therefore such a creditor of the insolvent cannot claim exemption of the period between the order of adjudication and the order of annulment *Walait Ram v Partap Singh* 32 P L R 905 135 I C 194 1932 A I R (L) 173. The rejection of a proof by the trustee holds good after annulment and the claims so rejected cannot be enforced *Brandon v Mc Menry* (1891) 1 Q B 538. Under the Presidency Towns Insolvency Act the admission of proof of a debt and payment of a part thereof by the Official Assignee during the insolvency of a debtor does not operate to extend the period of limitation against him as the Official Assignee is not an agent of the debtor within the meaning of sec 19 Explanation II of the Indian

Limitation Act. But the point has been dealt with by the legislature in section 78 (2) of the Provincial Insolvency Act where it has been provided that where an order of adjudication has been annulled under the Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree which might have been brought or made but for the making of an order of adjudication under the Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. *Currimbhai Abdulhussein v Amedalli Lukmanji*, 58 Bom L R 505.

Appeal.

An appeal lies against an order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication under sec 75 (2), Schedule I, *infra*. An appeal lies from an order passed under sec 37, *Sheo Narain v Bahadur Chand* 100 I C 137.

Compositions and schemes of arrangement

38. (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

(5) If any facts are proved on proof of which it

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(5) If any facts are proved on proof of which

Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent

(7) In any other case the Court may either approve or refuse to approve the proposal

Review

This is section 27 (1) (2) (3) (4) (5) (6) & (9) of Act III of 1907, sec 16 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 and corresponds to sec 28 (1) (2) (3) 29 (4) (5) (6) (7), of the Presidency Towns Insolvency Act. Besides the grounds mentioned in secs 35 and 36 this section provides another ground for annulment of an order of adjudication

Composition after adjudication

Section 27 (1) of the old Act provided for a scheme of composition to be submitted both before and after an adjudication. But under the present section a composition or scheme can be submitted only after an order of adjudication has been made. The reason for this departure is thus explained in the Notes on Clauses. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency Towns Insolvency Act and allow compositions and schemes only after adjudication.

After the filing of an insolvency petition and before the order of adjudication a composition deed signed by the majority of the creditors was filed for the approval of the Court. It was held that the application for approval of composition was premature because the approval of the Court is made dependent on the acceptance of the proposal by a majority in number and three fourths in value of the creditors whose debts are proved which can only mean proved after adjudication under section 24 and 25 (now 33 and 49) of the Act. *In Re Application of Assomal* 4 S.L.R. 222 9 Ind. Cas. 724

*Sadiram
Das v Satish*

Sub-sec. (1) ; What is composition.

A composition is an agreement between the compounding debtor and all or some of the creditors by which the compounding creditors agree with the debtor and (expressly or impliedly) with each other to accept from the debtor payment of less than the amounts due to them in full satisfaction of their claims, *Re Hutton*, (1872) 7 Ch App 723. The deed must in substance be of the nature of a composition, not a conveyance. A composition deed for the benefit of all the creditors, not comprising the whole of the property of the judgment-debtor, is not void, if the transaction is fair and *bona fide* and in the ordinary course of business or upon the pressure of the creditors. It does not become void by the circumstances that it is signed by some only of the creditors and that among them are some whose debts are barred by limitation, *Malukchand v Manilal*, 28 Bom 364. Where the insolvent enters into a composition with his creditors after the passing of a vesting order by the Court and the insolvency petition is afterwards dismissed, such composition deed is valid, *Kothandarama v. Murugesam*, 27 Mad 7 13 M L J 372.

Proposal for composition.

According to English law under sec 16 (1) of the Bankruptcy Act, 1914, where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement for his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the Official Receiver may fix, lodge with the Official Receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors and setting out particulars of any sureties or securities proposed.

The insolvent, so long as his insolvency lasted, could not be allowed to challenge the correctness of the debts entered in the schedule and, therefore, application, so far as it purported to dispute the correctness of those debts and amounted to a request to the Court to enquire into the accounts of the creditors, could not properly be a proposal for composition within the meaning of section 38. On the other hand, his offer to pay his just debts in full together with interest only at a reasonable rate, and not at the contractual rates, could very well be called a proposal. The proposal contemplated by sec 38 is a general proposal to satisfy the whole body of creditors and not merely disputing the validity of the debts of particular creditors. If a majority in number and three fourths in value of all the creditors, whose debts are proved, resolve to accept the proposal it is deemed to be duly accepted. If they do not, the unless the proposal contravenes the provisions of sub-sections or 6, the Court has power to approve of it. If the Court app

the proposal, then under sec 39 its terms ought to be embodied in an order of the Court which should frame a schedule and annul the adjudication. After the adjudication has been annulled on the ground that the proposal has been accepted, the insolvent is at liberty to apply under sec 50, sub section (2) to the Court to hold an enquiry and expunge an entry or reduce the amount of a scheduled debt. The scheme of the act seems to be that an insolvent after his adjudication when the property vests in the Court or Receiver has no *locus standi* to challenge the validity of the debts entered in the schedule. If he were allowed to do so, he may be harassing his creditors who cannot recover the costs incurred by them because they cannot prove debts incurred after the date of adjudication. On the other hand when the insolvency has been annulled after the approval of a proposal or composition, and the time has arrived for actual payment of the debts of the debtor, he is given the right to challenge the correctness of the claims of his creditors. The property, which passes to him or to a trustee on annulment does not pass free from all debts. It remains liable to debts which have not been proved or cannot be proved, *Ganga Sahai v Mukarram Ali Khan*, 24 A L J 441 97 I C 556 (1926) A I R (A) 361.

Procedure in Court.

In England the procedure is that the Official Receiver with whom the proposal is lodged holds a meeting of creditors before the public examination of the debtor is concluded, and sends to each creditor, before the meeting a copy of the debtor's proposal with report thereon, and if at that meeting a majority in number and three fourths in value of all the creditors who have proved resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors and when approved by the Court shall be binding on all creditors [sec 16 (2) Bankruptcy Act, 1914]. Under sec 38 of the present Provincial Insolvency Act, which corresponds to sec 27 of the Provincial Insolvency Act III of 1907, if a debtor submits a proposal for composition of his debts the Court fixes a date for the consideration of the proposal and is bound to issue notices to all the creditors. If on a consideration of the proposal a majority in number and three fourths in value of the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same is deemed to have been duly accepted by the creditors. This procedure prescribed by sec 38 should be strictly followed and the mere absence of objection by creditors to a proposal submitted by the insolvent and accepted by the Receiver does not give rise to a presumption that the creditors accepted it, *Muhammad Asadulla Khan v Sant Ram*, 89 I C 740 (1926) A I R (L) 87.

Notice of composition.

When a composition is put forward the Court ought to give

notice to the creditors. If less than three-fourths of the creditors approve, it falls through, if three-fourths of them approve, the Court ought to consider whether it will sanction, *Safiq uz-zaman v Deputy Commissioner, Oudh*, 18 O C 125 30 Ind Cas 694, *Mahammad Asadulla Khan v Sant Ram*, 89 I C 740 (1926) A I R (L) 87

Sub-section (2) ; Acceptance by creditors a condition precedent.

No doubt sec 38 (2) does not have the word "all" between the words "accepted by" and "the creditors" but the meaning is clear. In the English Bankruptcy Acts of 1883 and 1914 and in the Presidency Towns Insolvency Act (sec 30) it is perfectly clear on the wording that the composition is binding on all creditors mentioned in the insolvency petition schedule. It is therefore clear that a composition approved by the Court shall be deemed to be accepted by all such creditors, that is, the Insolvency Court by accepting the composition has provided for the payment of all such creditors in the insolvency proceedings themselves, and no such creditor can after the Court's approval of such a composition proceed independently against the insolvent. *Kamireddi Timmappa v Devasi Harpal*, 56 M L J 458 115 I C 815 1929 A I R (M) 157. A scheme for composition will be considered to be duly accepted by the creditors when the majority in number and three-fourths in value of all creditors whose debts are proved and who are present either in person or by pleader resolve to accept the proposal. It is a condition precedent to have the debts proved and to be present in Court either in person or by pleader to signify their acceptance. In England any creditor who has proved his debts may assent to or dissent from a proposal by a letter in the prescribed form, addressed to the Official Receiver so as to be received by him not later than the day preceding the meeting and any such assent or dissent shall have the effect as if the creditor had been present and had voted at the meeting, [sec 16 (4), Bankruptcy Act 1914]. The mere absence of objection by creditors to a proposal submitted by the insolvent and accepted by the Receiver does not give rise to a presumption that the creditors accepted it, *Muhammad Asadulla Khan v Sant Ram* 89 I C 740 (1926) A I R (L) 87. Where an insolvent submits, under sec 38 a proposal for a composition in satisfaction of his debts the acceptance of the proposal by a majority in number and three-fourths in value of the creditors, as presented in cl (2) of the section, is a condition precedent before the Court can proceed to consider the proposal. A composition in its essence is an agreement, and unless the proposal of the insolvent is duly accepted by the creditors in the manner laid down by cl (2) there is no agreement, and consequently there is no proposed composition before the Court for its consideration and either approval or refusal. Therefore in the absence of acceptance by the creditors as prescribed by cl (2) the Court can

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Sub-section (2) ; Acceptance by creditors a condition precedent.

No doubt sec 38 (2) does not have the word "all" between the words "accepted by" and "the creditors" but the meaning is clear. In the English Bankruptcy Acts of 1883 and 1914 and in the Presidency Towns Insolvency Act (sec 30) it is perfectly clear on the wording that the composition is binding on all creditors mentioned in the insolvency petition schedule. It is therefore clear that a composition approved by the Court shall be deemed to be accepted by all such creditors, that is, the Insolvency Court by accepting the composition has provided for the payment of all such creditors in the insolvency proceedings themselves, and no such creditor can after the Court's approval of such a composition proceed independently against the insolvent, *Kamireddi Timmappa v. Detasi Harpal*, 56 M L J 458 115 I C 815 1929 A I R (M) 157. A scheme for composition will be considered to be duly accepted by the creditors when the majority in number and three-fourths in value of all creditors whose debts are proved and who are present either in person or by pleader resolve to accept the proposal. It is a condition precedent to have the debts proved and to be present in Court either in person or by pleader to signify their acceptance. In England any creditor who has proved his debts may assent to or dissent from a proposal by a letter, in the prescribed form, addressed to the Official Receiver so as to be received by him not later than the day preceding the meeting and any such assent or dissent shall have the effect as if the creditor had been present and had voted at the meeting, [sec 16 (4), Bankruptcy Act 1914]. The mere absence of objection by creditors to a proposal submitted by the insolvent and accepted by the Receiver does not give rise to a presumption that the creditors accepted it, *Muhammad Asadulla Khan v. Sant Ram* 89 I C 740 (1926) A I R (L) 87. Where an insolvent submits, under sec 38 a proposal for a composition in satisfaction of his debts, the acceptance of the proposal by a majority in number and three fourths in value of the creditors, as presented in cl (2) of the section, is a condition precedent before the Court can proceed to consider the proposal. A composition in its essence is an agreement, and unless the proposal of the insolvent is duly accepted by the creditors in the manner laid down by cl (2) there is no agreement, and consequently there is no proposed composition before the Court for its consideration and either approval or refusal. Therefore in the absence of acceptance by the creditors as prescribed by cl (2) the Court cannot

approve the proposal for composition. *Shankar Lal v. Ali Ahmad* I.L.R. 58 All. 655. 1936 A.L.J. 44. 1936 A.W.R. 41 160 I.C. 994: 1936 A.I.R. (All) 102

Resolution by creditors to accept.

Where in an insolvency proceeding a proposal is made on behalf of the insolvent for a scheme of arrangement of his affairs the District Judge must under the provisions of the Act, fix a date for the consideration of the proposal and issue notices to all the creditors and put the scheme before them. If a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal, it is the duty of the Court to consider whether it shall or shall not approve of the proposal. The fact that the proposal is approved by the creditors does not involve approval by the Court, but if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court on its merits, *Shafiq v. Deputy Commissioner of Barbanks*, 18 O.C. 125. Under section 27 (now section 38) of the Provincial Insolvency Act consent of all the creditors is not by itself necessarily sufficient to

en v. Ganpat Ram, Under section 38 the circumstances scheme and it does not relieve the Court of the duty of judging independently whether the scheme is reasonable and for the benefit of the creditors by reference to other circumstances, such as, the state of the assets, the conduct of the insolvent, etc. The mere fact that the Receiver's management of the estate will involve delay and expense is not sufficient ground for giving effect to the scheme. Where the Court in approving a scheme failed to consider the relevant circumstances and mainly relied on the consent of the majority of creditors, it was held that the order was bad in law, *Sevugan Chettiar v. Murugappa Chettiar*, 54 Mad 823 : 61 M.L.J. 173 : 33 L.W. 620 : 1931 M.W.N. 378 : 132 I.C. 134. 1931 A.I.R. (Mad) 344.

Creditors whose debts are proved.

The proof of debts required by the section means that the creditor shall have proved his debts in some of the ways prescribed by the Act and that his name has been put by the Court in the schedule of creditors, *Chandan Lal v. Khem Raj*, 15 A.L.J. 538 : 40 Ind. Cas. 156. As to how debts are proved, *vide* sec 49, *infra*. The composition need not be found on the amount of debts provable at the date of the receiving order, but only on those remaining provable at the time of the composition being approved, excluding therefore, debts properly released before their time, *Re. E. A. B.*, (1902) 1 K.B. 457. But such releases must be absolute, and not made conditional on the scheme going through, the term on which

the debts have been released must be shown on the face of the proposal, and it would seem, the releases must not have been procured by or with the privity of the debtor, *Re Pilling*, (1903) 2 KB 50. The creditors whose debts have been released cannot vote on the question of acceptance or rejection of the scheme.

Sub sec. (3) ; Amendment of the proposal.

The proposal for composition is not absolutely final. It is put forward really as a basis of negotiation with the creditors, and may be amended at the meeting of creditors at which it is considered, but any amendment must satisfy the (Official Receiver in England) Court as calculated to benefit the general body of creditors, some of whom may not be present—*Ringuood*.

Sub-secs. (4) & (5) ; Refusal by Court to approve.

These correspond to sections 16 (9) and 16 (10) of the Bankruptcy Act, 1914, which run as follows. "If the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, or in any case in which the Court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the Court shall refuse to accept the proposal," and "If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach condition to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to accept the proposal, unless it provides reasonable security for payment of not less than five shillings in the pound on all unsecured debts provable against the debtor's estate." The proposal for composition, notwithstanding that it has been accepted by the creditors under sub section (2), does not become binding upon all the creditors unless and until approved by the Court (sec 39) and a safeguard is thus provided, not only against injustice to a dissenting minority, but also against disregard of the demands of commercial morality and of justice. To ensure that it has been provided that no proposal for composition will be entertained unless the order of adjudication has been made [sec 38 (1)] that is, until after the conclusion of the examination of the debtor under section 24, and that the Court shall not approve the proposal until it has heard not only objections raised by any creditor but also a report of the Official Receiver on two matters viz, (i) the proposed terms and (ii) the conduct of the debtor. The report of the Official Receiver is held to be *prima facie* evidence of the statements therein, *Ex parte Campbell*, (1885) 15 Q B D 213.

The Court shall refuse (i) if in its opinion the terms proposed are not reasonable, or calculated to benefit the general body of creditors, or (ii) if the proposal does not provide for payment in priority of debts which would be entitled to priority on the distribution of the debtor's assets in bankruptcy. *Vide* sec 61, *infra*. The

Court may approve a proposal—but only one that affords a reasonable security for payment of at least six annas in the rupee on all the unsecured debts provable against the debtor's estate—although the circumstances surrounding the debtor's insolvency are such that the Court would have no power to grant an unconditional discharge. Where for instance the value of the assets does not amount to eight annas in the rupee on the unsecured liabilities the Court cannot grant an unconditional discharge unless the bankrupt satisfied the Court that the fact that the assets are not of a value equal to eight annas in the rupee has arisen from circumstances for which he cannot justly be held responsible [sec 42 (1) (a)]. The Court can seldom approve a composition which does not afford reasonable security for the payment within a reasonably short time of five shillings in the pound. *Webb In Re* (1914) 3 K B 387. *Paine In Re* (1891) WN 208. *Re Flew* (1905) 1 K B 278.

Reasonable security for payment

By sub section 10 [sub sec (5) of the Indian Act] proposal must provide a reasonable security for five shillings in the £ (six annas in the rupee under the Indian law) which means not such security as it would be reasonable that a prudent man should invest money upon but a reasonable commercial probability that the amount named will be realised having regard to the state of affairs presented to the creditors. *Re Bottomley* 10 Mor 262. *In Re Paine* (1891) WN 208. Lord Esher MR said: This did not mean reasonable security for payment at a distant time but for payment now or within a short time.

Power of Court to enforce security

It is open to a Court under the Provincial Insolvency Act to give relief against the sureties under a composition scheme by summary orders though there is no provision corresponding to clause 2 of s 30 of the Presidency Towns Insolvency Act. In *Subramanya Iyer v Venkatarama Raju* 1936 MWN 197 43 LW 194 71 MLJ 733 161 IC 717 1936 AIR (M) 424 it was contended that the Provincial Insolvency Act does not contain any provision corresponding to clause 2 of s 30 of the Presidency Towns Insolvency Act and it is therefore not open to the insolvency Court to give relief against the sureties by summary orders and that the only course open to the creditor is to take an assignment of the bond and sue thereon. The Court held: But so far as the power to enforce the terms of the surety bond is concerned the absence of such a provision is by no means conclusive. On the principles indicated in the judgment of the judicial committee in *Raj Raghur Singh v Jai Indra Bahadur Singh* 42 All 158 (PC) the Court to which such bonds are given must *prima facie* have power to enforce them. In a case like the present the suggestion of a remedy by way of assignment of the bond has very little to

recommend it. The schedule may comprise numerous creditors some of whom might have been paid some of whom might have been partly paid and others not paid at all. To whom is the bond to be assigned? The Insolvency Court can do justice much more effectively between the parties if it has the power to enforce the terms of the bond than ordinary Courts can do in a suit filed to enforce the bond if that bond is assigned to a third party. Reliance was placed on the decision in *Ex parte Mirabita in Dale* (1875) 20 Eq 772 but that was a case of a bond given not to the Court but to a private trustee and the Court naturally held that the only remedy was by way of a suit on the bond.

Refusal of approval by Court for misconduct of the debtor

The cases in which the Court is bound to refuse suspend or attach conditions to a discharge are set forth in sec 41 *infra*. But although express power is given to the Court to refuse its approval yet it was held that the Court would consider the interest of the creditors as well as the conduct of the debtor and would not be bound to refuse its approval because the debtor had committed offences which would have prevented his immediate unconditional discharge. *Re Genese* (1886) 18 Q B D 168. *Re Bottomley* 10 Mor 262. The fact that the debtor had contributed to his bankruptcy by rash and hazardous speculation was held not to be of itself sufficient ground for refusing approval. Misconduct to justify refusal to approve must be of a gross character such as would make it against public policy to sanction the scheme. *Re Burr* (1892) 2 Q B 467. *Re E A B* (1902) 1 K B 457. A composition scheme under which one of the creditors was to take over the whole of the insolvent's property on condition of his paying six annas in the rupee to all the creditors was approved by the District Judge on three grounds (1) that the requisite majority of creditors had approved the scheme (2) that it was represented that the Official Receiver's administration of the estate of the insolvent under the Act would lead to considerable delay and expense and (3) that the opposing creditor did not accept an offer of the same terms made to him in the course of the proceedings. It appeared however that in approving the scheme the District Judge (1) had overlooked the fact that the Official Receiver had reported against the scheme and had represented that it was not beneficial to the creditors (2) had not himself considered whether the scheme was a fair scheme (3) had not commented upon the fact that the insolvent's conduct in connection with the insolvency had been bad (4) had not paid due attention to the fact that the creditor who agreed to take over the insolvent's assets upon the terms proposed was a very near relation of the insolvent (5) had ignored the probability that the scheme was a device to enable the insolvent to buy back his assets at a profitable figure and to make a

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out of his insolvency and (6) had not himself considered the question of what profit the proposed scheme would be to the creditors. It was held that the scheme was not one which should have been approved. Under sec 38 the assent of the requisite majority of creditors is not by itself a sufficient reason for approving a scheme. Even if there is that assent the Court must exercise its judicial discretion before approving the scheme—that is a discretion founded on sufficient reasons after considering all aspects of the same and ascertaining the facts as far as possible. The opposing creditor's failure to accept the offer made to him is not by itself a ground for approving the scheme. On a question whether a scheme should be approved the insolvent's failure to maintain proper accounts is one of the most serious matters to be taken into consideration. *Sevugan Chettiar v Murugappa Chettiar* 54 Mad 823 61 MLJ 173 132 IC 134 1931 AIR (Mad) 344

Sub sec (6), Priority of debts

This is section 16 (19) of the Bankruptcy Act 1914. It is provided in section 61 *infra* that in the distribution of the property of the insolvent there shall be paid in priority to all other debts (a) debts due to the Crown or to any local authority and (b) all salary or wages not exceeding twenty rupees in all of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the presentation of the petition. No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts stated before.

Sub sec (7), Approval or refusal by Court

In cases other than those mentioned in the foregoing sub sections the Court is given a discretion either to accept or refuse the proposal. In exercising its discretion each case must be considered on its own merits. The Court will form its own judgment upon all the circumstances of the case and the Court shall take into consideration the interests of the creditors and the conduct of the debtor. If the composition or scheme is manifestly the best thing for the creditors the Court will be inclined to approve it. *Kearsley Exp* (1887) 18 QBD 168. *Flew In Re* (1905) 1 KB 278. But even if it is so and the creditors have all accepted it the Court may in the interest of commercial and public morality refuse its approval if the facts proved against the debtor are of a serious nature. *Campbell Exp* (1885) 15 QBD 213. Where five shillings in the pound is secured the Court will not refuse approval for slight acts of misconduct on the part of the debtor. *E A B In re* (1902) 1 KB 457.

Under the Provincial Insolvency Act composition before adjudication is an impossibility in spite of the wordings of section 16 and

27 because there is no provision for proof of debts until after adjudication. Even after adjudication composition is impossible if the debts are not proved for section 27 (2) [now 38 (2)] makes the assent of the majority in number and three fourths in value of all the creditors whose debts are proved a *sine qua non*. The assent is not a mere formality. When a composition does not secure for the creditor anything more under it than what they would get if the bankruptcy proceedings had continued and the composition seems to have the effect of compounding a fraud and if likely to involve the creditors in litigation the Court will not sanction the composition. The Court has a discretion which is recognised in section 27 (6) [now 38 (7)] of the Provincial Insolvency Act and the discretion is exercised in the interests of commercial morality. *Re Application of Fleming Shah & Co to declare the firm of Sadi Ram Jumnadas Insolvent* 23 Ind Cas 565. Under the Provincial Insolvency Act sec 38 restricts the power of the Court to approve a composition scheme by certain conditions. If those restrictive conditions are fulfilled the last clause of the section provides that the Court may then either approve or disapprove of the scheme. That means that although the section has provided that no scheme shall be approved unless the requisite majority of the creditors consent still even if there is that consent of the creditors the Court must exercise its judicial discretion before approving of the scheme. The consent by itself is not a sufficient reason for approving of the scheme. *Serugan Chettiar v Murugappa Chettiar* 54 Mad 823.

Effect of schemes wrongly approved

A composition or scheme if acted upon after approval by Court will not be disturbed though the order of approval might be bad in law in view of the delay and practical difficulties in restoring the *status quo*. In *Serugan v Murugappa* 54 Mad 823 it was held that though the order of the lower Court in approving the scheme was bad in law still the scheme having been acted upon it need not be set aside because of the practical difficulties such a course might involve.

Composition out of Court

After being adjudicated insolvents appellants proposed a scheme for composition which was rejected. They subsequently represented that a majority of the creditors had accepted half of their respective dues in full satisfaction of their claims as suggested in the scheme of composition. It was held that these transactions could not be recognised in insolvency proceedings. *Beharilal Sikdar v Harsukdas Chukmal* 25 CWN 137 61 Ind Cas 904. The payment of 4 annas in the rupee is not a payment in full and the arrangement question could not be treated as composition when the prescribed procedure for it had not been followed. *Brijkishore Lal v Assignee* Madras 43 Mad 71 37 MLJ 244 (1919) MWN.

Appeal.

Where proceedings have taken place under sections 38 and 39, there is no appeal as of right. Leave of the District Court or of the order of the L] 441 97

39. If the Court approves the proposal, the terms shall be embodied in an order of the Court, and the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors, so far as relates to any debt due to them from the debtor and provable under the Act

Review.

This is section 27 (7) of Act III of 1907 and corresponds to section 30 of the Presidency Towns Insolvency Act and section 16 (12) & (13) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, which runs as follows "Cl (12) If the Court approves the proposal, the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the proposed composition or scheme, or by the terms being embodied in an order of the Court," and "Cl (13) A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relate to any debts due to them from the debtor and provable in bankruptcy, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability." This section provides another ground for annulling an adjudication order besides those mentioned in sections 35 & 36, *supra*

Amendment.

The section as it originally stood was "If the Court approves the proposal, the terms shall be embodied in an order of the Court, and the Court of section 33, provisions of se should be binc so far as relates to any debts entered them"

The Provincial Insolvency (Amendment) Act, X of 1935 was passed by the Indian Legislature which received the assent of the

Governor-General on the 28th September 1935 and sec. 2 of the said Act provides

2 In section 39 of the Provincial Insolvency Act, 1920 —

Amendment of (a) The words "the Court shall frame a schedule section 39, Act in accordance with the provisions of section 33" V 1920 shall be omitted, and

(b) for the words "entered in the said schedule so far as relates to any debt entered therein" the words "so far as relates to any debt due to them from the debtor and provable under this Act" shall be substituted

Statement of Object and Reasons In the statement of objects and reasons for introducing the Bill for amendment of sec 39 it was stated 'There is a judicial authority for the proposition that a composition under section 39 of the Provincial Insolvency Act, 1920 (V of 1920), releases the insolvent only from debts entered in the Schedule, but not from a debt in respect of which the creditor has not taken part in the insolvency proceedings, whereas section 30 of the Presidency-towns Insolvency Act, 1909 (III of 1909), releases the insolvent from all debts provable in insolvency. A comparison of section 44 of the former Act and section 45 of the latter Act indicates that the effect of an order of discharge is substantially the same under both Acts, and there is no good reason why the effect of a compromise should not similarly be the same. This Bill is designed to assimilate the terms of section 39 of the Provincial Insolvency Act, 1920, to that of section 30 of the Presidency towns Insolvency Act, 1909.'

Orders on approval.

Under sec 39 the Court shall (1) embody the terms of a composition in an order, (2) frame a schedule of creditors who have proved their debts under sec 33, (3) annul the order of adjudication, making such provision for carrying out the terms of the composition and if necessary, vesting the property in some person other than the bankrupt for the purpose of securing or bringing about the fulfilment of any condition on which the annulment is based

(1) *Order embodying the terms of composition* If the Court approves the proposal the terms must be embodied in an order of the Court. Omission to incorporate the terms of the proposal is a mere formal defect which can be remedied at any time and does not affect the annulment, *Bombay Company Ltd v The Official Assignee of Madras*, 44 Mad 381, *Ganga Sahai v Mukarram Ali Khan*, 24 A L J 441 97 I C 356 (1926) A I R (A) 361

(2) *Framing of the schedule by Court* When the proposal scheme has been approved by the Court it will proceed to schedule of creditors in accordance with the provisions of sec

The schedule is to contain the names of creditors who have proved their debts and the amount of their respective debts. The debts must be debts "provable under the Act" within the meaning of section 34. The debts must be proved in the mode prescribed by section 49. The Court has no power to dispense with the formality of framing a schedule of creditors. It is made by the Act a requisite part of the procedure for effectuating a composition. The importance of the schedule is that the section says that the creditors whose names and debts are entered in the schedule shall be bound by the composition. The meaning of this is that a creditor whose debt is not entered in the schedule will not be bound by the composition arrangement. *Gopalu Pillai v Kothadarama Ayyar*, 57 Mad 1082, 40 L W 110, 1934 A I R (M) 529, following *Khalil ul Rahaman v Ram Sarup*, 95 I C 204. Under amended section "framing of the schedule" has been dispensed with and it is not necessary.

(3) *Annulment of adjudication*. Sec 39 requires the Court to embody the terms of a composition in an order and annul the order of adjudication. The grant of permission to an insolvent to mortgage his property to one of his creditors and the subsequent filing of the proceedings owing to the absence of the parties will not amount to an order annulling the adjudication under sec 39 of the Act, *Govind v Sonba*, 121 I C 663.

Effect of order on approval of composition.

(1) *Re vesting of property on annulment*. There is no express provision in the section as to what are to be the powers of the debtor over his estate after a composition resolution has been approved. That he must have power to deal with his estate by *hisself* for the purpose of *disposing of* it would seem to be a necessary *condition* if at all he may pledge it to *anyone* for the purpose of raising money to pay the composition, may be doubtful, *Exp Allard*, (1881) 16 Ch D 505. When a composition or scheme approved of, the Official Receiver shall, on payment of costs and fees, forthwith put the debtor (or, as the case may be, the trustee or person appointed under the composition or scheme) into possession of the debtor's property. The Court shall also discharge the receiving order (Bankruptcy Rule 212).

In *Re Croom*, (1891) 1 Ch 695 it was held by Kekewich, J., that in the absence of any express provisions in the scheme or composition the debtor is entitled to all property acquired after approval, the approval being equivalent to an order of discharge. Plaintiff having been adjudicated bankrupt his creditors agreed to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy. The amount necessary to pay the composition was deposited with the Official Receiver. The Court, having

approved the composition made an order annulling the bankruptcy, but did not make any order vesting any property of the plaintiff in him or in any other person. After the annulment of the bankruptcy the plaintiff brought an action to recover a chose-in-action, which had been legally assigned to him before the receiving order. It was held, that upon the order of annulment the chose-in action re-vested in him and that he was entitled to sue for it. Younger, L. J., in delivering the judgment said "The law empowers the Court to make an order annulling the bankruptcy at a point of time when the composition on which annulment is based has not in fact been paid. In these circumstances it is natural that the law should enable the Court by order to vest the property of the bankrupt not only in himself but in such other person as the Court may appoint. An order vesting the property in some other person than the bankrupt may be necessary for the purpose of securing or bringing about the final payment of the composition." But in case an order annulling the bankruptcy was made but it contained no provision at all with regard to the vesting of the property of the bankrupt in himself or in any body else, the property vests in the bankrupt. The trustee in bankruptcy held the bankrupt's property for all the purposes of the bankruptcy. The only purposes for which the property was by statute vested in him having been fully discharged and the property not having been exhausted, remained in his hands free and discharged from them and all of them. The necessary result is that there is a resulting trust for the late bankrupt, certainly in equity at law," *Flower v Mayor of Lime Regis Corporation*, (1921) 1 KB 488. In *Re Tulsidas Kissendoyal, Ex parte Chhajuram Chowdhury*, 40 CWN 1029, which was a case under the Presidency Towns Insolvency Act, the observation of Lord Williams, J., that the effect of sec 23 (1) of the Presidency Towns Insolvency Act in cases where adjudication is annulled on the approval of composition by Court—is that upon the Court making an appointment within the meaning of that section, the property of the debtor *ipso facto*, vests in the person or persons appointed. The section does not require that the Court should make a separate vesting order. Even if a vesting order is necessary it is within the power of the Court to make it at any subsequent stage—after the acceptance of the composition by Court—acting under the powers conferred by sec 7 and 30 (2) of the Presidency Towns Insolvency Act, applies *mutatis mutandis* to a case under s 39 of the Provincial Insolvency Act, the provisions of which after amendment, are substantially the same as that of the Presidency Towns Insolvency Act. In the said case a composition scheme, which was accepted by the creditors and approved of by the Court, provided that trustees should be appointed to carry out the composition and that the payment of the composition should be secured in certain manners. One of the such manner indicated being that "the insolvent and the Assignee will convey by a sufficient document to the said

their right title and interest in their immovable properties" It was held that even when there has not been any conveyance by a sufficient document by the insolvent or the Official Assignee to the trustees within the meaning of the composition, still, the approval of the composition vested the property, *ipso facto* to the trustees

(2) *Composition binds the debtor and his estate* Certain persons, being adjudicated insolvents entered into a scheme of composition with their creditors and the scheme being approved by the Court and the transfers contemplated thereby completed the adjudication orders were annulled The scheme provided for the transfer of certain properties by certain guarantors to the official Assignee who was to apply them in payment of the creditors' claims The secured creditors were to be paid in full and a Bank a secured creditor, was to be paid off finally last, being paid interest in the meantime at 6% per annum, and a further 6% after certain other mortgages had been paid off A schedule to the scheme set forth the principal sums of the three mortgages held by the Bank and also a sum as approximate due which included arrears of interest This debt was proved before and admitted by the Official Assignee before the scheme but later on an objection being taken that the debt had not been fully investigated as shown by the word "approximate" and that it could not include past interests the matter was finally decided by the High Court in favour of the Bank The question being raised again by the Official Assignee that interest under the scheme could not be claimed on the whole sum it was held that on a proper construction of the scheme and the schedule a new mode of payment was accepted for the secured debt, the amount of which was fixed at the sum mentioned in the schedule, irrespective of the fact that it included arrears of interest, the word "approximate" merely referring to the arithmetical correctness of the calculation and that in view of the previous judgment, the question was no longer open to the Official Assignee *The Benaras Bank, Ltd v S C H Meyer*, 43 CWN 483 (PC)

(3) *Composition binds all creditors whether entered in the schedule or not* By the Bankruptcy Act 1883, section 18 sub sec (8) 'a composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and payable in bankruptcy,' In *Flint v Barnard*, 22 QBD 90, it was held that the debts in respect of which a composition is binding under this section include all debts and liabilities which would be released by an order of discharge in bankruptcy

In India there was a conflict of opinion as to whether on annulment of adjudication on approval of composition by Court under sec 39 the insolvency proceedings come to an end and whether the debtor is put again in *status quo ante* the insolvency at the mercy of his creditors who may pursue their remedy *de hors* the Insolvency

Court. The Lahore High Court in *Ram Sarup*, 8 L.L.J. 286 : 95 I.C. 117 : (1925) A.I.R. (L.) 376 that "the main distinction between an order of discharge and an order approving a composition is that an order of discharge release the insolvent from all debts provable under the Act, whether those debts have been entered in the schedule contemplated by sec 33 of the Act or not, but a composition is binding only on creditors who caused their debts to be entered in the schedule contemplated by sec. 39. Section 39 makes the composition binding on the creditors entered in the schedule but there is no provision binding on the unscheduled creditors and in the absence of such a provision an unscheduled creditor is entitled to execute his decree" The same view has been held in *Sind in Motumal Kishindas v Ghanshamdas Parmanand*, 120 I.C. 84 1929 A.I.R. (S) 204 where it has been observed. "A creditor who has not proved his debt and is not entered in the schedule of creditors framed by the Court under sec 33, is not bound by a composition, and such a creditor can, after annulment of insolvency consequent on approval of a scheme or composition, continue his suit which had been stayed under the provisions of sec. 29, on the adjudication of the debtor as an insolvent. By schedule is meant the schedule of the creditors who have proved their debts under sec. 33."

A contrary view is expressed in *J., in delivering the judgment*, 56 M.L.J. 458 : 115. "In cases under secs. 35 and 39 the annulment is because the debts have been paid, either in full or because creditors have accepted part payment in full satisfaction. In the case under sec. 43 the adjudication is annulled as a punishment because the debtor has not prosecuted his application for discharge. The annulment of adjudication under sections 35 and 39 is not by way of punishment. Therefore when the adjudication is annulled because he has paid his debts so far as he can, it appears that the intention of the Act is that he shall not be put again in *status quo ante* the insolvency at the mercy of his creditors. No doubt sec 38 (2) does not have the word 'all' between the words 'accepted by' and 'the creditors' but the meaning is clear. In the English Bankruptcy Acts of 1883 and 1914 and in the Presidency Towns Insolvency Act (sec 30), it is perfectly clear on the wording that the composition is binding on all creditors mentioned in the insolvency petition schedule. It is, therefore, clear that a composition approved by the Court shall be deemed to be accepted by all such creditors; that is, the Insolvency Court by accepting the composition has provided for the payment of all such creditors in the insolvency proceedings themselves and no such creditor can after the Court's approval of such a composition proceed independently

their right title and interest in their immovable properties " It was held that even when there has not been any conveyance by a sufficient document by the insolvent or the Official Assignee to the trustees within the meaning of the composition, still, the approval of the composition vested the property, *ipso facto*, to the trustees

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Court The Lahore High Court has held in *Khalil ul Rahman v Ram Sarup* 8 LLJ 286 95 IC 204 (1926) AIR (L.) 484 affirming *Ram Sarup v Khalil ul Rahman* 7 LLJ 158 87 IC 348 26 P.L.R. 117 (1925) AIR (L.) 376 that the main distinction between an order of discharge and an order approving a composition is that an order of discharge release the insolvent from all debts provable under the Act whether those debts have been entered in the schedule contemplated by sec 33 of the Act or not but a composition is binding only on creditors who caused their debts to be entered in the schedule contemplated by sec 39 Section 39 makes the composition binding on the creditors entered in the schedule but there is no provision binding on the unscheduled creditors and in the absence of such a provision an unscheduled creditor is entitled to execute his decree The same view has been held in *Sind in Motumal Kishindas v Ghanshamdas Parmanand* 120 IC 84 1929 AIR (S) 204 where it has been observed A creditor who has not proved his debt and is not entered in the schedule of creditors framed by the Court under sec 33 is not bound by a composition and such a creditor can after annulment of insolvency consequent on approval of a scheme or composition continue his suit which had been stayed under the provisions of sec 29 on the adjudication of the debtor as an insolvent By schedule is meant the schedule of the creditors who have proved their debts under sec 33

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against the insolvent. No Court can reasonably accept such a position, namely, that the approval by the Court of a composition by the insolvent immediately lays him open to arrest at a time when he has put all his property at the disposal of his creditors since it has all been handed over to the trustee under the composition, and when he is therefore unable to satisfy any debt and must go to jail. The remedy of any creditor mentioned in the insolvency petition is to come in on foot of the composition which is deemed to be duly accepted by all such creditors and to prove his right to the approved dividend. For that purpose the insolvency proceedings must obviously continue and they do continue. The Court is still bound to see that the composition is carried out and may even annul it (see for example sec 40). One case in the Lahore High Court reported in *Ram Sarup v Khalil ul Rahman* and confirmed on appeal in *Khalil ul Rahman v Ram Sarup*, supra, has been cited for the contention that all creditors are not bound by the composition. If that case is an authority for the position that the approval by the Court of a composition *ipso facto* puts the insolvent at the mercy of any creditor who refused to come in, I must express disagreement with it for reason already given. No limit of time appears to have been fixed in the Act within which the creditor may come in and prove. Therefore the correct view of the position is that although the annulment of adjudication puts an end to the insolvent's state of insolvency, it does not in cases such as are contemplated by sec 37 where the Court still retains control of the insolvent's assets put an end to the insolvency proceedings within the meaning of sec 28, and that all creditors named in the insolvency petition schedule are bound by a composition which has been approved by the Court and must come in on foot of it and cannot have any remedy *de hors* the insolvency proceedings, and that any creditor is entitled unless the Court thinks his application is unduly delayed, to prove his debt at any time before the final dividend has been paid, and will, when he proves his debt, be admitted on foot of the composition, have his name added to those already in the scheme schedule under sec 39 and get his dividend at the scheme rate so far as there are still assets available for distribution' vide also *Thangeswara Chettiar v Ramamurthi Chetti*, 1935 MWN 380 42 L.W 399 159 IC 689 1935 AIR (M) 602. The legislature with a view to remove this conflict of opinion ¹ — added the section to give effect to the views expressed, in *Harpal*, and *Thangeswara Chettiar*.

Effect of annulment on composition

Although in cases where the annulment is on the ground that the adjudication ought never to have been made the Court in all respects will try to remit the bankrupt to his original position

yet in cases where the annulment is after the Court has approved a scheme of composition a continuance of bankruptcy in another form the right of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy. *West v Baker* 1 Ex D 44. *Exp Lennard* (1875) 1 Ch D 177. In *Subramania Iyer v Venkatarama Raju* 1936 M W N 197 43 L W 194 71 M L J 733 161 I C 717 1936 A I R (M) 424 it was contented that by reason of the annulment under s 39 the insolvency Court becomes wholly *functus officio* and is no longer competent to pass any order by way of enforcement of the surety bond. It was held that the trend of authority in this country is distinctly against that view. Many of the authorities have been reviewed in the judgments in *Kamuri Reddi Timappa v Detasi Harpal* 1929 M W N 22 and *Samasundaram Chettiar v Periakaruppan Chettiar* 1930 M W N 587. The matter has been placed beyond question by the judgment of the Full Bench in *Veerayya v Srinivasa Rao* 58 M 908 1935 M W N 886. The doubt hitherto was in respect of the effect of an annulment under s 43. An annulment under s 39 has been assumed in accordance with the authorities in England not to put an end to the jurisdiction of the insolvency Court over all the parties and this view has in fact been relied upon in support of the wider proposition that even an annulment under s 43 does not wholly put an end to the jurisdiction of the insolvency Court. After annulment the power of the Insolvency Court continues only for the purposes of ss 39 and 40 in regard to the carrying out of the composition and not for other purpose. *Siddaya v Muddappa* 1935 M W N 825.

Amendment of the schedule framed in composition

In a case in which a person had been adjudged insolvent a composition scheme in which all creditors named in the insolvency application were to be paid at 4 annas in the rupee was approved by the District Judge and the adjudication was annulled. The scheme was based on a surety bond given by the appellant by which the surety undertook to pay the creditors named in the scheme schedule and the 4 annas dividend provided by the scheme and also to pay into Court such sums as the Court ordered to be paid to such creditors as the Court thereafter brought on to the scheme schedule. In consideration of his surety bond the assets of the insolvent were handed over to the appellant. The respondent was a creditor whose name appeared in the original insolvency petition schedule but who had not been served with notice of the scheme. On an application made by him subsequent to the annulment of adjudication the District Judge allowed him to prove his debts on foot of the composition scheme ordered his name to be included in scheme schedule and directed the surety the appellant to pay him his 4 annas dividend. It was held that the order of the District

Judge was right "Although the annulment of adjudication puts an end to the insolvent's state of insolvency, it does not, in cases such as are contemplated by section 37, where the Court still retains control of the insolvent's assets, put an end to the insolvency proceedings within the meaning of sec 28 of the Act. All creditors named in the insolvency petition schedule are bound by composition which has been approved by the Court and must come in on foot of it and cannot have any remedy *de hors* the insolvency proceedings. Any creditor is entitled, unless the Court thinks his application is unduly delayed to prove his debt at any time before the final dividend has been paid and will, when he proves his debt, be admitted on foot of the composition to have his name added to those already in the scheme schedule under sec 39 of the Act and get his dividend at the same rate so far as there are still assets available for distribution." *Kamireddi Timmappa v Detasi Harpal*, 56 MLJ 458 115 IC 815 1929 AIR (M) 157.

Under sec 8 of the Presidency Towns Insolvency Act the Court has ample powers to amend, revoke or get a fresh order of arrangement under sec 40 of the Provincial Insolvency Act to get the scheme amended. If a creditor and the debtor have agreed to exclude the debt from the schedule as it cannot be said that the scheme cannot proceed without injustice, *Gopali Pillai v Kothandarama Ayyar*, 57 Mad 1082 40 LW 110 1934 AIR (M) 529.

Right of unscheduled creditor in composition unaffected by agreement.

The consequences of annulment of adjudication are different to those of a discharge. On the annulment of adjudication there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings. So where after a composition scheme had been sanctioned the adjudication was annulled a creditor in whose favour a cheque had been given by the insolvent and who could not cash it owing to the adjudication, is entitled to bring a suit against the debtor for recovery of the amount due under the cheque, *Duni Chand Daulat Ram v Jita Ram*, 34 PLR 135 141 IC 260 1933 AIR (L) 187. In the case of a scheme in an insolvency proceeding sec 28 (2) has to be read with sec 39 and the protection is taken away by sec 39 in respect of debts not included in the scheme. Therefore where a holder of a promissory note agrees that the promissory note be left out of consideration in the settlement proposed and should not form an obstacle to it but at the same time he does not give up the rights in it, the holder is not precluded from recovering

the debt on the promissory note by a suit, *Gopalu Pillai v Kothandarama Ayyar*, 57 Mad 1082 40 L.W 110 1934 A I R (Mad) 529

Right of the debtor to surplus.

When by an order of the Court a composition or scheme is approved in insolvency and the order of adjudication is annulled and the property of the insolvent is directed to be vested in a trustee, the debtors are entitled to the unclaimed dividend in the hands of the trustee. After three years of the adjudication of some debtors, a deed of composition was approved and the adjudication was annulled. The trustee was placed in funds sufficient to pay those creditors who had proved their claims. The majority of creditors received payment from the trustee. Some, however, did not take any further steps or failed to claim their dividend, and a sum of money remained unclaimed in the hands of the trustee. The debtor applied for payment of such sum. It was held that the debtors were entitled to the unclaimed dividend in the hands of the trustee. *Pareshram v The Official Assignee of Calcutta*, 60 Cal 313

40. If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, re-adjudge the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is re-adjudged insolvent under this section, all debts provable in other respects which have been contracted before the date of such re adjudication shall be provable in the insolvency.

Review

This is section 27 (8) of Act III of 1907, corresponding to sec 31 of the Presidency Towns Insolvency Act and sec 16 (16) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926

Annulment of composition.

Although the approval of a scheme or composition is generally final the Court has power in certain cases, on the application of the debtor, Official Receiver or trustee, or any creditor, to ann

the composition or scheme and adjudge the debtor bankrupt. This course can be taken where either default is made in payment of any instalment as it falls due under the composition or scheme or it appears to the Court that in consequence of the legal difficulties or any sufficient cause the scheme or composition cannot proceed without injustice or undue delay to the debtor or the creditors or that the approval of the Court was obtained by fraud—*Ringuood*

Re adjudication of the debtor.

The Court is not bound to take the course having a discretion in the matter. The provisions of a composition or scheme may be enforced by the order of the Court upon the application of any person interested, and disobedience to the order is a contempt of Court, [Bankruptcy Act, 1890 sec 3 (14)] Legal difficulties delaying the execution of the composition or scheme is another ground [sec 3 (15) of the Bankruptcy Act 1890] The Court will not however in the absence of fraud exercise the power of adjudging the debtor bankrupt if it can see plainly that the creditors can gain nothing by it but will do so if there is a probability of gain, *Ex parte Moon*, (1887) 19 Q B D 669. After the acceptance and the approval of the scheme the jurisdiction of the Court continues and the scheme when accepted and approved operates only as a conditional discharge and subject to annulment and re adjudication the *status quo ante* is restored. In considering whether it ought to re adjudge the debtor under the section the Court should in the first instance have regard to the position of creditors and if the Court is of opinion that the creditors will not be benefited by an order annulling the scheme and re adjudicating the debtor in ordinary circumstances the Court will not make an order of re adjudication. It follows

the purpose of the further administration in insolvency of the deceased debtor's estate, *In re Krishna Kishore Adhichary*, 54 Cal 650 105 1 C 90 1928 A 1 R (Cal) 21

Relation back

Re adjudication after annulment of composition does not relate back to and take effect from the date of the presentation of the petition [sec 28 (7)]. It was held in *Re McHenry*, (1888) 21 Q B D 580, that "when the Court adjudged a debtor bankrupt because it appeared to the Court on satisfactory evidence that the composition could not in consequence of legal difficulties or for any sufficient cause proceed without injustice or undue delay to the creditors, or to the debtor, there was no relation back to the

trustee's title to the filing to the debtor's petition or to any other prior act of bankruptcy.' And in any case what has been done under the scheme or composition, such as the making of payments or the disposition of property, remains valid debts validly contracted by the debtor while the composition or scheme was in force likewise remain effective and are provable in the subsequent bankruptcy to the extent as if there had been no previous act of bankruptcy or proceedings in bankruptcy —*Ringuood*

Effect of annulment of composition

Unless the Court otherwise directs the annulment of the composition or scheme forthwith and without any special order vests the property of the debtor in the Official Receiver. It has also the effect of discharging any surety for composition from his liability, *Walton v Cook*, (1888) 40 Ch D 325. When the debtor is re adjudicated insolvent there is an end of the composition and the guarantor's liability under his covenant comes to an end. *Gotind Das Puri v Jardine Skinner & Co* 27 C W N 908 80 I C 849 1924 A I R (Cal) 176

Discharge

41. (1) A debtor may, at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

- (a) grant or refuse an absolute order of discharge ,
or
- (b) suspend the operation of the order for a specified time , or
- (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Review.

This is section 44 (1) and (2) of Act III of 1907 with the addition of the clause "and shall, within the period specified by the Court," and is based on sec 26 of the Bankruptcy Act, 1914 as amended by B. (A.) Act, 1926 and corresponds to sections 38 (1) and 40 of the Presidency Towns Insolvency Act. This section should be read with section 43 (1) of the Act. The additions are explained by Sir George Lowndes in his Speech see under heading 'Application for discharge,' *infra*

Discharge.

Lord Justice Vaughan Williams in the case of *Gaskell, In re Gaskell Ex parte*, (1904) 2 KB 478 has said "After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor, on giving up the whole of the property, shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately, he must pass through a period of probation; and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he is to give up everything he has; and on doing that he is to be made a free man," see also *Mul Chand v. The Official Receiver, Aligarh*, 52 All 385 1930 A.L.J. 316. 124 I.C. 410. 1930 A.I.R. (All) 471, and *Mahomed Ali Akbar v. Mt. Fatima Begam*, 32 P.L.R. 298 133 I.C. 553 1931 A.I.R. (L) 591. Generally it may be said that the effect of an order of discharge is to enable the bankrupt to contract freely and to acquire property, and his trustee in bankruptcy will have no right of intervention. A bankrupt who has obtained his discharge is freed from his statutory restrictions peculiar to undischarged insolvents (*vide* sec. 72). An order of discharge except in the cases mentioned in section 44 has the effect of releasing the bankrupt from all debts provable in bankruptcy, and a promise to pay debt after an order of discharge without fresh consideration is *nudum pactum*, *Heathen and Son v. Webb*, (1876) 2 C.P.D. 1. A discharge marks the termination of an insolvency proceeding so far as the insolvent is concerned, *Jevanji Mamooji v. Ghulam Hussain*, 12 S.L.R. 20. 47 I.C. 771. Merely that a suit is pending against the Receiver should not prevent an Insolvency Court from granting an application for discharge. The discharge does not necessarily end the insolvency proceedings and the Insolvency Court has jurisdiction to give directions as to the distribution of assets among the creditors and such power is not taken away on account of the insolvent's discharge, *Ram Chand v. Mohra Shah*, 33 P.L.R. 524: 135 I.C. 511: 1931 A.I.R. (L) 725.

Sub-sec. (1), Order of discharge.

Just as it requires an order of adjudication to make a man bankrupt, so it requires an order of the Court, an order of discharge,

to restore him to his original status "Without an order of the Insolvency Court the insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge," *Maharaj Han Ram v Sri Krishan Ram*, 49 All 201

Application for discharge.

An insolvent, as has been observed does not stand automatically discharged. He must have an order of discharge from Court on an application made for that purpose. Sir George Lowndes in introducing the bill for amendment of Act III of 1907, observed 'The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. I will pursue for the moment the course of the dishonest debtor, he files his petition and if he is in jail he automatically gets his release under the existing Act and he is practically protected from going to jail again. That is sufficient for him, that is all he wants, he does not want to pay his debts, all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge and until he applies for it the Court has practically no power over his misdoings. This is the state of things we have tried to remedy by this Amendment Bill. We propose to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court. If the insolvent does not apply for his discharge he will lose the protection of the Court altogether. *His adjudication will be annulled* and it is provided that he cannot file another petition on the same facts'. The insolvent can apply for discharge at any time though it is obligatory on him to make an application in the first instance within the time fixed by the Court at the outset *Ladha Ram v Prabhu Dial*, 32 P L R 476 132 I C 525 1931 A I R (L) 672. Where an insolvent who has applied for an order of discharge within the time specified by the Court, has failed to file *talabana*, his failure to do so cannot be considered as a failure to apply for the order of discharge, *Sultanuddin v Hakim Aminuddin*, 7 O W N 941 128 I C 273 1930 A I R (Oudh) 474. The minor sons of a debtor, who has been declared insolvent after his death and whose minor sons are brought on the record, can ask the Court for a discharge *Nanak Chand v Official Receiver* 1935 A I R (L) 935.

Time for making the application for discharge.

A debtor may, at any time after the order of adjudication and shall, within the period specified by the Court in the order of adjudication under sec 27, *supra*, apply to the Court for an order of discharge. The debtor has complete discretion to apply when

likes provided he applies within the period specified by the Court. The word shall in sec 41 of the Act imposes a duty upon the insolvent a breach of which involves the consequences pointed out in sec 43. *Ram Krishna Misra Ex parte* 4 Pat 51 88 IC 70 6 PLT 776 (1925) AIR (P) 355. As to powers of the Court to grant extension of time for making the application for discharge vide sections 27 (2) and 43 and notes thereunder.

Failure to apply for discharge within time

Vide sec 43 and notes thereunder

Notice to creditors

No effective order for discharge of an insolvent as contemplated by law could be passed in the absence of any of the creditors before the Court. An order of discharge as contemplated by s 41 could only be made in the interest of the general body of creditors of the insolvent and the fact that one of them only raised objection to the discharge was not material for the purpose of the Courts making an order which was to affect the entire body of creditors. In the above view of the case no valid order of discharge could be made

their heirs when they are dead
 113 Ld 39 CWN 1292 155

on the other hand it has been held in
 PLR 344 1937 AIR (L) 752

their debts are not necessary
 large. Therefore the failure to

give talabana for such a creditor or to being the representatives of such a deceased creditor on the record does not affect the proceedings. Omission to give notice of the application for discharge as required by sec 41 (1) is no irregularity if none of the creditors had proved his debt. The notice is only required to be given to those creditors who prove their debts. *Bisham Chand v Kishanlal* 1939 NLJ 96 1939 AIR (N) 103. Every creditor who has proved his debt is entitled to notice of the hearing and at the hearing the Court may hear a creditor as well as a Receiver. It is the practice for the report of the Official Receiver to be read at the beginning of the proceedings. In addition to hearing the applicant the Court may hear the Official Receiver and any creditor. The Court may put such question to the bankrupt and receive such evidence as it may think fit and it is the duty of the Judge to take a note of the evidence. *Ex parte Sharp* (1893) 10 Morr 114.

Receiver's report

The report of the Official Receiver is to include a report as to the bankrupt's conduct during the proceedings in bankruptcy. The Court is not concluded by the report even where the bankrupt has not given notice to dispute. *Re Osuell* 9 Morr 202. The burden is on opposing creditors to prove the facts which entitled the Court

to refuse or suspend the discharge and by sec 26 (6) [42 (2) of the Indian Act] the Official Receiver's report is made *prima facie* evidence of the statements therein. *Re Van Laun* 14 Mans 281

Scope of hearing of the application for discharge

Although a debtor may apply for his discharge at any time after his adjudication but always before the date specified by the Court in the order of adjudication it is essential that the Court should not decide whether to make or refuse the order until it is fully acquainted with the bankrupt's conduct and the state of his affairs. No application for discharge can be heard until the Receiver has made a report as to the bankrupt's conduct during the proceedings under his bankruptcy and the state of his affairs. Before passing an order of final discharge under sec 41 it is necessary for a Court to examine the insolvent and to be satisfied of certain facts which are to be found in sec 42. *Gopiram Bhotca v Biraj Mohan Chatterjee* (1929) AIR (C) 576. In an application for discharge under s 41 of the Act the Court has no power to annul the adjudication in insolvency though it may be of opinion that the insolvent is dishonest. *Pappama v Narasa Reddi* 68 MLJ 699 1935 MWN 414 41 LW 809 156 IC 453 1935 AIR (M) 646

Enquiry about bad faith

It is clear that the question whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the preliminary stage when the order of adjudication has to be made but at the final stage when the application is made for final discharge. *Udai Chand v Ram Kumar* 15 CWN 213 12 CLJ 400. In *Samiruddin v Kadumoyee* 15 CWN 244 12 CLJ 445 71C 691 it has been held that the question of bad faith or improper dealing with the property of an insolvent arises for consideration not when he is adjudged an insolvent but at a much later stage of the proceedings. If the debtor applies for an order of discharge it becomes obligatory on the Court under the provisions of section 44 (now sections 41 and 42) of the Provincial Insolvency Act to investigate whether or not he has been guilty of acts of bad faith. When the petitioner applies for discharge his conduct during the time which will elapse between the date of adjudication and the date of application for discharge will have to be scrutinised carefully and whether an order for discharge should be eventually made or not must depend on various circumstances which are independent of the circumstances brought to the notice of the Court by the insolvent when he filed the application for being adjudicated insolvent. *Abdul Kuddus Ga v Mutual Indemnity and Finance Corporation Ltd* 51 CLJ 545 128 IC 182 1930 AIR (C) 576

Sub sec (2), Powers of the Court

The Court has a very wide discretion as to whether or not

grant the application, and if so upon what terms "The Court has an almost unlimited discretion within the statutory limitation as to the order which it will make," *Re Barker Ex parte Constable and Jones*, (1890) 25 QBD 285. In considering an application for discharge the Court will have regard not to the interest of the creditors alone but also to the interests of the public and commercial morality, *Re Badcock*, (1886) 3 Morr 138. The statutory limitations to the discretion of the Court as provided by this sec are as follows. The Court may either (1) grant an absolute order of discharge or (2) refuse an absolute order of discharge or (3) suspend the operation of discharge for a specified period or (4) grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards accrue due to the insolvent or with respect to his self-acquired property or (5) exercise the above powers of suspending and of attaching conditions to a bankrupt's discharge concurrently [sec 42 (3)]. The jurisdiction of the Court to discharge the insolvent is limited by sec. 39 of the Presidency Towns Insolvency Act (sec 41 of this Act), so that it could make only one of the orders contemplated by that section. *M C Moses v A C Oakeshott*, 30 CWN 518 95 IC 522 1926 AIR (C) 794.

Sub-sec. (2), cl. (a) ; Grant of an absolute order of discharge.

An absolute order of discharge to take effect immediately cannot be granted unless the bankrupt not only has not been guilty of any misdemeanour under the Act or of any misdemeanour or felony connected with his bankruptcy but has also not done or omitted to do anything specified in sub sec (3) of sec. 26 of the Bankruptcy Act, 1914 (corresponding to sec 42 (1) of this Act, *Re Sultzberger*, 4 Mor. 82, *Re Heap*, 4 Mor 314. Proof of these matters seems to lie on those who oppose the discharge. But the Court may refuse such an order, even though none of the offences specified are proved, if the debtor's conduct in relation to the insolvency has been such as to induce the Court to impose some condition, *Re Barker*, (1890) 25 QBD 285.

Refusal of an absolute order of discharge.

Under sec 26 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, there is now no instance in which the Court is bound absolutely to refuse an order for discharge. Formerly it was bound to refuse where the bankrupt had been guilty of any felony or misdemeanour connected with his bankruptcy, but this restriction upon the powers of the Court has been removed by the Bankruptcy Act, 1926. There was no corresponding restriction on the power of the Court to refuse an order. But there are still a number of cases in which the Court has no power to make an absolute order of discharge to take effect at once ; in

certain circumstances it must, even if it does not refuse an order outright, either suspend its operation or attach conditions to it, or both—*Ringuood's Bankruptcy Law*, p 229 (15th Ed) In *Thanaiyalayudha Nadar v Subramania Pillai*, 1928 MWN 175 109 1C 636 (1928) A I R (M) 609, it was contended that as in English law so under sec 41 (2) of the Act, the Court can only do one of three things, viz, (1) grant an absolute order of discharge, (2) grant a discharge but suspend it for a specified time, and (3) grant a conditional discharge, but cannot merely dismiss the application for discharge It was held that the suggested interpretation gives no effect to the words 'or refuse' in clause (a) of the sub-section which would then be superfluous The sub-section appears to allow the mere dismissal of the application for discharge, but that will not prevent the insolvent from presenting further application for discharge at any later time

The above decision, it is submitted with great respect, overlooks the distinction between 'refuse an absolute order of discharge' and 'absolutely refuse an order of discharge' An absolute order of discharge takes effect immediately on passing of the order and the debtor is released from all liabilities and disabilities of an insolvent at once Sub sec (2) (a) of section 41 means that the Court may either 'grant an absolute order of discharge' or 'refuse an absolute order of discharge' Refusal to pass an absolute order of discharge does not mean the rejection of the application for discharge altogether but it means to pass an order of discharge which will not take effect immediately on the passing of such an order What the Court can do is that in refusing to pass an absolute order of discharge it can pass an order suspending the operation of the order of discharge for a specified time [clause (b)] or grant an order of discharge subject to condition [clause (c)] The Court shall refuse to grant an absolute order of discharge on proof of any of the facts mentioned in sec 42

An application by an insolvent for an order of discharge should not, ordinarily, be entirely rejected and if the Court is of opinion that the insolvent is not entitled to an absolute order of discharge, it should proceed to consider whether a conditional discharge, or a discharge the operation of which may be suspended for a specified time, should not be granted Ordinarily no second application for a discharge should be granted The law and the total rejection of the application, if made, would result in his remaining insolvent It would be only in extreme cases that an insolvent should be refused a discharge either absolute or conditional or of any kind whatever *Mul Chand v The Official Receiver, Aligarh* 52 All 385 1930 A L J 316 124 1C 410 1930 A I R (All) 471 Following this case it has been held in *In the matter of Karim Mia alias Muhammad Abdul Rashid*, 53 CLJ 44 132 1C 640 : 1931 A I R (Cal) 392 that the Legislature, c

up everything he has, however little it may be in proportion to the debts he has incurred, provided he is not responsible for the disproportion between his assets and liabilities, he is to be a free man, *Sitaram v Redden*, 91 IC 760 (1926) AIR (C) 529

Section 26 of the Bankruptcy Act, 1914, provides by sub-section (2) that on the hearing of an application for discharge the Court may either grant or refuse an absolute order of discharge or suspend the operation of the order for specified time or grant an order subject to any condition with regard to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after acquired property. It is also provided that the Court shall refuse the discharge in all cases when the bankrupt has committed any misdemeanour under the Act connected with his bankruptcy, and shall on proof of any of the facts thereafter mentioned, either (1) refuse the discharge or (2) suspend his discharge for a period of not less than 2 years or (3) suspend his discharge until a dividend of not less than 10 shillings in the £ has been paid to the creditors. But where proof had been made of some of these facts viz., that the bankrupt's assets were not of a value equal to 10s in the £ on the amount of the unsecured liabilities and the Registrar made an order suspending the discharge until the debtor has paid 15s in the £ to his creditors, it was held that there was no jurisdiction under this section to make the order, *In Re Kutner*, (1921) 3 KB 93. Upon the application of a bankrupt for an order of discharge, the Court may under sec 28, sub sec (2) of the Bankruptcy Act, 1883, either suspend the operation of the order in point of time, or grant it subject to any of the conditions authorized by the section but it has not the power to make the order of discharge, conditional and also to suspend its operation, *In re Huggins, Exp Huggins* 22 QBD 277.

Where an insolvent was found to have been guilty of excessive expenditure and his assets amounted only to a very small fraction of the unsecured debts and the Court passed an order refusing a discharge "until such time as the insolvent could make 4 annas in the rupee for his creditors" it was held that 'under sec 41 it was open to the District Judge either to suspend the operation of the order of discharge for a specified period or grant an order of discharge subject to any conditions with respect to any earnings or income, etc. He has not followed either of these two courses' and the order was set aside as wrong *Devi Dayal v Sarmukh Singh* 117 IC 662 (1929) AIR (L) 281. There is no provision for the adding of any other order refusing a discharge under sec 41 (2) (a). Section 41 (2) (b) permits suspension of a discharge for a specified time only. Therefore where the Court refuses an insolvent his discharge and at the same time directs him to pay certain amount to the Receiver until he had paid all his debts

his order is illegal, *Ram Prasad Johar v. Ramjee Marwan*, 126 I C 529 : 1930 A.I.R. (Rang) 236

Review of the order of suspension.

In *Re Douson* 4 Mor 310, a County Court Judge, who had suspended discharge for five years, came to the conclusion, from facts subsequently brought to his notice, that his opinion of the debtor's conduct had been mistaken and expressed a desire that his decision should be further considered and in the meantime the bankrupt had appealed, the Divisional Court held that the proper course was for the appeal to stand over in order that an application might be made to review his decision

Automatic discharge on termination of suspension.

An adjudicated insolvent obtained on the 2nd October 1912 an order of discharge on the following terms "It is ordered that the insolvent's discharge be suspended for one year and that he be discharged as from 2nd October 1913" No final order of discharge was made. The insolvent having acquired property in 1916-17, the Official Assignee claimed the property for division amongst the insolvent's creditors, it was held that the order of discharge became operative by itself on the 3rd October, 1913, and the claim of the Official Assignee be negatived, *Murad Ally v. Lang*, 44 Bom 555 21 Bom L R 981 In an insolvency proceeding an order was passed "The property mentioned by the insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written" The property was sold and an order was passed stating that the property has been sold and the proceeds should be distributed at once. It was held that the first order was an order of absolute discharge which was suspended for a specific time, that is, until the property has been sold and that the insolvency proceedings terminated with the second order with an unconditional discharge, *Mool Chand v. Dip Chand*, 1935 A.L.J. 274 153 I C 869 1935 A.I.R. (All) 272. When the discharge of an insolvent is suspended for a period of two years, on the expiry of the period of two years there is no necessity to apply for an order of final discharge. Therefore, an insolvent can be granted his final discharge on an application made by him on the expiration of two years without notice of the application to the creditors, *Tar Mahomed Vally Mahomed v. Adamjee Hoosein*, 131 I C. 721 : 1931 A.I.R. (Rang) 188

Sub-sec. (2), Cl. (c) ; Discharge subject to any conditions.

Under sec 26 (2) (iv) of the Bankruptcy Act, 1914 as amended by the the Court shall "require the consent to judgment bein receiver or trustee for

any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge such balance or part of any balance of the debts to be paid out of the future earnings or after acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct but execution shall not be issued on the judgment without leave of the Court which leave may be given on proof that the bankrupt has since his discharge acquired property or income available to wards payment of his debts Under sec 39 (1) (d) of the Presidency Towns Insolvency Act the Court shall require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the Official Assignee for any balance or part of any balance of debt provable under the insolvency which is not satisfied at the date of his discharge such balance or part of any balance of the debts to be paid out of the future earnings or after acquired property of the insolvent in such manner and subject to such conditions as the Court may direct but in that case the decree shall not be executed without the leave of the Court which leave may be given on proof that the insolvent since his discharge acquired property or income available for payment of his debts

It is therefore clear that the conditional discharge is none the less an absolute discharge simply because a condition is super imposed to it It takes effect immediately the order is passed It is not a contingent order of discharge and it does not depend upon the happening of the condition imposed The effect of the condition imposed is merely to have the force of a judgment or decree acquired property if any of the observed in *A K R M S Chettyar* 1936 A I R (R) 2 that a conditional discharge under the provisions of s 41 (2) (c) of the Act is as much a discharge as an absolute order of discharge and concludes the insolvency proceedings The fact that a condition in regard to after acquired property is imposed merely gives the creditors right to proceed against such property when it is acquired by the discharged insolvent

The language used in sec 41 (2) (c) of the Provincial Insolvency Act is grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after acquired property Though the language is a little different from those used in the Bankruptcy Act and the Presidency Towns Insolvency Act the expression discharge subject to any conditions bears the same meaning as in the other two Acts

Where a Court finds on an application for absolute discharge that the insolvent is not entitled to the same it should consider whether he is entitled to a conditional discharge under sec 41 In most cases order of conditional discharge is suitable and arises of

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It is therefore clear that the conditional discharge is none the less an absolute discharge simply because a condition is superimposed to it It takes effect immediately the order is passed It is not a contingent order of discharge and it does not depend upon the happening of the condition imposed The effect of the condition imposed is merely to have the force of a judgment or decree against the future earnings or after acquired property if any of the discharged insolvent As has been observed in *A K R M S Chettyar Firm v Dau Pua* 161 IC 342 1936 AIR (R) 2 that a conditional discharge under the provisions of s 41 (2) (c) of the Act is as much a discharge as an absolute order of discharge and concludes the insolvency proceedings The fact that a condition in regard to after acquired property is imposed merely gives the creditors right to proceed against such property when it is acquired by the discharged insolvent

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Where a Court finds on an application for absolute discharge that the insolvent is not entitled to the same it should consider whether he is entitled to a conditional discharge under 41 In most cases order of conditional discharge is suitable

refusal of discharge unconditionally for ever are rare, *Fazal Din v Nathu Mal*, 1934 A I R (L) 109. A discharge granted to an insolvent subject to the condition that he shall hand over to the Official Receiver all the assets which he might inherit from his father is a valid one. The possibility of the insolvent's father not dying for a long time or not leaving any property for his son is no ground for making the discharge unconditional. Section 41 (2) (c) is meant to apply to cases like the present *Abdul Jabar v Din Muhammad*, 35 P L R 786 1934 A I R (L) 659. The order of discharge subject to conditions cannot be made unless there is some reasonable probability of the insolvent's coming into possession of funds, *Ex parte James*, 8 Morr 19. Unless there is evidence to show that since his insolvency the insolvent has or is likely to have, any income or has acquired or is likely to acquire any property a conditional discharge asking an insolvent to deposit all his subsequent earnings or his after acquired property in Court is not good. An order vesting the whole of a man's earnings subsequent to his insolvency and after acquired property in the Court is an order which ought not to be made because it destroys the very motive which moves a man to attempt to obtain income or to acquire property, it has the effect that he has no incentive either to work or to acquire property. *Eusoof Abdul Razak v Messrs Royal Stationary House*, 1939 A I R (R) 58. Where an insolvent after obtaining his personal discharge inherits property from his father there must be evidence that his income is more than sufficient to keep his family in good circumstances and to enable him to meet the necessities of himself and his family, *Abdul Kareem v Official Assignee*, 28 Mad 168. An order of discharge of an insolvent on condition that he should be subject to his right of an allowance of Rs 25 a month for the maintenance of himself and his family place at the disposal of the Court all property he might afterwards acquire does not amount to such a discharge as is referred to in sec 42 (3) *supra* *Sivasubramania v Thetheappa*, 45 M L J 166 1923 M W N 895. An order directing the insolvent to pay Rs 15 a month and to apply for discharge after one year imposes conditions but does not grant any discharge subject to those conditions and hence does not come within any of the clauses of section 41, *Khaldas v Nazir Sub Civil Court, Shikarpur*, 144 I C 247 1933 A I R (Sind) 151. An order granting discharge "subject to the insolvent paying Rs 140 for six months to the Official Assignee" is not an order covered by any of the above clauses and it cannot be made, *G C Moses v A C Oakeshott*, 30 C W N 518 95 I C 522 1926 A I R (C) 794. In *Ganga Ram v Amar Nath*, 1937 A I R (L) 304 the Lower Court granted a conditional discharge, the condition being that he should pay 8 annas in the rupee to scheduled creditors. It was held that the condition directing payment of a fixed proportion of the debts without regard to his income or property could not be imposed but that a conditional order should be passed asking him to pay certain proportion

of his monthly income for a fixed period and that any property acquired by the insolvent during the period should also vest in the Official Receiver.

The function of the Court acting under Ch XX of the Civil Procedure Code was to compel the insolvent debtors to pay their debts, if it could, either by its own compulsory process or where that could not be used, by withholding from them when it had the power of doing so the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter was to a certain extent discretionary with the Court, and if the Court was of opinion that an insolvent might reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached it ought very seriously to consider whether under such circumstances it ought to exercise its powers to discharge the insolvent and not rather stay its hand and require him as a condition of such a discharge to satisfy it by payment on account of its debts that he really desires, so far as he can, honestly to discharge his debts that he owes. A Gayawal who was in receipt of considerable offerings made by pilgrims was declared insolvent and discharged by the District Judge. It was held that the Court had power to withhold the discharge until the insolvent had satisfied it by payment on account of his debts that he really desired to discharge his debts. *Poona Lal v. Kanhya Lal* 19 Cal 730.

Ordinarily when an insolvent in India whose case is governed by the provisions of the Provincial Insolvency Act V of 1920, has paid up annas eight in the rupee he is entitled to be free from the disability of an insolvent unless it can be established that his case falls under the provisions of sec 42 (b) to (c) of the Act. It does not, however, follow that the removal of the disabilities as an insolvent should be accompanied with an absolute acquittance in respect of the liabilities which he has not discharged inasmuch as section 41 of the Act gives to the Court a discretion to impose conditions for the payment of the balance of the liabilities which will bind the insolvent after discharge, *Nand Lal Mukherjee v. Giridharilal*, 109 IC 633 (1928) AIR (O) 263. Under section 41 it is open to the Court granting a discharge to the insolvent to impose any condition as regards after acquired property. *The firm of Prayag Shaha Saheb Ram v. Dwisapada Roy*, 55 CLJ 94 138 IC 745 1932 AIR (Cal) 623. A conditional order of discharge should be as far as is reasonable for the benefit of the creditors. What is exactly just to both parties is a matter difficult to determine. A direction on the insolvent to contribute Rs 50 out of his monthly salary of Rs 100 for a period of five years would be just in place of Rs 25 fixed by the Lower Court for a period of 25 years which amounts to a life sentence which should not be directed. *Mahomed Ali Akbar v. Mt Fatima Begam*, 32 PLR 298 133 IC 553 1931 AIR (L) 591.

Modification of conditions

Under the proviso to sec. 26 (2) (iv) of the Bankruptcy Act and sec. 42 (2) of the Presidency Towns Insolvency Act the Court may if at any time after the expiration of two years from the date of any order of discharge subject to conditions, the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, modify the terms of the order, or of any substituted order in such manner and upon such conditions as it may think fit. There is no corresponding section in the Provincial Insolvency Act.

Effect of Failure to draw up a formal order of discharge

On the application of an insolvent the Court passed an order that the property mentioned by the insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written. Subsequently on the property being sold the Court passed an order stating that the property has been sold. Let proceeds be distributed at once. The question was what construction is to be placed on the order set forth above. *Bennet J* in delivering the judgment in *Mool Chand v. Dip Chand*, 1935 A L J 74 1935 A W R 38 1935 A L R 307 153 I C 869 1935 A I R (All) 272 held. In my opinion there was a clerical error of the office in not drawing up a formal order of discharge on or after February 6 1924 but I consider that the Judge by his order of October 6 1922 had passed the order of absolute discharge suspended for a certain period. His object in suspending the order of discharge clearly was to retain jurisdiction to deal with the insolvency case until the remaining property had been sold and the proceeds had been distributed. I consider that the insolvency proceedings terminated in 1924 with an unconditional order of discharge.

Discharge by a Foreign Court

The discharge of a debtor under the Bankruptcy Law of Ceylon operates as a discharge of a debt payable by the insolvent for which there was an enforceable cause of action in Ceylon even though the place of performance or payment may have been fixed in British India. *Marguda Pillay Routhier v. Muhammadu Routhier* 9 Mad L W 535. The Insolvency Court in Bombay has no jurisdiction to restrain a decree holder from filing a suit against an insolvent who has obtained his discharge in an Insolvency Court, in a foreign state within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge has been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in British Empire but there is no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. *Lakshmiram v. Purnachand*, 22 Bom L R 1173.

Effect of the order of discharge on insolvency proceedings.

A discharge marks the termination of an insolvency proceeding so far as the insolvent is concerned, *Jeevanji Mamooji v Ghulam Hussain*, 12 SLR 20 47 IC 771. An order under section 41 does not put an end to the insolvency proceedings. The discharge of the insolvent does not put an end to the power of the insolvency Court to give directions as to the distribution of the assets. In *K. P. S P L Firm v C A P C Firm*, 7 Rang 126 117 IC 582 (1929) AIR (R) 168, a secured creditor's rights were ignored by mistake and the proceeds of the sale of the insolvent's property were distributed among the creditors and the mortgagee subsequently sued for recovering the money from persons who had received payment. It was held that "the insolvency Court could at that stage give directions as to enforcing the right of the secured creditor and this power of the Court is not taken away on account of the insolvent's discharge. A discharge does not necessarily end the insolvency proceedings." It was said in the case of *Roue v Tan Thean Taik*, 2 Rang 643 that "one of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge. An order under section 41 of the Act does not put an end to the proceedings in the insolvency." *Maung Himoot v The Official Receiver Mandalay*, 11 D 704. An insolvent even after discharge occupies the same position as before as to the assistance in the administration of the estate. The court has compulsory power to examine him formally, when necessary in the interest of administration, *Shadhan Chandra Bhandari v Seunaram Golabrai*, 37 CWN 718 57 CLJ 467. An order of discharge does not revest property in the insolvent, *Khemchand v Hemandas*, 31 SLR 506 1937 AIR (S) 306, *Bisham Chand v Kisanlal*, 1939 NLJ 96 1939 AIR (N) 103. As regards the effect of an order of discharge in respect of creditors, vide section 44 and notes thereunder.

Revocation of the order of discharge.

Under sec 26 (9) of the Bankruptcy Act and section 43 of the Presidency Towns Insolvency Act, 'a discharged bankrupt shall, notwithstanding his discharge give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee, and, if he fails to do so, he shall be guilty of a contempt of Court, and the Court may also, if it thinks fit, revoke his discharge. If the order of discharge is revoked, the result would be the same as if there had been no discharge at all and the debtor had continued insolvent but subject to the validity of the sales and other dispositions of property lawfully made or things duly done subsequent to the discharge.'

Modification of conditions

Under the proviso to sec 26 (2) (iv) of the Bankruptcy Act and sec 42 (2) of the Presidency Towns Insolvency Act 'the Court may if at any time after the expiration of two years from the date of any order of discharge subject to conditions, the bankrupt satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, modify the terms of the order or of any substituted order in such manner and upon such conditions as it may think fit' There is no corresponding section in the Provincial Insolvency Act

Effect of Failure to draw up a formal order of discharge

On the application of an insolvent the Court passed an order that 'the property mentioned by the insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written' Subsequently on the property being sold the Court passed an order stating that the property has been sold Let proceeds be distributed at once' The question was what construction is to be placed on the order set forth above Bennet, J in delivering the judgment in *Mool Chand v Dip Chand*, 1935 ALJ 74 1935 AWR 38 1935 ALR 307 153 IC 869 1935 AIR (All) 272 held In my opinion there was a clerical error of the office in not drawing up a formal order of discharge on or after February 6 1924 but I consider that the Judge by his order of October 6 1922 had passed the order of absolute discharge suspended for a certain period His object in suspending the order of discharge clearly was to retain jurisdiction to deal with the insolvency case until the remaining property had been sold and the proceeds had been distributed I consider that the insolvency proceedings terminated in 1924 with an unconditional order of discharge

Discharge by a Foreign Court

The discharge of a debtor under the Bankruptcy Law of Ceylon operates as a discharge of a debt payable by the insolvent for which there was an enforceable cause of action in Ceylon even though the place of performance or payment may have been fixed in British India, *Marguda Pillay Rowther v Muhammadu Rowther*, 9 Mad LW 535 The Insolvency Court in Bombay has no jurisdiction to issue an order of discharge against an insolvent who has no property in India, for recovering property, for recovering a debt in respect of which the discharge has been obtained The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in British Empire but there is no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order, *Lakshmiram v Punamchand*, 22 Bom LR 1173

Effect of the order of discharge on insolvency proceedings

A discharge marks the termination of an insolvency proceeding, so far as the insolvent is concerned. *Jainji Mamooji v Ghulam Hussain* 12 SLR 20 47 IC 771. An order under section 41 does not put an end to the insolvency proceedings. The discharge of the insolvent does not put an end to the power of the insolvency Court to give directions as to the distribution of the assets. In *K P S P L Firm v C A P C Firm* 7 Rang 126 117 IC 582 (1929) AIR (R) 168 a secured creditor's rights were ignored by mistake and the proceeds of the sale of the insolvent's property were distributed among the creditors and the mortgagee subsequently sued for recovering the money from persons who had received payment. It was held that the insolvency Court could at that stage give directions as to enforcing the right of the secured creditor and this power of the Court is not taken away on account of the insolvent's discharge. A discharge does not necessarily end the insolvency proceedings. It was said in the case of *Roue v Tan Thean Taik* 2 Rang 643 that one of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge. An order under section 41 of the Act does not put an end to the proceedings in the insolvency. *Maung Hinoat v The Official Receiver* 14 R 704. An insolvent even after discharge is in the same position as before as per assistance in the administration compulsory power to examine him formally when necessary in the interest of administration. *Shadhan Chandra Bhandari v Seunaram Golabrai* 37 CWN 718 57 CLJ 467. An order of discharge does not revert property in the insolvent. *Khemchand v Hemandas* 31 SLR 506 1937 AIR (S) 306. *Bisham Chand v Kisanlal* 1939 NLJ 96 1939 AIR (N) 103. As regards the effect of an order of discharge in respect of creditors vide section 44 and notes thereunder.

Revocation of the order of discharge

Under sec 26 (9) of the Bankruptcy Act and section 43 of the Presidency Towns Insolvency Act a discharged bankrupt shall notwithstanding his discharge give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee and if he fails to do so he shall be guilty of a contempt of Court and the Court may also if it thinks fit revoke his discharge. If the order of discharge is revoked the result would be the same as if there had been no discharge at all and the debtor had continued insolvent but subject to the validity of the sales and other dispositions of property or payments duly made or things duly done subsequent to the discharge.

There being no corresponding section in the Provincial Insolvency Act authorising the Court to revoke the order of discharge it may be inferred that the Legislature did not intend to invest the Court with such powers. In *Naran Das Dori Lal v. Mihil Lal* 3 A W N 481 1934 AIR (All) 521 it was held the Provincial Insolvency Act is an Act to consolidate and amend the law relating to insolvency in British India and it must be presumed that the Indian Legislature in passing this Act was aware of the exceptions made by the Courts in England to the English Bankruptcy Act on which the Indian enactment is based. If it was the intention of the Legislature to allow exceptions we should expect to find a provision to that effect in the Act itself.

Appeal

An appeal lies against an order on an application for discharge under section 75 (2) Sch I. The question whether the Courts would have exercised better discretion if they had acted under cl (b) or cl (c) and not clause (a) sub sec (2) of sec 41 is not one which can properly be raised in revision. *Ladha Ram v. Prabh Dal* 32 P L R 476 132 I C 525 1931 AIR (L) 672

42 (1) The Court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts namely —

Cases in which Court must refuse an absolute discharge

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible
- (b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency
- (c) that the insolvent has continued to trade after knowing himself to be insolvent
- (d) that the insolvent has contracted any debt provable under this Act without having at the

time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it ,

- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ,
- (f) that the insolvent has brought on, or contributed to, his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs ,
- (g) that the insolvent has, within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due, given an undue preference to any of his creditors ,
- (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors ,
- (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust

(2) For the purposes of this section, the report of the receiver shall be deemed to be evidence , and the Court may presume the correctness of any statement contained therein

(3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently

Review.

This is section 44 (3)—(5) of Act II¹ of 1907 and corresponds to section 39 of the Presidency Towns Insolvency Act and sec 26 (3) of the Bankruptcy Act 1914, as amended by B (A) Act, 1926. This section provides for the exceptions to the exercise of ' ' to grant discharge under section 41 (2) and sets forth the on which the application for an absolute order of discharge

be refused *In Re Hormusji Ardesir* 17 Bom L R 313 The benefit of Insolvency Act is intended for traders and others who act honestly and straightforwardly and according to the recognised proper mode essential to knowing their position but who through misfortune incur loss The benefit should not be extended to those traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them *S R M C T Chetty v Ko Aung Gyi* 15 IC 276 The benefit of release from debts under the Act is intended for the honest debtor who by reason of misfortune is unable to pay his debts It is not and could not have been intended for the benefit of the reckless and careless borrower or the dishonest trader *Kalleappa Chetty v Maung Kyue* 9 IC 950 Whether a Court shall grant or refuse an absolute order of discharge must be determined with references to the terms of s 42 of the PI Act and a judge cannot reject a debtor's application on grounds not indicated in or warranted by the section *Doddi Abdul Nobi Saib v Kalappa Rajappa Patel* 44 LW 284 71 MLJ 371 1936 MWN 1229 165 IC 83 1936 AIR (M) 800

Sub section (1), Grounds for refusal of absolute discharge
 Clause (a); Refusal of discharge when assets below
 eight annas in the rupee

The present clause makes the absence of assets equal to eight annas in the rupee on the unsecured liabilities one of the facts which will prevent the debtor from obtaining an unconditional discharge unless the deficiency has arisen from circumstances for which he cannot justly be held responsible Under cl (5) of section 26 of the Bankruptcy Act 1926 it is provided that for the purposes of this section a bankrupt's assets shall be deemed of a value equal to ten shillings in the pound on the amount of his unsecured liabilities when the Court is satisfied that the property of the bankrupt has realised or is likely to realise or with due care in realisation might have realised an amount equal to ten shillings in the pound on his unsecured liabilities and the report of the Official Receiver or the trustee shall be *prima facie* evidence of the amount of such liabilities

It will therefore appear that under the English law it is not essential that the property of the bankrupt should actually realise that amount it may be disposed of without proper care being taken or if it has already been actually worth If the Court is satisfied that the property of the bankrupt has realised or is likely to realise or with due care in realisation might have realised an amount equal to ten shillings in the pound on his unsecured liabilities given due care in the realisation then the value is to be deemed equal to this amount But a different construction has been put upon the clause in India The clause is interpreted to mean that actual payment of a sum equal to eight annas in the rupee on the amount of unsecured liabilities is a condition prece

dent to the insolvent's getting an absolute order of discharge unless he shows that the fact has arisen from circumstances for which he cannot justly be held responsible. When the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities no discharge should be granted unless he satisfies the Court that

he cannot justly be held
44 [now section 42 (1)] is
Ljue 9 IC 950

Before passing an order of final discharge under sec 41 it is necessary for a Court to examine the insolvent and to be satisfied that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities arose from circumstances over which he had no control and for which he cannot justly be held responsible. *Gopiram Bhotica v Brijmohon* (1929) AIR (C) 576. Merely stating in the order that there is nothing in the report of the Receiver to stand in the way of the insolvent's discharge is not sufficient. The Judge must be satisfied that the assets were not of the requisite value arose from circumstances for which the insolvent could not be held to be justly responsible. The order is not legal in the absence of such finding. *P N Dutta Choudhury v J H Blades* 48 CLJ 550 115 IC 585 (1928) AIR (C) 843. When the insolvent's assets were not of a value equal to eight annas in the rupee and it was also found from the report of the Receiver that the insolvent so far from helping the Receiver to pay his debts had rather obstructed him the order refusing discharge was perfectly reasonable. *Jagmohan Sing v Deputy Commissioner Fyzabad* 80 Ind Cas 54.

In *The Firm of Prayag Shaha Saheb Ram v Duijapada Roy* 55 CLJ 94 138 IC 745 1932 AIR (C) 623 the insolvent applied for his discharge and the learned District Judge found that the Receiver had no complaint against his conduct in connection with the insolvency. In the circumstances he gave an immediate order of discharge. Rankin C J in delivering the judgment held

The District Judge had no business to do that at all because it is quite clear that the insolvent came within the scope of the provisions of sec 42 and it is absurd in a case of this sort to say that the fact that the insolvent's assets are not of a value equal to eight annas in the rupee has arisen from circumstances for which he cannot justly be held responsible. Everybody is responsible for the way in which he conducts his own business and this section was never meant to apply to people merely because they unsuccessfully trade. It is intended to apply to cases of a very different type. Under section 47 the Court is bound to refuse to grant an absolute order of discharge when the assets are found

even to pay eight annas in the rupee. *Ladha Ram v Prabh R* 32 PLR 476 132 IC 525 1931 AIR (Lah) 672. Where

insolvent's assets are insufficient to pay eight annas in the rupee to the creditors but such fact is not due to any misconduct of the insolvent he may be granted absolute discharge *Gokal Singh v Krishnan Lal* 35 P L R 114 1934 AIR (L) 198

Onus

The provision of sec 42 (1) (a) are imperative and the onus of proof lies on the insolvent and in the event of failure on his part to satisfy the Court in this respect the Insolvency Court has no jurisdiction to pass an order of discharge *Bakarim Bapuji v Mangha Adkus* 1 L R 1937 (N) 461 165 IC 926 1931 AIR (N) 31. An order of discharge cannot be passed unless the circumstances laid down in s 42 (1) (a) are shown to exist and the burden of proving the existence of these circumstances is on the debtor. It is not necessary for the creditor or the Official Receiver to show that the debtor could justly be held responsible for the deficiency of assets *Ahmed Maraikayar v Thangiah Nadar* 47 MLW 623 1938 1 MLJ 760 1938 M W N 528 1938 AIR (M) 590. The how that the reason for his not the rupee on the amount of his circumstances over which he had ourt has no jurisdiction to pass an order of discharge in the absence of any evidence in the record *Santi Lal v Rajnarain* 119 IC 4 (1929) AIR (All) 858. Where an insolvent applies for an absolute discharge the onus is on him to show the requirement under sec 42 (1) (a) i.e. his inability to pay 8 annas in a rupee is from circumstances beyond his control and it is not necessary that the creditor should show in the first instance that the insolvent is guilty of fraud or dishonesty *Fa al Din v Nathu Mal* 1934 AIR (L) 109. Where the insolvent's assets have not been found to be equal to eight annas in the rupee and the insolvent has failed to prove that his liabilities arose out of circumstances for which he could not justly be held responsible it was held that he could not legally be granted an order of discharge under sec 41 *Bril Mohan v Sarje* 8 O W N 843 134 IC 607 1931 AIR (Oudh) 326. The onus is shifted on the creditors on proof of the above facts by the insolvent. Where it is true that the assets of the insolvent are less than eight annas in the rupee on the amount of the unsecured liabilities but it has not been shown that this state of things has been brought about by any fraudulent act on the part of the insolvent or by circumstances which he could have led sec 42 (a) does not stand in the way of the insolvent discharge *Suraj Pal Singh v Shib Lal* 119 IC 16 (1929) 11) 843. Where through no fault of their own the assets of the insolvents have not been properly administered and the non payment of 8 annas in the rupee was not due to any thing for which the insolvents could be held responsible and the insolvency proceedings have been dragging on for a pretty long time (14 years) and

there was no reasonable prospect whatsoever of the insolvents coming into any property which can be taken over by the Receiver for liquidating the debts due by the insolvents, in order granting discharge was held to be right and proper. *Shi Rao Na. v. K. v. Na. v. P. I. R. 218, 104 I.C. 1067, 1936 A.I.R. (L.) 840.* Where it is found that the debts shown by the insolvent are trade debts incurred in the course of business carried on by the insolvent and his father and that the insolvent is not guilty of any of the acts mentioned in cl. (d) to (f) of s. 42 there being nothing to suggest that the insolvent continued to trade knowing himself to be insolvent or contracted any debt recklessly or brought on his insolvency by any sort of rash and hazardous speculation the Court can properly grant him an absolute order of discharge although his assets are not of value equal to eight annas in the rupee, especially when the receiver reports recommending a discharge. *And N. v. Na. v. K. v. P. I. R. 44 L.W. 284, 71 M.L.J. 371, 1936 M.W.N. 1229, 105 I.C. 83, 1936 A.I.R. (M.D.)* But in *Pulha M. v. A. v. Na. v. P. I. R. 1104* it was held that the facts that at the time of the transactions the insolvent was a young man of about 20 years of age and was carrying on business with his father under his direction and control is no ground for granting him an absolute discharge though such circumstances can no doubt be taken into consideration.

Order to pay more than eight annas in the rupee.

The discretion given to the Court by the first proviso to suspend the discharge until a dividend of not less than 10% in the £ has been paid to the creditors does not empower the Court to suspend that discharge until a larger dividend has been paid. To give such a power to the Court and thus in effect compel the debtor to work for his creditor to an extent beyond the prescribed sum as a condition of his discharge is not to be implied from the statute. In *Re Kuntar* (1931) 3 K.B. 95. Ordinarily when an insolvent in India, whose case is governed by the provisions of the Provincial Insolvency Act has paid up eight annas in the rupee, he is entitled to be free from the disabilities of an insolvent unless it is established that his case falls under the provisions of sec. 42 (b) to (d). The removal of his disabilities as an insolvent need not be accompanied by an absolute acquittance in respect of the liabilities which he has not discharged for sec. 41 gives to the Court a discretion similar to the discretion given in sec. 20 of the English Act to
 of the balance of the liabilities
 discharge N. v. L. v. Muth,
 50 A.I.R. 101, 203.

Clause (b) : Omission to keep books of account.

Ordinarily a man carrying on business is supposed to keep a book of account, because books of account, if kept properly, are

means to enable him to understand his financial position which means his financial position regarding the trade or business carried on by him. Generally books of account of trade or business need not relate to personal purchases and a man out of business need not keep books at all, *Re Mutton* (1887) 19 QBD 102. The plea of a businessman that he has no books of account raises a presumption that he is wilfully withholding the books of account inasmuch as they would show that he has concealed his assets to defeat the claims of his creditors. This is a state of things which the section is intended to prevent and punish by refusing an absolute order of discharge and by conviction under sec 69. It is to be borne in mind, and must always be borne in mind, in dealing with the question of books, even where they are false or so badly kept, as to amount not merely to negligence but to a suggestion of dishonesty, that sec 42 itself provides and defines a quasi offence, with regard to the keeping of books, which, if established, is a ground for a kind of a penal order, postponing the absolute discharge of the insolvent when he applies for it, *Ganga Prasad v Madhuri Saran*, 100 IC 550 (1927) AIR (A) 352.

Clause (c) : Trading with knowledge of insolvency.

What constitutes a trader depends upon the definition given to that term in sec 65 of the Statute 25 & 13 Vict c 106, which is rendered applicable to this country by sec 9 of the Indian Insolvency Act. In the enumeration of traders given in sec 65 of the Act are persons using the trade of merchandise or who seek the living by buying and selling or by workmanship of goods or commodities. A manufacturer who works with raw materials is a trader. A person who merely produces an article from the soil is not a trader because there is not that buying and selling necessary to constitute him a trader and also because the article which he produces and sells is not produced by the workmanship of goods or commodities. A tea-planter who produces dried tea leaves is a trader, an indigo planter is a trader, *In Re Mome*, 21 Cal 634. *In Re Stanton*, (1887) 4 Mor. 242, Cave J has stated that, A man, of course, has a perfect right, as long as he is solvent, to determine, that he will go on with a business, although, it may be a losing business. He may trust that, before the becomes insolvent, matters will change, and he will again be in a condition of prosperity. But the moment he becomes insolvent, then he is no longer going on at his own risk in case of failure, he is going on at the risk of his creditors, in case things do not mend, as he hopes they will. In my judgment, a man has no right to do that. The moment things have got to such a pitch that he cannot pay twenty shillings in the pound, but he nevertheless thinks that if he goes on he may be able to retrieve his position, in my opinion, he ought to call his creditors, and leave them, who will have to bear the loss, in cases calculations are wrong to determine whether that course of going

on shall be proceeded with or not" It is essential that there should
 If a trader has kept proper books as
 not, as a rule, be able to say that he
Re Heap, Ex parte Board of Trade, 4

Mor 314

Clause (d) , Contracting debt without reasonable expectation to pay.

The words in sec 42 "without any reasonable or probable ground of expectation" at the time when contracted, of paying them, are pointed not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. If it shall appear that the insolvent's whole debts so greatly exceeded his means of providing payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same that would afford good ground for deferring the discharge in *Re Cowie* 6 Cal 70. If it is found that the insolvents had at the time of contracting the debts no reasonable or probable ground for expecting that they would be able to repay them but had brought on their insolvency by extravagant living and culpable neglect of their business and were unable to account for the loss of their assets, an order dismissing their application for discharge is just and proper, *Tara Singh v Sarmukh Singh*, 34 P L R 991 146 I C 532 1933 A I R (L) 917. It is not capital, but it is this clause, *Re well* (1867) 3 Ch App 20, *Carruthers* L J observed. It is said that the bankrupt systematically lived beyond his income and therefore must have contracted debts without any expectation of being able to pay them. But if a man having £100 in hand were to contract debts to that amount, it would be impossible to say that he contracted them without reasonable expectation of being able to pay them. If he then were to contract further debts to the amount of the £100 in paying them, so as to be as blamable as such conduct could be brought within the provisions of this section, there being no debt provable under his bankruptcy which he had contracted without a reasonable expectation of being able to pay it."

Onus.

In the case of any provable debt, the section throws the onus on the bankrupt to show that when he contracted it he had reasonable or probable ground of expectation of being able to pay it. *Ex parte Rufford*, 2 De G M & G 234. In respect of debts contracted by the debtor, the onus is on the bankrupt to show that the debts had been contracted by him, he had reasonable

bable ground of expectation that he would be able to pay it, *Ex parte Mee*, L R (1866) 1 Ch 337, *Ex parte White*, (1885) 14 Q B D 600 In the matters of *Maung Tun Aye*, 165 1 C 384 1936 AIR (R) 412, it has been said that the insolvency laws are devised for the protection of distressed debtors and, not for the purpose of enabling reckless and impudent persons to incur with relative impunity obligations which they know they cannot perform Where an insolvent, although fortunate enough in obtaining an unconditional discharge in a previous application for insolvency in spite of his assets being almost nil and their being a finding that his debts were contracted recklessly, again presents a second application for insolvency within a period of twenty eight months, and, it is again found that he has incurred his debt recklessly, it is a case in which it is the duty of the Insolvency Court to refuse a discharge For 'debts provable under this Act, vide Notes under ss 33 & 34, *supra*

Clause (e) , Failure to account for any loss or deficiency.

Dishonesty is the natural inference in the absence of any books of accounts showing that the debtor has really suffered a loss He must give a satisfactory explanation as to how there has been a loss or deficiency in his assets In the absence of an explanation it is presumed that he has removed the assets to defeat the claims of his creditors and therefore not entitled to an absolute order of discharge The mere fact that a man has not been able to explain every shilling of his losses does not show that he is acting fraudulently

Clause (f) ; Rash and hazardous speculation.

If a man advances money on that which may or may not succeed, it is speculation To bring the case within the Act the speculation must be rash as well as hazardous Lopes LJ in *Re Ex parte Keays*, (1891) 9 Mor 18 observed "In my opinion a speculation which no reasonably careful man would enter into having regard to all the circumstances of the case is a rash and hazardous speculation, and by all the circumstances of the case I mean his own means and all the surrounding circumstances connected with the matter" Thus trading to the extent of thousands where the trader has no capital to meet losses is rash and hazardous speculation So acceptance by a banker of foreign bills of exchange to large amounts after failure of the foreign bank to meet earlier acceptances is rash and hazardous speculation, *Re Braginton*, 14 LT 277, so speculative dealings by a share broker largely on his own account, *Re Wilson*, 14 LT 492 Lord Westbury L C defined a 'rash' speculation as a speculation such as no reasonable man would enter into *Ex parte Downman*, (1863) 32 LJ 49 'Rash and hazardous' must be looked at with regard to all the circumstances The allegation that the transaction was a rash and hazardous speculation must be

definitely alleged and strictly proved, *Re John Brown & Co*, (1906) 22 T L R 291

Mere speculation would not disentitle an insolvent from asking the Court for a discharge. Many people indulge in all kinds of speculations but the thing which debars an insolvent from claiming his discharge is rash and hazardous speculation. *Shiv Deo Saran v Kidar Nath*, 38 P L R 218 164 I C 1087 1936 A I R (L) 840. If a man borrows money, he is responsible for the payment of it whether the man who lends him money is foolish or otherwise. Under the Provincial Insolvency Act, the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor who by reason of misfortune is unable to pay his debts. The conduct of the seeker of the benefit, not the conduct of creditors is what has to be considered, *Kalleappa Chetty v Maung Kyue*, 5 L B R 189 9 I C 950, *In Re Hormusji Ardeshir*, 17 Bom L R 313

Unjustifiable extravagance in living.

A man is not bound to keep up appearances but to pay up debts and if his property will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living and not to go on living out of the money of his creditors, *In Re Stainton*, 4 Mor 242 (1887) 9 Q B D 102. When a charge of "unjustifiable extravagance" is being enquired into against the insolvent, it is the duty of the Court to have regard to the position of the bankrupt and the amount of expectation which he might entertain from it, and unless extravagance in living is the immediate cause of insolvency it is not unjustifiable, *Ex parte Ryley*, 14 L T 707

Culpable neglect of business affairs

"Negligence" has been defined to be the breach of a duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do or the doing something which a prudent and reasonable man would not do, *Blyth v Birmingham Water Works Co* 11 Ex D 784 *Smith v L S W Railway*, L R 5 C P 102. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection. Culpable rashness is acting with consciousness that mischievous and illegal consequences may follow, but with hope that they will not, and often with the belief that the actor taken sufficient precaution to prevent their happening. The ability arises from acting despite the consciousness. N

Nagabhushanam 7 M H C R 119 *Empress v Ketabdi Mundul*, 4 Cal 764

Clause (g) , Undue preference.

The matters mentioned in this clause are matters which ought to be looked at in considering what the conduct of a bankrupt who is asking for his discharge, has been. That is a different object, and therefore the meaning of 'undue preference' is different from the meaning of preference in section 54. This conduct of the debtor could not be made void. Lord Esher M R, in *Re Skegg* 63 L T 90, said "Section 28, sub sec (3) (f) [corresponding to sec 42 (1) (g) of this Act] relates to something which the bankrupt may have done being conduct which may affect his discharge. Now, what is the duty of a debtor who is unable to pay his debts as they become due, and is within three months of his bankruptcy? In my opinion, it is his duty when on the eve of bankruptcy, not to interfere in any way whatever among his creditors, he knows that, as, will be equally divided, do anything to prevent advantage to any one of the creditors over the others, he is guilty of giving an undue preference." This principle was applied in the case of *Re Bryant* (1895) 1 Q B 420, to the payment in full of a creditor who would have probably been entitled to preferential payment under the bankruptcy and such a payment would seem to be equally within the sub section even if it was certain that the creditor would be entitled to payment in full under the bankruptcy.

Within three months

In the English Act, the period of three months dates from the receiving order and not from the presentation of the petition [sec 26 (3) (i), Bankruptcy Act], whereas under the present sub-section the period of three months dates from the presentation of the petition and not from the dates of adjudication or the receiving order.

Clause (h) , Previous bankruptcy & composition

These two clauses correspond to section 26 (3) (k) & (l) of the Bankruptcy Act, 1914. The next ground for refusing an absolute order of discharge is where the bankrupt has been, on any previous occasion adjudged bankrupt or has made composition with his creditors, and where the bankrupt has been guilty of any fraud or fraudulent breach of trust. The words "previous occasion" in cl (h) of sub-sec (1) of s 42 not only apply to words 'adjudicated an insolvent' in the same sub-section but the composition must also be governed by the words "on any previous occasion", and

these words mean a composition previous to adjudication. Sec 42 (1) (h) of the Act means that there should be no discharge of an insolvent who has done one of two things, both previous to the adjudication of insolvency. One of these things is to have been previously adjudged an insolvent, and the other is to have previously made a composition or arrangement with his creditors. The intention of the Act is that where a man has been relieved of his liabilities on a previous occasion by one of these methods, he is not entitled to be relieved of his liabilities a second time by the Court of Insolvency granting him a discharge after a second adjudication as an insolvent, but that in such a case he shall remain permanently as an undischarged insolvent and have the disadvantage of not being able to obtain further credit without disclosing the fact that he is an undischarged insolvent. *Ram Chandra Sahai v Dalpat* 1937 A W R 384 1937 A L J 387 168 I C 159 1937 A I R. (All) 526

Clause (1) Fraudulent concealment or removal of property.

Where an insolvent transferred certain goods prior to his adjudication and the transfer was set aside on the ground that it was made with a view to use it as a shield against his creditors, it was held that the case came within sec 39 sub-section (2), cl (j) of the Presidency Towns Insolvency Act III of 1909 and the insolvent was guilty of fraud within the meaning of the sub-section, *G C Moses v A C Oakeshott*, 30 C W N 518. Following this case it has been held in *Kazi Abdul Sattar v Dinajpur Trading and Banking Co Ltd*, 42 C W N 1153, that the language of s 42 gives the Court wide authority to examine the insolvent's conduct whether before or after insolvency. Fraudulent transfer prior to insolvency comes within the purview of s 42 (1) (i) and entitles the Court to refuse an order of absolute discharge. But what has to be taken into consideration is not conduct remote in character, but such conduct or affairs as may or can have had some effect on the insolvency. Under sec 42, the Court has power generally to review any questionable transaction covered by the section and is not limited to such transactions as come strictly under secs 53 and 54.

Refusal of discharge is not termination of proceedings.

The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings, and in spite of such refusal, the bar against the commencement of the suit against the insolvent after the adjudication order laid down by sec 28 (2) continues to operate and a creditor of the insolvent is not entitled to commence a suit for the recovery of a debt against the insolvent without the leave of the Insolvency Court. The plaint in such a suit must be rejected, *Tan Seik Ke v C A M C T Firm*, 6 Rang 27 109 I C 769 (1928) A I R. (R.) 109, following *Roue & Co v Tanthen Taik*, 2 Rang 643 84 Ind Cas 909, and dissenting from

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Maung Po Toke v. Maung Po Gyi, 3 Rang 492 : 92 I.C. 142 : (1926) A.I.R. (R.) 2 where it was held that where the Court under the provisions of sec. 42 refuses the discharge of the insolvent, as far as that Court is concerned the proceedings have terminated and the insolvent is liable to be arrested notwithstanding sec. 28 (2). "The refusal under section 42 of the Provincial Insolvency Act, of final discharge of an insolvent does not *ipso facto* determine the insolvency proceedings. Until and unless an adjudication order is annulled the insolvent's property continues to vest in Court, and so long as that vesting remains, the insolvency proceedings cannot come to an end", *Alamelu Ammal v. T. S. Venkatarama Iyer*, (1927) M.W.N. 593 26 L.W. 305 : 53 M.L.J. 422 105 I.C. 165. The full Bench case of *Mallapalli Gopalan Nayar v. Koppathil Gopalan Nayar*, 22 M.L.W. 202 : 1925 M.W.N. 612 : 91 I.C. 31 : (1925) A.I.R. (M) 915, expressly lays down that there is nothing in sec. 44 of the Act to warrant the suggestion that the application for discharge, when refused, is refused for ever and that no later application can be made, or no renewal of the former application can be had.

Power of the Court to review its order of refusal.

Under the general powers conferred by sec. 108 of the Bankruptcy Act, 1914, the Court can review an order refusing a discharge and although there is power to refuse a discharge with liberty to the bankrupt to apply again, the more convenient course is to use the power of re-hearing, *Re Tobias*, 8 Mor. 30, *Re Shields*, 106 L.T. 345. The refusal of an order of discharge is not tantamount to an annulment of the order of adjudication as has been held in *Maung Po Toke v. Maung Po Gyi*, 3 R. 492. There is no provision in the Provincial Insolvency Act, whereby on the refusal of an insolvent's discharge his property which vested on adjudication in the Court or a Receiver, re-vests in the insolvent, and although the wide powers of review conferred by the Presidency Towns Insolvency Act are not reproduced in the Provincial Insolvency Act, there seems to be nothing to prevent the insolvent renewing his application for discharge in case fresh circumstances justify him in doing so, *Tan Seik Ke v. C. A. M. C. T. Firm*, 6 R. 27 : 109 I.C. 769 : (1928) A.I.R. (R.) 109. In the Full Bench case of *Mallapalli Gopalan Nair v. Koppathil Gopalan Nair* 22 M.L.W. 202 : (1925) M.W.N. 612 : 91 I.C. 31 : (1925) A.I.R. (M) 915, it was held that "there is nothing in sec. 44 of the Act to warrant the suggestion that the application for discharge when refused, is refused for ever, and that no later application can be made, or no renewal of the former application can be had," though it was held in *Re Application by Henry Robert Smith*, 9 S.L.R. 132 : 32 I.C. 575, that "an Insolvency Court has no power to set aside or vary a previous order refusing a discharge. No Court has power to set aside an order which has been properly made unless it is given by statute."

Sub-sec (2) : Receiver's Report.

Sub-section (2) of section 70 of the Presidency Towns Insolvency Act lays down "In particular it shall be the duty of the Official Assignee to investigate the conduct of the insolvent and to report to the Court upon any application for discharge, stating whether there is reason to believe that the insolvent had committed any act which constituted an offence under this Act or under sections 421-424 of the Indian Penal Code in connection with his insolvency or which would justify the Court in refusing suspending or qualifying an order for his discharge." Though there is no corresponding section in the Provincial Insolvency Act it is essential that the Court should not decide whether to make or refuse the order of discharge until it is fully acquainted with the bankrupt's conduct and the state of his affairs. No application for discharge can be heard until the Receiver has made a report as to the bankrupt's conduct during the proceedings under his bankruptcy and the state of his affairs.

Receiver's report is evidence

Under sec 26, sub-section (6) of the Bankruptcy Act, 1914, the report of the Official Receiver shall be *prima facie* evidence of the statements therein contained. "The Report of the Official Receiver is made evidence by the Act only for the purpose of this section and not of any other," *Chinna v Kumar*, 36 Ind Cas 906. Whenever it was intended by the Legislature that the report of the Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter, for example, in sections 38 and 42, on which a finding could be based. The report of the Receiver in any other matter in the absence of an express provision that it may be treated as evidence, is not by itself legal evidence and any finding of the Court solely based upon it is erroneous, *Bisnu Bis v Nanthi Mal* 23 A L J 792 89 I C 357 (1926) A I R (A) 29. Where an insolvent applies for discharge and the report of the Official Receiver is in favour of granting a discharge to the insolvent the onus of proving the contrary lies on the opposing creditors. *Tara Singh v Sarmuka Singh*, 34 P L R 991 146 I C 532 1933 A I R (L) 812. Under Rule 231 of the Bankruptcy Act, 1914 where a bankrupt intends to dispute any statement with regard to his conduct and affairs contained in the Official Receiver's report he shall, not less than two days before the hearing of the application for discharge, give notice in writing to the Official Receiver specifying the statements in the report, of any, which he proposes at the hearing to dispute.

Sub section (3) , Suspension of discharge and attaching conditions.

This sub section gives the Court power to suspend

conditions to the discharge concurrently. In none of the cases mentioned in sec 42 (1) (a) to (d) can the Court make an unconditional order of discharge to take effect at once. When faced with any of these circumstances it has four courses open to it. It may do any one of the following (a) refuse an absolute order of discharge; (b) suspend the discharge either for a definite period of time; or (c) suspend until a dividend of eight annas in the rupee has been paid to the creditors, (d) to require the bankrupt as a condition of his discharge to consent to a judgment being entered against him by the Official Receiver or the trustee for any part of any balance of the debts provable in bankruptcy which is not satisfied at the date of discharge. The amount for which such judgment is entered will then have to be paid out of the future earnings or after-acquired property of the bankrupt, as and when the Court may direct. The Court cannot suspend both for a stated time and until the prescribed dividend has been paid. *Walmesly, in re*, (1907) 98 L.T. 55. Nor can it on suspending the discharge until payment of a dividend, fix the amount of the dividend at any figure other than eight annas in the rupee, *In Re Kutner*, (1921) 3 KB 93, *Nand Lal Mukherjee v Girdhari Lal*, 109 IC 633 (1928) AIR (O) 263. The discretion of a bankruptcy Court with regard to the period of suspension or the conditions to be laid down with respect to any earnings or income which may thereafter become due to the insolvent cannot be fettered by the provision of the present sub-section. It is a discretion which is incumbent upon a bankruptcy Court to exercise carefully and judiciously with reference to the facts of each particular case. The power of suspending and of attaching conditions to an insolvent's discharge may be exercised concurrently under the present section, *Debi Prasad v Allen Grant*, 39 IC 916.

43. (1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent days as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly.

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is re-committed shall receive such debtor into

his custody according to such recommitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made

Review.

The section is new, and its introduction is explained by Sir George Lowndes in his Speech and his Statement of Objects and Reasons "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor, he files his petition, and if he is in jail he automatically gets his release under the existing Act and he is practically protected from going to jail again. This is the state of things that we have tried to remedy by this Amendment Bill. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court, which we hope will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so will enable the Court to deal with any malpractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled, and it is proposed that he cannot file another petition on the same facts."

Object of the section

The object of sec 43 is to punish the debtor if he does not with due diligence apply for his discharge, *Chinnappa Reddi v Kolakula* 51 Mad 839 54 MLJ 344 109 IC 581 (1928) AIR (M) 26. In the case under sec 43 the adjudication is annulled as a punishment because the debtor has not prosecuted his application for discharge, *Kamireddi Timmappa v Detasi Harpal* 56 MLJ 458 115 IC 815 (1929) AIR (M) 157.

Scope of the section

Section 43 is penal and it deals with the consequences that would follow upon the insolvent either (1) not making an application for discharge within the time specified in the order of adjudication under sec 27, or (2) his not appearing on the day fixed for hearing the application for discharge when he has made one. The section provides that the adjudication order shall be annulled on failure of the insolvent to fulfil either of the above conditions. The result of the annulment of adjudication is to relegate the debtor to his *status quo ante* the insolvency. The creditors will then be at liberty to take such action against his person and property as they could had he not been adjudicated an insolvent. For purposes of limitation the period from the presentation of the

to the date of the order of annulment will be excluded from computation

Sub sec (1), Application for discharge

Under section 41 the Act imposes a duty upon the insolvent to apply for discharge within the time fixed by the Court a breach of which involves the consequences pointed out in sec 43 *Ram Krishna Misra Ex parte* 4 Pat 51 8S1C 70 6 PLT 776 1925 AIR (Pat) 355 The insolvent can apply for discharge at any time though it is obligatory on him to make an application in the first instance within the time fixed by the Court at the outset *Ladha Ram v Prabh Dial* 32 PLR 476 13 IC 575 1931 A.L.R. (L) 672 Without an order of the Insolvency Court an insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge *Mahara/ Hari Ram v Sri Krishna Ram* 49 All 201 Where the Court does not specify the time within which the insolvent is to make an application of sec 27 the penalty adjudication does not

107 IC 830

What is annulment

The only case in which the meaning of the word annulled is *Baly v Johnson* (1842) L.R. 7 C.J. said It is quite clear that the case of a bankruptcy being annulled by whatever means and is not limited by the manner suggested is that the property of the debtor reverts to him upon or relate to a case where the on appeal but was confined the Statute In *Amar Saha v Lali* 476 34 PLR 812 the order adjudicating the debtor insolvent in 1906 was set aside in 1918 on appeal to the High Court the case being remanded with direction to proceed in accordance with law The lower Court in April 1930 a decision which was 1930 The plaintiff pleaded that in computing limitation for a suit instituted subsequently the intervening period between the date of adjudication and the date of annulment should be excluded under sec 78 (2) of the Act It was held that as there was a valid order of adjudication in the present case which was set aside or annulled on appeal sec 78 (2) of the Act was applicable and the period between the order of adjudication and the order of annulment must be excluded The word annulled is not limited to annulment under sec 35 of the Act but applies to annulment by whatever means

Annulment of adjudication is not automatic.

The penalty of annulment under sec 43 is hardly appropriate in the case of an insolvent who comes before the Court in time and applies for extension of the time charge, *Vellachami Chetti v Arumaci* AIR (Mad) 325 So also when the hearing of the insolvent's appli
v Hakim Aminuddin 1930 AIR (Oudh) 474 The annulment of adjudication does not *ipso facto* come into operation without an express order of the Court to that effect under sec 43 of the Act, *Gopal Ram v Mugni Ram*, 7 Pat 375 (FB), 107 IC 830 The Calcutta High Court in *Abraham v Sukeas*, 51 Cal 337 81 Ind Cas 584 1924 AIR (Cal) 777, has held that 'it is true that sec 43 provides that the order of adjudication shall be annulled, but that seems to indicate that it is to be annulled at the instance of the opposite party, or by expiry of the period' Though the provisions of sec 43 are mandatory still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court Wall *Mohamed Cassim v Haji Ayoub Haji Abba & Coy* 144 IC 869 1933 AIR (R) 133 So the order of adjudication has been held not to be automatically annulled, on the failure of the debtor to apply for discharge within the time fixed by the Insolvency Court, *Asa Nand v Jugal Kishore*, 37 P L R 144 159 IC 667 1935 AIR (L) 606, and in the Full Bench case of, *Sh Fazal Azim v Rana Umanath Bux Singh*, 1938 AIR (O) 122 it has been held that "though the provisions of sec 43 are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court, in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge Hence a Court has jurisdic - 27
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Who can apply for annulment

In *Abraham v Sukeas*, 51 Cal 337 81 IC 584 (1924) AIR (C) 777, it has been observed that, 'it is true that section 43 provides that the order of adjudication shall be annulled, but this seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself' Under section 29 (1) of the Bankruptcy Act, 1914 (corresponding to sec 35 of this Act) the Court may on the application of any person interested annul
 tion "Section 43 (1) does not say by whom the annul
 the adjudication has to be made But it is that who
 is affected by the adjudication is certainly
 to the Court under section 43,' *Aru*
Mudaliar, 33 IC 955

Notice before annulment.

There is no provision of law for issuing a fresh notice upon an insolvent who has failed to apply for discharge within the prescribed period to show cause why the adjudication should not be annulled, *Gopal Ram v. Mugni Ram* 7 Pat 375 (F.B.) 107 I.C. 830. Where an application under sec. 53 in relation to an alleged fraudulent transfer of property was pending the Court before annulling the insolvent's order of adjudication for failure to apply for discharge within the appointed time should issue special notice of the course proposed to be adopted to any interested creditor to show cause against such course being adopted. *S. V. A. R. S. Firm v. Maung Pau*, 101 I.C. 589 1927 A.I.R. (R.) 173. Following this case it has been held in *Shankar Lal v. Bansi Dutt* 11 L.R. (1937) All. 855 1937 A.L.J. 773 171 I.C. 594 1937 A.I.R. (All.) 686 that s. 43 of the Act should be read with s. 27 and having regard to the fact that the debtor has been adjudged insolvent on a petition by his creditors and the fact that steps were apparently being taken with a view to initiate proceedings under s. 53 or s. 54 of the Act, notice ought to have been issued to the petitioning creditors before the adjudication was annulled.

Court's power to extend the period for discharge.

There is a conflict of opinion as to the power of the Court to extend the time for discharge under section 43. So far as the Madras High Court is concerned the balance of authority is in favour of the view that sec. 43 is mandatory and that the Court has no power to extend the time after the period specified in the order. *Tirumala Reddi v. Kollala*, 51 Mad 839 54 M.L.J. 344 27 M.L.W. 311 1928 M.W.N. 177 109 I.C. 581 1928 A.I.R. (M.) 26 though in *Arinagan Madalar v. Kandasamy Mudalar*, 53 Ind Cas. 955 1924 M.W.N. 331 1924 A.I.R. (Mad) 655 it has been held that the power conferred by section 27 (2) of the Act to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired, under section 43 of the Act. Section 145 C.P. Code is applicable to the insolvency proceedings by virtue of sec. 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. But Waller, J. dissenting held that sec. 43 is absolutely peremptory in its terms and directly the Court is informed of the insolvent's omission to apply for discharge within the time fixed, the only course open to it is to annul the adjudication. No application for extension of time can lie after the expiry of the period originally fixed. Sec. 145, C.P. Code is applicable to insolvency proceedings only so far as it does not conflict with the provisions of the Provincial Insolvency Act, see also *Hari Ram v. Sri*

Krishna Ram 100 IC 320 *Laksh v. Molar* 86 IC 115 (1925) AIR (L) 416 *Amjal Ali v. Muhammad Ali* 4 O W N 993 105 IC 912

In *Expirta Kankrishna Mista* 4 Pat 51 (1925) AIR (P) 355 it has been held that the debtor has complete discretion to apply for discharge when he likes provided he applies within the period specified by the Court in the order of adjudication passed under sec 27. The word shall in section 41 of the Act imposes a duty upon the insolvent the breach of which involves the consequences pointed out in sec 43. The provision of sec 43 is mandatory and the Court has no discretion to enlarge the period fixed by the Court for an application for an order of discharge. The provision was intended to remedy the defect in Act III of 1907 under which the conduct of the debtor never came under the scrutiny of the Insolvency Court. It is a new provision and should receive strict interpretation. In *Girji Charan v. Sheoraj Singh* 111 IC 903, it has been held that where a debtor who has been adjudicated an insolvent does not apply for an order of discharge within the period fixed by the Court the Court has no power to grant an extension of time and must annul the adjudication under sec 43 of the Provincial Insolvency Act. The same view was held in *Pandit Brindaban v. Official Receiver* 8 Rang 187 1930 AIR (R) 166 which was doubted in the Full Bench case of *Jang Bir Singh v. The Official Receiver*, 11 Rang 287 (FB) 145 IC 320 1933 AIR (R) 223 where it has been held that the Court under sec 43 has a discretion to make or refrain from making an order of annulment as it deems right having regard to the circumstances of the case.

In *Abraham v. Sukeas* 51 Cal 337 81 IC 584 (1924) AIR (C) 777 it was held that under sec 27 (2) the Court has the power to extend the time even after the expiry of the period in the order for discharge. Although the provisions of sec 43, that if the debtor fails to apply within specified time for discharge, the adjudication shall be annulled are mandatory under sec 27 (2), the period within which the debtor shall apply for his discharge, should be extended so that the operation of sec 43 is delayed until the insolvency proceedings have had time to be carried to completion. The words shall be annulled in sec 43 are to be construed as directory and discretionary and not mandatory or peremptory. So the Court in its discretion in the circumstances of a particular case, where the debtor has failed to apply for his discharge within the time originally fixed, has power to extend the time within which the debtor must apply for his discharge. *Saligram v. Official Receiver*, 91 IC 467 (1926) AIR (S) 94. *Chettiar v. Maung Myat Thu* 6 Bur L.J. 5 100 IC 921.

An order of adjudication in insolvency is not *ipso facto* - " by the expiry of the period fixed for applying for discharge, but to be determined by an order of annulment, and until the citation is so annulled, the Court has seisin of the case and h

to extend the time for making the application for discharge under sec 27 (2) of the Act. Time for making an application for discharge may be extended even after the period limited in the order of adjudication has expired, *Kunnamul Nathmul v Anup Sahoo*, 108 IC 803. In *Rup Singh v Official Receiver*, 10 LLJ 156, the question raised was, whether it is open to an Insolvency Court to extend the period specified in the order of adjudication within which the debtor is to apply for his discharge either on the application of the creditors or *suo motu* or whether the power of extension given by sec 27 (2) can be exercised only on the application of the debtor, and the answer of the Court was that the Court has power to extend, on sufficient cause being shown, and that sufficient cause may be patent on the face of the record or may be established by any interested party. It is for the Court to decide whether the cause is sufficient and if it extends the period the later date to which it is extended becomes the last date of the period specified by the Court under section 43 of the Act.

Sec 43 is controlled by sec 27. From these two sections read together, it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has the power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of any body interested. The section merely requires that sufficient cause shall be shown, but it does not say that the debtor alone may apply for extension or shall show sufficient cause. If then, before the expiry of the term fixed an application is made under sec 27 (2), it is obvious that it is not obligatory upon the Court under sec 43 to annul the adjudication. To this extent it is plain that the word 'shall' is not imperative, in *re Lord Thurlow*, *Exp* Official Receiver, (1895) 1 Q B 724, is an authority on this point. Then comes the question, supposing the Court is moved under sec 27 (2) after the expiry of the time originally fixed but before the adjudication is annulled under sec 43, has the Court power to extend the period within which the debtor could apply for his discharge? In the first place, the adjudication does not get automatically annulled under sec 43 on the expiry of the original period. The words of the section show that the Court must make an order of annulment. Section 27 (2) while saying that the Court may extend the time does not say in express terms that it may be extended either before or after the period originally fixed. Sec 148 CPC enacts that the time may be enlarged irrespective of the fact that the application is made either before or after the expiry of the period originally specified.

It is open to the Insolvency Court under sec 27 (2) to extend the time on a proper application to that effect made at any time before the adjudication is annulled under sec 43, *Jethaji Peraji Firm v Krishnayya* 52 Mad 648 57 MLJ 116 1929 MWN 489.

shall revert to the debtor to the extent of his right or interest therein." On the annulment of an adjudication order the property re-vests in the debtor who was adjudged insolvent. Inasmuch as the Insolvency Court has seisin only of the property of the insolvent, the debtor ceases to be insolvent as soon as the order of adjudication is annulled. Hence "an order vesting the property in some person other than the bankrupt may be necessary for the purpose of securing or bringing about the fulfilment of any condition on which the annulment is based, *Flower v The Mayor of Lyme Regis* (1921) 1 K B 488. When the insolvent fails to apply for discharge the Insolvency Court can annul his adjudication. But in order to protect the creditors

of the Court should be that the person appointed by the Court, o, 94 IC 234 (1926) A I R (L) f annulment is that the property of

the insolvent subject to sec 37 reverts to him or to the person in whom the property is vested as at the date when the order of adjudication was passed, *Jang Bir Singh v The Official Receiver* 11 Rang 287. When adjudication is annulled under sec 41 of the Presidency Towns Insolvency Act by reason of the failure of the insolvent to apply for his discharge within the prescribed time, his property should be vested in the Official Assignee or some other officer for the benefit of his creditors. Where, on such annulment, it was directed that the money to the credit of the insolvent's estate be kept in the hands of the Official Assignee pending further order of the Court it was held that it was the intention of the Court to vest the estate in the Official Assignee and that the fund did not revert to the debtor for his benefit, *In re Keshab Lal Dhar*, 60 Cal 259.

Where the insolvent fails to apply for an order of discharge within the time prescribed, the Court is bound to annul the adjudication, though it has power under sec 37 to protect the creditors by directing that the property shall vest in a person appointed by the Court and not vest in the insolvent, *Chinnappa v Kolakula*, 51 Mad 839 54 MLJ 344. The scheme of the Act shows that adjudication does not necessarily lead to the annulment of the insolvent petition vide *Exp Kamreddi v Detasi*, 56 MLJ 100. Insolvency proceedings do not necessarily

come to an end and his property does not ipso facto revert to the insolvent. The Court may, in proper cases, vest in the Official Receiver or other person as provided by sec 37 of the Act. And if before the annulment the Official Receiver had applied to set aside a mortgage under sec 54 of the Act as an act of fraudulent preference he can prosecute the application after the annulment, *Jethaji Peraji Firm v. Krishnayya*, 52 Mad 648, *Shamasundaram Chettiar v Periakaruppan Chettiar*, 58 MLJ 658 31 MLW 546 1930 A I R (M) 520. The language of sec 37 might be taken to imply that the original vesting is put an end to by the annulment of the adjudication.

cation, that is while acts done by the Court or the Receiver upto the date of annulment remain valid, such acts as have not been completed remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court directs their continuance, *Bhadramma v Parateesan Ayyararu* 63 M L J 414 1932 M W N 1105 36 L W 655

(2) *In case where the vesting order is not made* The effect of the annulment of adjudication under s 43 is that the provisions of s 37 apply immediately an order of adjudication is annulled, and if on such annulment no order is made vesting the properties in the Official Receiver the latter ceases to have any right or authority to deal with the properties of the insolvent after the date of annulment *Balusuami Naidu v The Official Receiver, Madras* 1936 M W N 806 44 L W 719 165 IC 207 1936 A I R (M) 915 In a case where no vesting order is made at the time of annulment and no directions are given by the Court to the Receiver, the estate with its liabilities reverts to the insolvent and therefore the Official Receiver appointed on the adjudication ceases to represent the estate of the insolvent and the Receiver no longer represents the creditors

Powers of Appointee under s. 37.

As soon as an order of annulment coupled with a vesting order under sec 37 is made, all acts done by the Receiver shall be valid and the property of the insolvent shall vest in such person as the Court may appoint. The consequences of the annulment are that the insolvent does not get back any property which has already been distributed among the creditors and as to such property as still remains in hand, the Court will to protect the creditors make an order vesting it in such person as the Court may appoint with a view to distribute the same. That person may proceed to sell and distribute the property among the creditors then existing and not call for any future claims. He should proceed to divide the property in his hands amongst the creditors whose claims have been admitted and entered in the Schedule. *Re M F Nazareth*, 25 S L R 367 129 IC 898 1931 A I R (S) 31. There being considerable divergence of judicial opinion as to the powers of the appointee under s 37 after annulment under s 43 of the Provincial Insolvency Act the questions referred to a Full Bench in the case of *Moturi Veerava v Srinuasa Rao* 11 L R 58 M 908 1935 M W N 886 42 L W 386 69 M L J 364 158 IC 1060 1935 A I R (M) 826 were 'Question No 1 Where the Insolvency Court annuls an adjudication under S 43 of the Provincial Insolvency Act (V of 1920) and chooses to pass an order under section 37 vesting the properties of the quondam insolvent in an appointee (Official Receiver or any other person) is the administration in insolvency to continue for the realisation and distribution of the assets by such a person, despite the annulment of the adjudication itself'

Question No 2 If not what is the scope of his function as to the order under section 37 ?

the Insolvency Court retains as to the realisation and disposal of the debtor's assets. That power should not of course be used arbitrarily but should be used in the interests not of this or that individual creditor but of the whole body of creditors which means in other words that the only proper order of the Court to pass is that the appointee should continue to realise and distribute the debtor's property in accordance with the provisions of the Insolvency Act and the answer of the Full Bench to the first question was in the affirmative. It was also laid down in the above case that the Official Receiver has the power to adjudicate the claims under ss 53 and 54 of the Act pending when the order of adjudication is made but in so far as the power of the appointee to initiate proceedings under ss 53 and 54 are concerned it was held that No authority has laid it down specifically that the appointee has any such power and we think that under the terms of the vesting order he clearly could not have it.

Supplementary order of vesting

Where an Insolvency Court while passing an order under sec 43 annulling adjudication has omitted to pass an order under sec 37 directing that the property of the insolvent shall vest in the Official Receiver for the benefit of the general body of creditors it has the power to add it at a later stage. An Insolvency Judge possesses the inherent powers of a Civil Court to make all orders necessary for the ends of justice and prevent abuse of the process of the Court. *Balla Mal v. Mt Fatima Bibi* 15 Lah 698 1934 A I R (L) 468. As was observed by the learned Judges of the Patna High Court in *Chouthmal Bhagirath v. Jokhiram* 12 Pat 168 141 I C 836 1933 A I R (Pat) 84 the order of annulment without making provisions for the protection of the creditors was obviously an order which would have defeated the ends of justice and led to an abuse of the process of the Court and the Court was perfectly entitled to exercise its inherent powers by making the supplementary order.

Setting aside of the order of annulment

When an order of annulment has been passed under section 43 is not open to the Insolvency Court the provisions of Order IX provides a special procedure by means of which the insolvent can have his remedy. According to that section he can after obtaining leave of the Court file a fresh application for adjudication on the same facts. He cannot rely on

the provisions of the CPC by virtue of sec 5 of the Act *Venugopal Chariar v Chimman Lal* 49 M 953 51 MLJ 209 (1926) MWN 674 97 IC 706 (1926) AIR (M) 942

Review of the order of annulment

The Court exercising Ordinary Original Civil Jurisdiction has power to review its orders. There is no warrant for the proposition that a Civil Court cannot correct its own orders or cannot modify any order which it has passed when it finds that the order is patently wrong. The power of review is inherent in the Civil Court and in what cases it can be exercised is laid down in Or 47 CPC. When an Insolvency Court has the same powers and follows the same procedure as a Civil Court exercising Ordinary Original Civil Jurisdiction it cannot reasonably be contended that the power to review has been taken away. Under the English Bankruptcy Act the power to review is specifically given vide section 108. Such provision is not specifically enacted in the Provincial Insolvency Act as the Insolvency Court is invested with jurisdiction which an ordinary Civil Court has in the exercise of its original jurisdiction. The point has been specifically dealt with by Spencer J in *Official Receiver Tanjore v Nataraja Sastrigal* 46 Mad 405 (1923) AIR (M) 355. In *Munnu Lal v Kunj Behari Lal* 44 All 605 (1922) AIR (All) 206 a Bench of the Allahabad High Court held that a District Judge was competent to review his judgment in appeal. *Chella Abbireddi v Chella Venkatarreddi* 51 MLJ 60 23 MLW 644 (1926) MWN 256 94 IC 351 (1927) AIR (M) 175.

Appeal against an order of annulment

There is no appeal against an order under sec 43 (Vide Schedule 1) except with the leave of the Court under section 75 (3) of the Act. But a petition for Revision lies to the High Court by persons aggrieved. In *Chella Abbireddi v Chella Venkatarreddi* 51 MLJ 60 23 MLW 644 1926 MWN 256 94 IC 351 (1927) AIR (M) 175 it was contended that the creditors who have tendered proof of their debts are not persons aggrieved and they are not competent to appeal. The Court observed: It has been brought to our notice that at least two of them have tendered their proof. If they have tendered their proof they are creditors and they are persons aggrieved by the order of the Court annulling adjudication. It was held in *In re Henry Langtry* (1894) 1 Manson 169 that a creditor who had tendered his proof was a person aggrieved within the meaning of sec 104 of the English Bankruptcy Act. In *Ex parte Ditton* *In re Woods* (1879) 11 Ch D 26 the Court of Appeal held that a person who had not tendered his proof was not entitled to appeal as a person aggrieved. So two of the petitioners who have tendered their proof are entitled to appeal. An order annulling an adjudication on account of the failure of the debtor to apply for

discharge within the time fixed by the Court falls within the purview of sec 43 of the Provincial Insolvency Act and cannot therefore be appealed from except with the leave of the Court. The admission of an appeal from such an order by a Division Bench of the High Court may under proper circumstances amount virtually to the granting of leave to appeal. It is open to the Appellate Court to grant such leave even after the hearing of the case *Gopal Ram v Mugni Ram* 7 Pat 375 107 I C 830. In *Ramakrishna Reddi v Official Receiver Bellary* 1938 M W N 18 176 I C 48 1938 A I R (M) 461 a creditor on behalf of himself and other creditors made an application to the District Judge under sec 151 Civil P C read with s 5 P I Act praying that the order annulling the adjudication passed by his predecessor should be modified by vesting the insolvent's estate under s 37 P I Act in the Official Receiver till the debts due to the unpaid creditors were paid under the insolvency law. The District Judge refused to modify the order of his predecessor. It was held that the order of the District Judge was appealable with the leave of the District Judge or of the High Court.

Order of Annulment can not be attacked collaterally

An order of annulment of adjudication though ill considered but not made without jurisdiction cannot be set aside in collateral proceedings. Where the insolvency Court extends the period for discharge and in absence of an application for discharge during such period annuls the adjudication it has jurisdiction to do so. If a creditor who is affected by the order does not go in appeal or revision against it but only appeals against decision of the Court that he has failed to prove his debts the order of annulment of adjudication cannot be set aside in such collateral proceedings and holds good *J N Mundara v Nemsu Rajpal & Co* 1935 AIR (N) 246

Sub sec (2), Effect of annulment

The intention of the Legislature was to ensure that the conduct of the insolvent should be in all cases brought under the scrutiny of the Court. The penalty for not applying for discharge is that the insolvent is liable to imprisonment or to the result that he is liable to imprisonment but on his creditors but on his imprisonment and any other form of execution for debts at the instance of judgment creditors — *Civil Justice Committee Report* p. 233. When an adjudication is annulled under sec. 43 the insolvency proceedings automatically come to an end except so far as they are kept alive by order passed under sec. 37. Such acts in the insolvency as have not been completed at the time of annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court directs their

continuance. An enquiry under sec 53 begun prior to the annulment stops short where it is on the date of the annulment but the Court has the power at the time of annulling the adjudication to give a direction to continue the enquiry. It is clear from secs 43 and 37 that when an adjudication is annulled under sec 43 the insolvency proceedings will come to an end except so far as they are kept alive by order passed under sec 37. That position has been clearly laid down in *Jethaji Peraji Firm v Krishnayya* 52 Mad 648. *Prima facie* if the adjudication is annulled under sec 43 the insolvent is placed *status quo ante* the insolvency *Bhadramma v Parvateesam Ayyararu* 63 MLJ 414 139 IC 574 1932 AIR (M) 731. When the Insolvency Court passes an order of annulment under sec 43 (1) and imposes no conditions under sec 37 (1) the debtor reverts to the position that he was in before the insolvency and the Court no longer has jurisdiction to set aside a transfer which as between the debtor as transferor and transferee is valid in law and not open to challenge. The provisions of sec 43 (1) are directory and not mandatory so that the Insolvency Court has power to refuse to annul the order of adjudication in circumstances which make it just to refuse and the Court would thereby retain jurisdiction to decide an application for setting aside a transfer under sec 53 or sec 54 *Jagannath Ramratan v Hirulal* 1934 AIR (N) 73.

Validation of suits and other legal proceedings without leave on annulment

When an order of adjudication is annulled it is annulled for all purposes and accordingly even although it may be that had the suit come up for disposal at the time when the defendant was till an adjudicated insolvent the point as to absence of leave might have been taken yet as soon as the adjudication was annulled the position was as though there had never been any necessity for obtaining the leave of the Court and the suit therefore was in no way different in this respect from any other suit *Chandmull Sardarmull v Satya Charan Dawn* 42 CWN 34.

44 (1) An order of discharge shall not release the insolvent from—
Effect of order of discharge

- (a) any debt due to the Crown
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party, or
- (d) any liability under an order for munter

made under section 488 of the Code of Criminal Procedure, 1898

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts provable under this Act

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him

Review

This is section 45 of Act III of 1927 and corresponds to sec 45 of the Presidency Towns Insolvency Act III of 1909 and section 28 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows

(1) An order of discharge shall not release the bankrupt—

- (a) from any debt on a recognisance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any breach of the public revenue or the suit of the Sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom, or
 - (b) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party or
 - (c) from any liability under a judgment against him in an action for seduction or under an affiliation order or under a judgment against him as a co respondent in a matrimonial cause except to such an extent and under such conditions as the Court expressly order in respect of such liability
- (2) An order of discharge shall release the bankrupt from all other debts provable in bankruptcy
- (3) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order the bankrupt may plead that the cause of action occurred before his discharge

the King shall be preferred to that of the subject and that interests of the individuals are to be postponed to the interests of the community *New South Wales Taxation Commissioner v Palmer* (1907) A C 179

Sub sec (1), Clauses (b) & (c), Discharge does not release from debts incurred by fraud or fraudulent breach of trust

Debts incurred by fraud in so far as they are the subject of actions of tort have never been provable and therefore have never been barred by the order of discharge. The right of a creditor to sue in respect of a debt incurred by fraud or breach of trust of a character would seem to arise at the time of the discharge. *Exp Hemming* (1879) 13 Ch D 163. Until discharge execution in such an action would be restrained. *Cobham v Dalton* LR (1875) 10 Ch 655 but the action itself will not be restrained and the creditor can proceed up to judgment in any action to which the discharge would be no defence. *Ex parte Coker re Blake* LR (1875) 10 Ch 652. Where the bankrupt had knowingly put forward false statements in a prospectus even if he had not knowledge of the true facts it was a fraudulent act for him for his own advantage to issue a statement which is false in fact being utterly careless whether it was true or not. *Duce and Duce* (1889) 6 Morr 290. A company promoter who had made a secret profit was guilty of fraud and breach of trust and the debt incurred to the company was a debt incurred by fraud and breach of trust therefore not released by an order of discharge. *Emma Silver Mining Co v Grant* (1880) 17 Ch D 122. See also *Panangupalli v Ramchandra* 28 Mad 152 (FB) 15 MLJ 1. It is necessary that the insolvent should be personally implicated in the fraud or fraudulent breach of trust. So a liability as partner for the fraud of a co partner would not come under this section. *Cooper v Pichard* (1883) 11 QBD 351.

An insolvent was discharged in 1930. A decree holder who had obtained a decree in 1929 and who was ignorant of the insolvency proceedings put into execution his decree after the insolvent's discharge. It was held that the debt was one provable under the Act within the meaning of sec 34 (2) that the fact that the creditor was not informed of the insolvency proceedings did not prove that the debt was incurred by fraud within the meaning of sec 44 (b) and that the insolvent was released from the debt by his discharge. *Pirithi Raj v Vishnu Das* 144 IC 888 1933 AIR (All) 340. Where money representing the estate of the testator is mixed up by the executor with his own money and dissipated he must in the absence of anything shown to the contrary be deemed to have applied it to his own use. Such user is a fraudulent breach of trust within the meaning of Sec 45 (1) of the Presidency Towns Insolvency Act (corresponding to section 44 (1)(b)) and an order of discharge in insolvency does not release him from liability. *Dulal*

Chandra v Hiralal Mondal, 42 C W N 965 The fact that a person conceals an important circumstance but for which concealment another person would not have acted as he did and does so with the intention of causing him so to act is equally a fraud. It constitutes the offence of cheating as much as an actual untrue representation. An insolvent incurred a debt on a Pro note on 9th December 1931. Before that date on 11th October 1931 he had filed his own petition to be adjudicated as an insolvent. The said petition was prosecuted and on the 21st November 1932 he was adjudicated. He was given one year's time to apply for discharge and at the end of that time he did apply for discharge and an order of discharge conditional on payment by him of one anna in the rupee was granted. The payee of the Pro note filed a suit subsequently and the discharged insolvent pleaded his insolvency and subsequent discharge in defence. It was held that the act of the insolvent in executing a Pro note after he filed a petition for adjudication without disclosing that he had done so was not only dishonest but it also amounted to a fraud within the meaning of s 44 (1) (b) Provincial Insolvency Act, and therefore the insolvent was not by reason of his discharge in the insolvency discharged from his liability to pay the debt. *Srinivasulu Naidu v Sundaresa Iyer*, 1937 M W N 404 172 IC 797 1937 AIR (M) 677. An order of discharge has not the effect of revesting property in the insolvent. *Khemchand v Hemandas*, 31 SLR 506 1937 AIR (S) 306. There is no provision that property, which is vested in the Insolvency Court would re-vest in the insolvent on the passing of the absolute discharge, and it was never contemplated that an insolvent should get an order of absolute discharge and yet retain part of his property. S 44 (2) means that the order of discharge frees the insolvent from liability for all debts provable under the Act, but does not free his property from such liability. So, when after an absolute discharge of the insolvent, his property is vested in the Insolvency Court but remains unsold and if a creditor applies to Court for sale of the property, the Court is bound to allow the application. *Suka v Ramchandra* 1 LR (1937) Nag 380 170 IC 161 1937 AIR (N) 171. So far as the debts due from the insolvent at the time of the order of adjudication are concerned he is released from them on an order of discharge. But the power of the Official Receiver to deal with the property which vests in him at the time of the order of discharge does not cease with the passing of the order of discharge. *Kanshu Ram v Hari Ram* 1 LR 17 L 775 171 IC 610 1937 AIR (L) 87.

Sub sec. (1), Clause (d) : Discharge does not release from liability for maintenance.

This clause is new. Its introduction is thus explained in 'Notes on Clauses'. The effect of existing section 45 is to release a discharged insolvent from liability under an order of

made under section 488 of the Code of Criminal Procedure 1898 and in this respect the section is in conflict with section 45 of the Presidency Towns Insolvency Act. It is proposed to bring it into accord with the latter Act. Formerly there was divergence of opinion as to whether an insolvent who had obtained an order of discharge was released from his liability to pay maintenance or arrears of maintenance as ordered by a Court. In *Tokue Bibi v Abdul Khan* 5 CrL 536 it was held that arrears of maintenance included in the schedule was a debt. But in *In the application of Pamanmal Hemanmal* 10 SLR 28 35 Ind Cas 541 it was held that maintenance ordered to a wife is not a debt provable under the Act and hence the order of discharge will not release the insolvent from the liabilities to pay arrears of maintenance and to be imprisoned for non payment. The conflict in the law has been set at rest by the enactment of this new clause (d). In *Halfhide v Halfhide* 50 Cal 867 it has been held that the fact that a husband who is in arrears of maintenance has been adjudicated insolvent under sec 27 of the Provincial Insolvency Act V of 1920 is conclusive as long as the order of adjudication stands that he is unable to pay the amount due and he is therefore not guilty of wilful neglect within sec 488 (3) of the Cr P Code.

Sub section (2), Discharge releases from all provable debts

In s 44 (2) of the present Act which corresponds to sec 45 (2) of the old Act 111 of 1907 all debts provable under the Act have been substituted for the words all debts entered in the schedule. The effect of this is to bring the law in a line with the Bankruptcy law in England and to extend the protection to the debtor in respect of all debts which are provable under the Act. *Firm Pannalal Tassadaq Hussain v Firm Hira Nand Juan Ram* 8 L 593 102 IC 37 1928 AIR (L) 28 *Ponnusami Chettiar v Kaliaperumal Naicker* 113 IC 550 1929 AIR (M) 480 *Firm Ganga Din Gur Pershad v Jagmohan Singh* 1936 OWN 52 160 IC 229 1936 AIR (O) 226. When after the order of discharge of the insolvent the decree holder who had no notice of the insolvency proceedings applies for execution of his decree he would have to seek recourse to the insolvency Court for recovering his debt even if he had no notice of the insolvency proceedings and was not represented in it. *Bisham Chand v Kisanlal* 1939 NLJ 96 1939 AIR (N) 103. An order of discharge except in certain cases has the effect of releasing the bankrupt from all debts provable in bankruptcy and a promise to pay a debt barred by an order of discharge without fresh consideration is *nudum pactum* —Halsbury Vol II p 269. Applying this principle it was held in *Kathayan Chettiar v Govindaswami Chettiar* 35 MLW 449 1932 AIR (M) 416 that a creditor could not enforce a debt against a debtor incurred after the order of discharge in consideration of a debt incurred before the date of the presentation of the petition in insol

veny by reason of the prior debt being automatically discharged on the discharge of the insolvent under sec 44 (2) and hence there was no consideration for the debt incurred after discharge. A fresh agreement by a discharged insolvent, after discharge promising to pay debts contracted before insolvency, in order to be enforceable must be based on fresh consideration which must be real. Mere assistance in the nature of supplying meals and trying to procure employment without any thought of consideration at all, are not such factor as to make the consideration real. Where a debt related to a *hundi* given by the plaintiff as security, to a Bank for a loan taken by the defendant and on a suit being brought by the Bank, the plaintiff had undertaken to liquidate the debt by a series of instalments which had not yet been completed, but the plaintiff had not proved the liability in the insolvency proceedings, it was held (in an action brought against the defendant after his discharge) that the plaintiff's claim based on a revival of the old guarantee by the promissory note was unenforceable inasmuch as the order for discharge of the defendant was a bar to any fresh suit. *Sudhansu Mohan Bagchi v Khitish Chunder Das Gupta* 39 CWN 563. It is a general rule that a discharge, whether absolute or conditional puts an end to all debts provable in bankruptcy. An order or certificate of discharge was held to be a good defence in an action for a debt provable in bankruptcy or liquidation though the debtor made a subsequent promise to pay the debt from which he was so discharged. *Heather v Webb*, (1876) 2 CPD 1, and though the creditor knew nothing of the bankruptcy or liquidation, *Elmslie v Corrie*, (1879) 4 QBD 395. The rule of law enacted by sec 44 (2) is, that an order of discharge shall release the insolvent from all debts provable under the Act is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not on any rule of constructive notice. Where no question of fraud is involved the fact that a creditor had no notice of the insolvency proceedings does not prevent the operation of sec 44 (2) as against him and the order of discharge releases the insolvent from the debt provable under the Act which was due to the creditor, *Kundan Lal v Nathu*, 55 All 636 1932 ALJ 1340 146 IC 765 1933 AIR (All) 600.

In this connection the difference in effect of the order of discharge between the present Act and CPC 1882, should be noted. In *Harapriya Devi v Shama Charan*, 16 Cal 592 it was observed 'We think it is necessary for us to notice what does appear at first sight to be somewhat anomalous in the provisions of sec 352. As the learned pleader points out, although an insolvent may come into Court seeking to be released from his debts and although the object of those proceedings is to release him from those debts, if a creditor does not come in and prove his debts, this would prevent an insolvent acquiring the relief that the Code contemplates

limit their remedy for the purpose of realising the same from the assets vested in the Court or receiver according to the provisions of s 28 of the Act. *Arjun Das v Marchia Telini* 1936 A I R (C) 434. Though an order of discharge releases the bankrupt from certain debts provable in bankruptcy, its effect is not to destroy the debt as though it had never been. If a creditor can otherwise realise his debts there is nothing in the Insolvency law which precludes him from doing so as the debt is not extinguished. In *Haji Abdul Kuthus Sahib v Inayatulla Sahib*, 1937 M W N 279 170 I C 851 1937 A I R (M) 727 certain property was attached in a suit before judgment. The wife of the judgment debtor preferred a claim to the property but it was disallowed. The judgment debtor was adjudged insolvent after the decree and then an order of discharge was also passed. The Official Receiver did not take possession of the property attached nor any proceedings in respect thereof. In a suit between the judgment debtor and his wife to which the decree holder was not a party, it was decided that the property belonged to the wife. After the death of the wife the judgment debtor obtained the property as her heir. An application was made by the decree holder to execute the decree by attachment and sale of that property. It was held that decree debt was not extinguished by the insolvency of the judgment debtor. The judgment debtor must be deemed to have taken the property after the death of his wife subject to the result of adjudication against her, and the property was therefore liable to attachment and sale in execution of the decree.

Discharge does not divest property.

If the property of the debtor at the time of the adjudication was his property or if it had come into the hands of the Official Receiver for realisation then after discharge, it could no longer have been open to a creditor to pursue his claim against the debtor or his property. But when the property was already attached before adjudication and was subsequently transferred by the debtor, such transfer being contrary to the provisions of s 64 of the Civil P Code was not void absolutely but only as against all claims enforceable under the attachment. The transferee does not stand in the better position by reason of his transferer's subsequent discharge by the insolvency Court or that the transferer's discharge operates to relieve the property in the hands of the transferee from subjections to the claims under attachments. *Doraisami Pillai v Arumuga Naicker*, 42 L W 834 69 M L J 799 1935 M W N 1328.

The discharge of the insolvent cannot possibly mean the divesting of the Official Receiver. It cannot be said that the Insolvency Court becomes *functus officio* as soon as the insolvent is discharged for it is not necessary for the Court to wait until all the assets of the insolvent have been realised and distributed among the creditors in order to discharge the insolvent. The proceedings in insolvency can undoubtedly go on in respect of the property in the

of the Official Receiver in spite of the order of discharge *Mahange Lal v Firm Suraj Prasad Chandu Lal*, 1938 A L J 1151 1939 A I R (All) 114

Discharge does not affect secured creditors

An order of discharge does not affect the rights of a secured creditor against the insolvent, *Sudhar Narayan v Atina Ram*, 7 Bom 455 But when a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent *Hatuli Shah v Md Hussaina Jan*, 1938 A I R (L) 217

Sub section (3) ; Discharge of a debtor does not release a co debtor.

Although a co-partner with the insolvent is not discharged from liability by an order of discharge in respect of the insolvent, the insolvent is released from liability both in respect of the separate debts and partnership debts included in the schedule *Ex parte Maund*, 16 Eq 615 A certificate of discharge granted to one of several joint grantors of an annuity discharges the bankrupt and not the others, *Baxton v Nichol* 4 Taunt 90 A surety who is compelled to pay the creditors after the discharge of the debtor in insolvency proceedings is not entitled to recover the amount paid by him from the debtor inasmuch as a surety has a right of proof in respect of contingent liability as a surety and a discharge releases the debtor from all debt provable under the Insolvency Act *Gangadhar v Kanhai* 26 A L J 425 109 I C 421 (1928) A I R (A) 306, following *In Re Blackpool Motor Car Co.*, (1901) 1 Ch 77 The discharge of an insolvent does not release his surety from liability to be proceeded against in execution of decree passed jointly against him and the insolvent *Nazukrao v Janantras*, 18 N L J 145

Effect of discharge outside India.

An order of discharge does not operate outside British India so as to prevent recovery of the debt there out of the property there which has not been taken by the Receiver, *Lakuram Kevalram v Punamchand*, 45 Bom 550 Where a discharge had been granted to an insolvent in a foreign country which extinguishes a debt, it forms a good answer to an action in England brought in respect of a debt which was contracted in the country where the discharge was granted, *Potter v Brown*, 5 East, 124 But it is otherwise if the debt was one contracted in England *Bartley v Hodges*, 1 East 6 But where a discharge had been obtained in England, it forms a good answer to an action brought in Courts subject to English jurisdiction in respect of a debt contracted in any part of the world, *Armani v Castrique*, 13 M & W 447

PART III.

Administration of Property.

This chapter deals with the administration of the property of the insolvent either by the Court or through the Receiver appointed by the Court. Under sec. 20 the Court when making an order admitting the petition may, and when the debtor is the applicant shall, appoint an *interim* Receiver of the property of the debtor or any part thereof and may direct him to take immediate possession thereof or any part thereof. And under sec. 28 on the making of an order of adjudication the whole of the property vests in the Court or in the Receiver appointed by the Court to be divisible amongst the creditors and the insolvent shall aid to the utmost of his power in the realisation of his property and distribution of the proceeds amongst the creditors. The provisions under this chapter are chiefly concerned with (1) proof of debts, secs. 45-50, (2) effect of insolvency on antecedent transactions, secs. 51-55, and (3) the realisation and distribution of the property of the insolvent, secs. 56-67.

Method of proof of debts

45 A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Debt payable at a future time

Review.

This is section 29 of Act III of 1907 and corresponds to Rule 24 Sch. II of the Presidency Towns Insolvency Act, 1909 and is based on Rule 21 (now 22) of Schedule II of the Bankruptcy Act, 1883 (now 1914). The enactment of this section in Act III of 1907 was thus explained in the Notes on Clauses to that Act: "It may be doubted whether claims payable at a future time is a debt for the purpose of rateable distribution. Rule 21 of the Second Schedule of the Statute of 1883 has accordingly been adopted so as to include such claims."

Proof of debts payable in future.

Under section 34 (2) all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication shall be deemed debts provable under this Act. The effect of section 30 and Rule 22 of Schedule II of the Bankruptcy Act, 1914, [corresponding to sections 34 (2) & 45 of this Act] is that when a debt is by contract payable at a future date, with interest in the meantime, and the bankruptcy ensues before the time when the interest first accrues, the creditor must deduct the rebate from the dividend upon it, and then to value the liability to pay interest and prove for that value the dividend on which does not fall within the section so as to be liable to rebate. If the rate of interest contracted for is six per cent the principal sum should be proved as a present debt and no rebate deducted from the dividend. *Re Brown and Wingrote*, (1891) 2 Q B 574.

For proof of debts already due with interest, vide sec 48 and notes thereunder, infra

46. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

Mutual dealings and set off

Review.

This is section 31 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and corresponds to sec 30 of Act III of 190 and sec 31 of the Provincial Insolvency Act, III of 1909 and (

Mutual dealings.

If a creditor who proves himself indebted to the bankrupt, it would be unfair to make him pay his debt in full and allow him only a dividend on the debt due to him. Where there have been mutual credits debts or other dealings between the bankrupt and another person then on the trustee demanding payment of any sum due to the bankrupt, the other person is entitled to set off any sum

that may be owed to him by the bankrupt. Of course a person is not entitled to set off as against the trustee in bankruptcy a debt that is not binding on the trustee such as debt which he allowed the bankrupt to contract with notice at the time of an available act of bankruptcy (sec 31 Bankruptcy Act 1914). A mutual credit means reciprocal demands which must naturally terminate in a debt. There is no debt due by a drawer of a bill of exchange until dishonour. *Miller v The National Bank of India* 19 Cal 146. When there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to the other in respect of such mutual dealings although the debts may be unconnected with such other and the balance of the account and no more has to be paid. The law is not that the receiver in insolvency can recover the full amount due to the insolvent leaving the creditor to take a *pro rata* dividend only. The above principle of sec 46 of the Provincial Insolvency Act and sec 47 of the Presidency Towns Insolvency Act applies to companies in liquidation by virtue of sec 229 of the Indian Companies Act the only exception being the case of a contributory who cannot set off the dividend that may come to him afterwards.

Order 19 of the Civil Procedure Code allows a claim to set off and even in cases which do not come strictly within the rule it can do so on general principles and in exercise of an inherent power. *Krishna Chandra Bhoumick v Pabna Dhanabhandar Co Ltd* 39 CWN 106 60 CLJ 281.

Long before the making of statutory provisions on the subject it was the practice in bankruptcy where there was a debtor and creditor account between the bankrupt and another person to take the account between them and to adjust the balance provided that the debts were connected with each other. The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take *pro rata* dividend only. Sections 46 of the Provincial Insolvency Act and 47 of the Presidency Towns Insolvency Act deal with this matter in the way indicated above. The term mutual dealings has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt for the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set off under the said provisions against a claim for rent and in the law

reports diverse other cases can be found, *Krishna Chandra Bhoimick v Pabna Dhanabhandar Co Ltd* 39 CWN 106 60 CLJ 281

The mutual dealings must be between the same parties. So a joint debt cannot be set off against a separate debt nor a separate debt can be set off against joint debt, *Bishop v Church* 3 Atk 691. The right of set off will be found to exist not only in cases of mutual debts and credits but also where the cross demands arise out of one and the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit, *Stephen Clerk v Ruthnavello Chetty*, 2 MHC R 296. The object of a set off is not merely to avoid cross actions but to do substantial justice and prevent the great injustice which would arise if a person who is insolvent's creditor on one account and his debtor on another is compelled to pay the entire amount due by him, receiving only a dividend on the amount due to him, *Seth Radhakissen v Firm of Ganga ram Radha*, 95 PLR 1914 23 Ind Cas 927.

Mutual credits that may be set off include credits that have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. So claims in respect of bills and notes discounted for the insolvent before insolvency but dishonoured by the makers after insolvency may be set off. *In the matter of, Cantham*, 33 Mad 53 S. 33 Mad 467 7 M L of mutual dealings.

AIR (S) 153. A person had a personal account with a bank on which he had withdrawn. He was also interested in another account which was in the name of the firm of which he was a partner and which he alone operated on. This latter account was in credit. The liquidators of the bank sued the person for the amount due under his personal account. The plaintiff's claim the amount due to him in the firm's name on which that sec 229 of the Indian Companies Act made the provisions of the dealings in question. *Union of sec 46 and set off v Mohan Lal*, 8 L 105.

The words "mutual dealings" referred to in the section refer to mutual dealings at the time of the insolvency, and cannot refer to a purchase by one of the debtors of a claim against the insolvent long after the insolvency. Reference may be made in this connection to the case of *Dickson v Evans*, (1794) 3 RR 19. Lord Kenyon in the course of his judgment made the following observations: "But it would be most unjust indeed if one person who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted by any intrigue between himself and a third person

so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of bankruptcy and cannot be varied by any change of situation of one of the parties" *Ma Yait v. The Official Assignee*, 9 Rang 373

Joint-debt.

A joint debt cannot be set-off against a separate debt under the Provincial Insolvency Act. Thus where A & B are sued by a bank on joint promissory note, B cannot set-off against the bank's claim on the note, an amount admittedly due to him from the bank on his deposit account, since the dealings on the deposit account and on the promissory note are of a different character and do not come within the term "mutual dealings," *Trimbak Gangadhar v. Ram chandra*, 23 Bom L R 537 63 Ind Cas 906

Elements of set-off.

It should be noted that to constitute a case of set-off the amounts recoverable by each against the other must (1) be ascertained, (2) be legally recoverable and (3) be between parties of the same character, (Or VIII, r 6, C P C), *Ascertained sum* does not mean a sum admitted but a sum the amount of which is known, *Eduard v Ramdin*, 14 C W N 170. The word *ascertained sum* used in Or VIII C P C, is used to exclude such items as unliquidated damages and mesne profits the amounts of which are not ascertainable until the Court determines them. Where a defendant says that there were definite sums of debit and credit between the parties and that on the date of the suit a definite known balance, the amount of which is given in the written statement was due to the defendant from the plaintiff, the sum so claimed is an *ascertained sum* for which a set off is allowed, *Har Prosad v Ram Suarup*, 82 Ind Cas 340

The defendant opened a speculative account with a firm of stock-brokers and deposited with them as security for any debit balance which might from time to time be owing by him on that account, the indicia of title to various bonds and shares including certain rubber-shares. In 1920 the firm sold the rubber shares without the knowledge or authority of the defendant who was kept in ignorance of the sale till after the bankruptcy of the firm. On 16th February, 1922 a receiving order was made against the firm and they were adjudicated bankrupt. In February, 1923, the trustee in bankruptcy of the firm rendered the defendant a final account, which after giving credit to the defendant for the proceeds of the sale of the shares showed a balance due from the defendant. In an action to recover that balance the trustee claimed that the rights of the parties ought to be adjusted under the mutual credits clause, the Bankruptcy Act, 1914, as at the date of the receiving order.

Lawrence J, in ordering the account to be taken, directed that the value of the shares, to be ascertained when the account was certified (that being the date when the shares ought to have been returned to the defendant), should be set off against the claim of the trustee. It was held in appeal, that the brokers could not have maintained an action for their debt if they were not in a position to hand over the shares against payment, and that the trustee in bankruptcy had no higher right, that no question of set off arose under the mutual credits clause of the Bankruptcy Act 1914 the right of the defendant being to a return of the shares in specie. *Trustee of the Property of Ellis & Company v Dixon Johnson* (1925) A C 489

Right to set off

In *Baker v Lloyds Bank Ltd* (1920) L R 2 K B 322 defendants acted as bankers of a firm up to February 3 1914 when the firm being insolvent by deed assigned all their properties to the plaintiff as trustee for their creditors. The deed provided that payments to the creditors should be made upon the basis of a bankruptcy distribution of the property and that the secured creditors should have the same rights as under a bankruptcy. At the date of the deed the firm had £2 943 to the credit of their current account in the defendant bank, and the bank held certain shares as security for an advance to the firm. These shares were subsequently sold by the bank who realised £812 in excess of the amount of the advance to the firm. Before February 3, 1914 the firm had discounted with the bank a number of bills of exchange which matured after that date and in respect thereof the firm became debtors of the bank to the amount of £1,941. In an action by the plaintiff as trustee under the deed to recover from the bank the two sums of £2 934 and £812 the bank claimed a lien on those sums and also to set off a sufficient portion of £1 941 against those sums. It was held that the bank's claim was right on both points.

An executing Court can entertain a claim to set off. In execution of a decree for costs obtained by a decree holder in the Privy Council the judgment debtor is entitled to claim a deduction of the sum of money previously recovered by the decree holder on account of the decree for costs awarded by the subordinate judge which decree was ultimately reversed by the Privy Council. The fact that in the meantime the decree holder company went into liquidation will not affect the claim of the parties, *Krishna Chandra Bhoomick v Pabna Dhanabhandar Co Ltd*, 60 C L J 281 39 C W N 106

Palmer & Co, borrowed a large amount as a collateral security accompanied with a written agreement authorising the bank in default of payment of the loan by a given day 'to sell the Company's papers for the reimbursement of the bank rendering to Palmer & Co any surplus. Before default Palmer & Co was declared

insolvent. At the time of the adjudication the bank was also the holder of 2 Promissory Notes of Palmer & Co., which they had discounted for them before the transaction of the loan. The time for repayment of the loan having expired, the bank sold the Company's papers and after satisfying the principal and interest due on the loan, there was a considerable surplus. In an action by the Official Assignee of Palmer & Co., to recover the amount of the surplus, it was held that the bank could not set-off the amount of the promissory notes as "the deposit of Palmer & Co., did not amount to a credit given, and Palmer & Co., giving the bank a power to possess itself the surplus after repaying its own debt when the debt shall become due cannot be said to be giving a credit to the bank." *James Young & Ors v Bank of Bengal*, 1 MIA 87.

The above case was distinguished in *Alsagor v Currie*, (1844) 12 M & M 751 and also in *Naoroji v Chartered Bank of India*, (1868) LR 3 Ch Prac 444 on two grounds, (1) that in 1 MIA 87 the deposit was not simply a delivery of security for the purpose of receiving the money but a deposit of the security with power of sale and (2) that though there was a power to sell and to pay over the surplus it was only in present a bailment. This case was distinguished also in *Miller v Beer* 6 CLR 294 on the ground that each party there actually owed a debt to the other though the exact amount of one debt was in dispute, whereas in 1 MIA 87, there was a deposit of Government Securities by one party for a specific purpose and that there was no mutual credit and no mutual debt. The leading case of *Rose v Hart*, 2 Smith's Leading Cases, 9th Ed., 324, shows that the credit must in its nature terminate in a debt or as Byles J., puts it in *Naoroji v Chartered Bank* supra "mutual credit means simply reciprocal demands which must naturally terminate in a debt." See also cases under Or VIII r 6 & Or XXI, r 8 of the CPC.

Due.

The word "due" as used in sec 46 means "legally recoverable" and not debts which have become time barred. The Official Receiver has no right to set off against the creditor's claim a time barred claim against the creditor. *T V Gopalakrishna Ayyar v Official Receiver*, 1930 MWN 837 1930 AIR (M) 998.

Costs ordered to be paid by a petitioning creditor to a debtor when an adjudication in bankruptcy is set aside cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor by the debtor, *In re Ebrahim Ahmed* 32 Bom LR 1076 128 IC 24 1930 AIR (B) 516.

Account.

Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the or

to the other in respect of such dealings and the balance of the account and no - - - - - the other, *Krishna Chandra Bhounu* Ld 60 CLJ 281
The Act is silen shall be taken of
what is due from one party to the other Accounts have to be taken till the date of the order of adjudication, *Exparte Barrel*, 34 LJ 41

47. (1) Where a secured creditor realises his security, he may prove for the balance due to
Secured creditors. him, after deducting the net amount realised

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt

(3) Where a secured creditor does not either realise or relinquish his security he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of the security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend

Review.

This is section 31 of Act III of 1907 and corresponds to Schedule II, Rules 9-11, 15 of the Presidency Towns Insolvency Act 1909 and Rules 10-18 of the Second Schedule of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926

Sub section (1), Secured creditor.

Under section 2 (e) a secured creditor means a person holding a

mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor (sec 167, Bankruptcy Act) It is well-established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. He is in the position of a person beneficially entitled for the time being to an interest in bankrupt's property. To the extent of the security, the bankrupt, as already pointed out [vide sec 28 (6)], is in control of the property, if in control at all, as in a sense, a trustee for the secured creditor, and the property does not pass to the Receiver because not divisible among the creditors. If the bankrupt has no beneficial interest in the property which he holds and no rights over it exerciseable on his own behalf, it is obvious that it is not really his property at all, and no possible benefit could accrue to the creditors from its vesting in the trustee, *Richardson, In re*, (1911) 2 K B 705

The following are some of the instances of secured creditors —

Mortgagee — A mortgagee of the property of the insolvent is not a person proving in the bankrupt's estate, he is a secured creditor and is entitled out of the sale of the mortgaged property to be paid his principal and interest at the contractual rate up to the date of payment and costs, *Jugal Kishore v Bankim Chandrai*, 41 All 481 17 A L J 480 51 Ind Cas 192. The owner of a printing and publishing business who owed to a bank entered into an agreement with the bank to the effect that all books then in stock and all books to be published thereafter were to be made over to the bank and that a commission at a certain rate was to be allowed to the bank on the sale of the books, and the sale proceeds were to be credited to the debtor's loan account. It was held that the bank was entitled to rank as a secured creditor of the owner of the printing and publishing business on the insolvency of the business, *Allahabad Trading and Banking Corporation v Ghulam Muhammad*, 37 All 383

Money decree holder — In *Purshottam Das v E B David*, 13 A L J 893 30 Ind Cas 779, it was held that a decree holder was a secured creditor, the money set apart for him as a condition precedent for the setting aside of an *ex parte* decree being a security to him which he might draw and appropriate to his own use. "Attachment before judgment of a debtor's property at the instance of a creditor of his, prior to his adjudication as an insolvent, does not confer any right of property on the attaching creditor as against the Receiver in bankruptcy, inasmuch as the attachment does not constitute the former a secured creditor, nor does it give him any charge or lien over the attached property. This principle, however, does not apply to the case of a creditor in whose favour an order has been made by a Court directing the debtor to bring deposit with a specified person a certain sum of money, to be kept as abiding the result of a creditor's suit or as

for him and the insolvency Receiver gets no priority over the creditor in respect of such amount of deposit *Gouranga Behari Basa'* 58 CLJ 222 37 CWN 475
 145 *Bansilal v Kashinath* 29 NLR
 303 229

Unpaid vendor—An unpaid vendor of immovable property has only an equitable right under section 55 (4) (b) of the Transfer of Property Act to recover the purchase money from the property that he has sold and does not obtain the status of a secured creditor of the vendee until his right is declared by a decree of Court *Mokshagunam Subramania v S B Ramkrishna* 70 Ind Cas 357

Equitable assignee—A person who was carrying on business in the sale of goods wanted money for that purpose and he entered into agreement with another that the latter was to advance moneys for the purchase of goods and as and when the goods were sold the realisations were to be paid to the creditor's account in his bank. The debtor became an insolvent. It was held that the agreement did not create any right of property in either the goods or the proceeds of the sale of the goods amounting to an equitable assignment such as would be binding on the trustee in bankruptcy *Palmer v Carey* 95 LJPC 145 (1926) AC 703

Rent decree holder—A decree for arrears of rent of an under tenure was obtained against a tenant who became insolvent and his tenure became vested in the Official Assignee. An application was made under the Rent law for an order that the tenure should be sold for its own arrears. The Official Assignee objected and contended that the decree holder's only remedy was to prove in the insolvency for the amount of his debt. It was held that whether the arrears of rent became due before or after the insolvency of the judgment debtor the decree holder was entitled to sell the tenure in execution of his decree *Chundra Narain Singh v Kishen Chand Golicha* 9 Cal 855. This very point was raised in the Madras High Court in the case of *Chinna Subbaraya v Kandasami Reddi*, 1 Mad 59 in which it was held that the interest of the patta holder is one dependent upon his payment of rent and if he does not pay his right to do it ceases and becomes saleable for the arrears. By virtue of the provisions contained in sec 101 of the Oudh Rent Act a landlord is a secured creditor of his rent and when the tenant becomes insolvent the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of crops before distribution is made amongst the creditors *Bishambhar Nath v Rukha* 81 Ind Cas 647

For other instances of secured creditor vide notes under secs 2 (e) and 28 (6)

Rights of a secured creditor

There is a distinction in the Act between a creditor and a

secured creditor A secured creditor is not a creditor in the sense in which the word is used in the Provincial Insolvency Act. He has his remedy independently of the Insolvency Court to realise his security. He can come in the insolvency proceedings as an unsecured creditor on relinquishment of his security or by deducting the value of his security [vide sec 9, sub-sec (2)]. In order to be entitled to participate in the benefits of the insolvency proceedings he has to comply with the requirements of section 47. Speaking broadly, a secured creditor may do one of the three things: he may enforce his security and prove for the balance that may be due to him, or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him, or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend if his security should prove insufficient *Sant Prasad Singh v Sheo Dut Sing* 2 Patna 724. A secured creditor may adopt one of three alternatives. He can prove for the whole debt and abandon his security or he may value his security and prove for the balance or he may ignore the insolvency proceedings altogether and rely on his security, *The Union Bank of Bijapur v Bhimrao Shrinivasrao* 31 Bom LR 463 119 IC 189 (1929) AIR (B) 258. Generally a secured creditor stands outside the bankruptcy, *White v Simmons*, (1871) 6 Ch 555. He may rely upon his security and need not prove for the whole debt. A secured creditor who comes in under the insolvency has only three courses open to him viz, (1) that he may realise the security and then prove for the balance, (2) he may surrender the security and prove for the whole debt and (3) he may state the whole valuation at which he has assessed the security and then prove for the balance after deducting the assessed value *Rajendra Chandra Sarkar v Bipin Chandra Shah Bhowmick* 37 CWN. 973 1934 AIR (Cal) 64. A secured creditor decree holder cannot at the same time proceed with the decree under the mortgage and also arrange to get the property sold by arrangement with the Official Receiver. The only courses open to him are those under sec 47, *Haveli Shah v Mt Zorah Jan* 133 IC 876 1932 AIR (L) 84. Sec 47 does not empower the mortgagee to authorize the Official Receiver to sell property not vested in him *Rahiman v Nagar Mal* 1933 AIR (Lah) 1010.

Secured creditor's right to realise security

To realise security means to put the property to sale and to appropriate the sale proceeds towards the payment of his principal with the interest and costs, *Jugal Kishore v Bankim Chandra*, 41 A¹¹ 481 17 ALJ 480 51 Ind Cas 192. Sec 28, cl (6) which is applicable only to the mofussil cannot be said to refer to the

of a mortgagee to effect private sale of the property. The word "realise" must be understood in the ordinary sense of a secured creditor realising his security by a suit. The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by section 28 by reason of the adjudication of the mortgagor as an insolvent. The terms of section 28 (6) are quite general and there is no reason to conclude that the section as a whole was intended to deprive a secured creditor from enforcing his security. The general policy of the Act does not deal with the secured creditor. He may or may not choose to come on the schedule of creditors. He has the option of coming in or enforcing his security, and the Receiver is bound to discharge a *bona fide* mortgage debt even when the mortgagee has not come on to the schedule, *Official Receiver Coimbatore v Palaniswami Chetty*, 88 I C 934 (1925) AIR (M) 1051. The position of a secured creditor is dealt with in sec 28 (6) and 47. Sec 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to deal with his security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act subject to subsection 3 of sec 28. 'As has been laid down in sec 28 (6), a secured creditor's remedy against the estate of an insolvent is not affected in any way by the insolvency proceedings. He has the absolute right of realising his security i.e. he may realise his dues from the Insolvency Court or he may enforce his mortgage charge or lien by foreclosure or otherwise without the leave of the Insolvency Court,' *Badri Das v Chetty* 45 Ind Cas 918.

Proof for the balance

Under sec 47 a secured creditor who realises his security may prove for the balance due to him after deducting the net amount realised. A decree under Or XXXIV, r 6 CPC does not create a debt but merely authorises the decree holder to realise it by means of execution in the ordinary way. The absence of such a decree therefore does not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purpose of insolvency proceedings is to prove the existence of the debt. The fact that he had got his name removed from the list of creditors and had proceeded to realise his security will not prevent him from proving for the balance due. *Sahu v Krishnaprasad* 85 Ind Cas 1000. The decree directs that if the mortgage debt be not satisfied by the sale of the mortgaged property, the balance be realised from the person and property of the mortgagor, on the adjudication of the mortgagor the mortgagee is entitled to have his name entered in the schedule of creditors not as a secured creditor but as an unsecured creditor for the balance of the amount then due. *Baranashi Koer v Bhabadev Chatterji*, 34 CLJ 167.

The proof must be limited to the amount due for the principal and interest at the date of the receiving order (presentation of the petition) after deducting the proceeds of the realisation, and the proceeds cannot be applied in payment of interest subsequent to the receiving order, although profits made and income received since, may be set off against such interest. *Quartermaine's case* (1892) 1 Ch 639. The English authorities show that although para 10, Sch II of the Bankruptcy Act permits a secured creditor to prove his balance after realisation as a debt in bankruptcy proceedings the case law does not permit him to include in the balance any interest which has accrued after the commencement of the bankruptcy. But in Indian insolvency where the Courts have to look at the terms of the Act itself it must be decided whether this principle of the English law applies. *Kuer v Kalawan Kuer*, 55 I A 18.

In *Kuer v Kalawan Kuer*, 55 I A 18, their Lordships of the Judicial Committee of the Privy Council, who have been pointed out by this Board that where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded. It is clear that if the Legislature had intended to apply English rules to Act V of 1920 the best course would have been to have inserted in sec 47 the clause but such balance shall not include any interest which has accrued upon the principal sum before the date of adjudication as an insolvent. Further if sec 48 had been intended to apply as a restriction on the amount of balance due under sec 47, it would have been easy to draft the section to secure that object. The restriction imposed by the English practice does not exist under the Provincial Insolvency Act. Sec 48 has no application to secured creditors. *Shar,uzzaman v H Hunter* 6 O W N 982 (1930) A I R (O) 20.

Sub sec. (2) ; Proof for the whole debt on relinquishment of security.

'Relinquish' means that the creditor does not elect to enforce his claim independently of the insolvency proceedings by sale of the security. The relinquishment or surrender of a security by the creditor enures for the benefit of the creditors generally not for the benefit of the second mortgagee. *Cracknall v Janson* (1877) 6 Ch D 735. There is no obligation on a secured creditor to give up the security before proving his claim and he might prove for the whole amount of the debt and retain the security. In *the Matter of Shib Chandra Mullick* 8 B L R 30. The general rule in bankruptcy that, when a creditor seeks to prove against his debtor's estate he must give up or value any security which if not retained by him, would go to augment that estate, pre-supposes that the security is for the particular debt for which he seeks to prove and does not apply to a case where the security is for a different debt. *Ex parte Ma*

Liverpool District Banking Co Ltd (1924) 2 Ch D 199 Where the secured creditor not only has given proof for the whole debt but has actually received a dividend on the whole debt the correct view to take is that by his conduct the creditor must be taken to have relinquished his security because unless he did so he had no right to take the step which he did of proving and still less had he any right whatever to receive the dividend which he did receive. In the expression 'relinquishes his security' in sec 47 (2) the word 'relinquish' is sufficient to cover an abandonment by conduct. *Union Bank Bifapur v Bhimrao Shrinivasrao* 31 Bom LR 463 119 IC 189 (1920) AIR (B) 258 *Padam Parshad v Firm Mittar Sam Ganesh Lal* 38 PLR 414 164 IC 540 1936 AIR (L) 690

Sub sec (3), Valuation of security and proof for the balance

Under Rule 12 of the second schedule of the Bankruptcy Act 1914 if a secured creditor does not either realise or surrender his security he shall before ranking for dividend state in his proof the particulars of his security the date when it was given and the value at which he assesses it and and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed

Sub sec (4) Redemption of the security

Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells the property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. The discharge of the insolvent did not affect the mortgage debt and the Receiver is bound to pay off the mortgage even when the debt has not been scheduled in the insolvency proceedings the position of the mortgagee being essentially different from that of the unsecured creditor. *Sridhar v Atmaram* 7 Bom 455 *Sridhar v Krishnaji* 12 Bom 272 *Sheoraj Singh v Gauri Sahay* 21 All 227 *Mokhagunam v Ramkrishna* 70 Ind Cas 357 *Gowda v Abdul Kadir* (1923) AIR (N) 150. But it must be noted that here the mortgage section must necessarily be postponed if a legal charge is called in question. *Moti J* 32 (1923) AIR (A) 159 see also Cal 592 *Bank of Upper India v Adm* 653

It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale-proceeds as he had against the property itself. *Gopinath v Gunuprasad*

52 Ind Cas 860 Only the property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with the consent of the mortgagee. Such a consent could not be imposed merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free from mortgage in case he did not reply. An unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrance did not estop the mortgagee from thereafter filing a suit to enforce his mortgage, *Kanneappa Mudaly v Raju Chettiar* 47 Mad 605 47 MLJ, 16 79 Ind Cas 850 (1924) A1R (M) 761 But where the mortgagee desires that the mortgaged property of the insolvent mortgagor should be sold free from the mortgage rights and the mortgage debt should be recovered from the sale proceeds the Insolvency Court would be quite competent to comply with his request and it would be unfortunate if the Insolvency Court had not power to adopt this procedure when convenient to all parties, *Gopal Gunaji v Balaji* 122 IC 374 1930 A1R (N) 196 A mortgagee from a person adjudicated an insolvent is entitled as a secured creditor to receive out of the sale of the mortgaged property his principal, interest and costs and is entitled to interest up to the date of payment *Jugal Kishore v Bankim Chandra*, 41 All 481, followed in *Ramasubba Raju v Seshamma*, (1929) A1R (M) 242

Sub sec. (5), Amendment of the valuation of the security.

This is R 16 of the second schedule of the Bankruptcy Act Under R 14 of the second schedule of the Bankruptcy Act where a creditor has valued his security he is permitted at any time to amend the valuation and proof on showing to the satisfaction of the trustee, or the Court that the valuation and proof were made *bona fide* on a mistaken estimate or that the security has diminished or increased in value since its previous valuation. As to how late a creditor may amend his valuation see *Ex parte Norris* 17 QBD 728, *Re Morter*, 76 LT 532 *Re Fanshawe* (1905) 1 KB 170 The amendment may be made even after a tender by the trustee of the assessed value which the creditor has refused to accept *Re Newton*, (1896) 2 QB 403 Where a valuation has been increased by amendment the creditor must repay any amount of dividend which he has received in excess of that which he would have been entitled on the basis of the amended valuation and where a valuation has been reduced by amendment he would be entitled to receive out of any money for the time being available for dividend before it is made applicable to the payment of any future dividend, any dividend or share of dividend which he has failed to receive by reason of the inaccuracy of the original valuation, but not so as to disturb any dividend declared before th

amendment Rules 14, 15, and 16 deal with amendment of valuations, which the creditor is entitled to make at any time on showing to the satisfaction of the trustee or the Court that the valuation and proof were made *bona fide* on a mistaken estimate or that the security has diminished or increased in value since its previous valuation. In *Couldery v Bartrum* 19 Ch D 394, the Court refused to allow amendment after a composition had been completed on the faith of the original valuation. A mortgagee may amend although there are subsequent mortgagees to oppose *Exp Arden*, 14 Q.B.D. 121.

Sub-sec. (6) ; Effect of non-compliance with the provisions of sec. 47.

The provisions of this section must be strictly complied with before a secured creditor is entitled to a dividend under the insolvency proceedings, *Gopinath v Guruprasad*, 15 Ind Cas 360. The penalty for non-compliance with the provisions of sec. 47 is exclusion from all share in any dividend. S. 47 must be read as corollary to and subject to s. 62. Before the Official Receiver is required to make any reserve the claim must be submitted in the required form and further the Official Receiver can not reasonably be expected to retain any assets when he is not in a position to know the extent of the debt he is to provide for. Hence where there is no compliance by a creditor with s. 47 there is no debt provable in respect of which the Official Receiver can have retained money in his hands. *Jamnadas Vishandas In re*, 1935 A.I.R. (S) 57.

Rights of a secured creditor under a trust deed.

— The Official Committee have held in *H Hunter* W.N. 610 42 L.W. 146 1935 M.W.N. L.R. 874 40 C.W.N. 33 61 C.L.J. 1 W.R. 944 155 I.C. 426 1935 A.I.R. (P.C.) 104, that properties in respect of which the owner has created a valid trust, do not form part of his estate and do not vest in the receiver on his subsequent insolvency to be administered under the Insolvency Act, and neither has such receiver any right to administer them in accordance with the terms of the trust. If the receiver takes possession of such properties and realises rents and profits therefrom, he must be deemed to hold them as trustee of the trustees and the rents and profits will be subject to the provisions of the trust deed. A mortgagee of the properties, subject to whose mortgage the trust was created, should institute a suit in the proper Court for the administration of the trust and for a transfer to the Court of administration of the receiver and for the payment of the claims in the course of the administration of the trust. The argument before the Court was that the receiver's hands

consists entirely of the rents and profits of the property which was the subject of the above mentioned mortgages, and that being so, their Lordships fail to understand how the provisions of secs 47 and 48 of the Provincial Insolvency Act are in any way material to the claim of the liquidator or how the receiver in the insolvency had any right to deal with the said money. It is true that it was not until April, 1924, that it was finally decided that the deed of trust dated the 30th January 1912, was a valid deed and that when the adjudication of the insolvent was made in January, 1914 the receiver took possession of all the property which he considered to belong to the insolvent, which included the property covered by the mortgages but the greater part of this unfortunate litigation, which has lasted for so many years, is due to the failure to recognise the true position when once it had been established that the deed of the 30th January 1912 was a valid and effective deed of trust. By that deed the insolvent's interest in the mortgaged properties became vested in the trustees to be held and administered by them on the trusts mentioned in the deed, which trusts included the payment of certain specified creditors one of whom was the Bank. After the execution of the said trust deed the insolvent had no interest in the properties covered by the mortgages and consequently the said properties never vested in the receiver in insolvency and were not the subject to be administered by him on behalf of the general body of creditors. Nor had the receiver in insolvency any right to administer the assets in accordance with the terms of trust. Such a proposition is altogether untenable.

48. (1) On any debt or sum certain whereon interest

Interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

- (a) if the debt or sum is payable by virtue of a written instrument at a certain time from the time when such debt or sum was payable to the date of such adjudication or
- (b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication

(2) Where a debt which has been proved under thi

Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full

Review.

This is section 32 of Act III of 1907 and corresponds to Rule 23 of Schedule II of the Presidency Towns Insolvency Act III of 1909 and Rule 21 of the Schedule II of the Bankruptcy Act, 1914. This section should be read along with sec 61 (6) and sec 67 of this Act

Analysis.

The section provides

(1) in case of debts where no interest is agreed upon but there is a due date, interest not exceeding six per cent per annum may be proved from the due date to the date of adjudication

(2) in case of debts where no interest is agreed upon and there is no due date, interest not exceeding six per cent per annum may be proved from the date of the demand by notice to the date of adjudication

(3) in case of debts where interest is agreed upon interest not exceeding six per cent per annum may be proved without prejudice to the right of receiving a higher rate from the surplus if any

General rule as to interest payable to creditors on adjudication.

The general rule in bankruptcy is that the interest ceases at the date of the bankruptcy and there shall be no proof of interest subsequent to that date. James, L.J. referred to that rule as well established in *Re Savin*, L.R. 7 Ch App 760, and held that even a secured creditor who sought to prove for a claim for deficiency was bound to apply the sale proceeds of his security in payment of principal and interest up to the date of bankruptcy and up to that only. There is hardly any room for doubt that the same rule is applicable under the Insolvency Act in India. It must be remembered that the rule must be applied subject to the limitation mentioned by Cotton, L.J. viz., that there can be no proof in bankruptcy for interest accruing due after the filing of the petition unless the estate is more than sufficient to pay the creditors in full, *Ex parte Bath*, *Re Phillips*, (1882) L.R. 22 Ch D 450. The principle on which the general rule rests is stated by James, L.J. in *Re Savin*, *supra*, in these terms "the theory in bankruptcy is to stop all things at the date of bankruptcy and to divide the wreck of the man's pro-

property as it stood at that time." Directly the insolvent files his petition and a vesting order is made, he is divested of all his property; and he ceases to be *suu juris* for the purpose of satisfying his obligations, and the Insolvency Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. The general rule then rests on this foundation, viz., that the contracts of the insolvent stop at the date of the vesting order as a matter of legal right and the Insolvency Court becomes seised of jurisdiction to deal with his property towards their satisfaction through the Official Assignee as a Court of Equity and according to equitable rules of distribution, *Subbrayalu v. Roulandson*, 14 Mad. 134

In *Ramasubba Raju v. Seshamma*, (1929) A.I.R. (M.) 242, the question arose, till when interest is payable first, to the unsecured and secondly, to the secured creditors. It was held that "the provision of law which applies to administration suits is Or XX, r. 13, C.P.C. It says that where the Court is administering the estate of a deceased person which is insolvent, the same rule shall be observed, as to the respective rights of secured and unsecured creditors as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force with respect to the estate of persons adjudged or declared insolvents. This rule substantially corresponds with sec. 10, Judicature Act, 1875. The question came up as to until what date an unsecured creditor is entitled to interest under this English section. In *re Summers Bosuelli v. Garney*, (1879) 13 Ch. D. 136, Jessel, MR, expressed approval of the following rule as stated in Seton on Decrees, 'a creditor of an insolvent's estate whose debt bears interest is not entitled to interest upto the date of payment, but only to the date of the judgment for administration, which, by virtue of the Judicature Act, 1875, sec. 10, is equivalent to an adjudication in bankruptcy'. The words in this rule, 'the judgment for administration' correspond to the words 'preliminary decree' in Or. XX, r. 13, C.P.C. It follows, therefore, that unsecured creditors are entitled to interest to the date of preliminary decree and not to the date of payment or any other date."

General rule as to interest payable by debtors to the insolvent's estate.

An insolvent's solvent debtors are not absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency. The interest when collected is distributed among the creditors, *Firm of Kanhya Lal Mohan Lal of Amritsar v. Seth Radha Kissen*, 112 P.L.R. 1913 : 92 P.W.R. 1913, 18 I.L.R. 205.

Sub sec (1), clause (a), Interest payable by virtue of a written instrument

The words as used in sec 1 of the Interest Act (XXXII of 1839) contemplate an instrument by virtue of which the amount mentioned therein is payable. A certificate of the Administrator General admitting a debt to be due is not such an instrument. *Amrita Nath v Administrator General* 25 Cal 54

Sub sec (1), Clause (b), Demand in writing

In the absence of a demand in writing interest up to date of suit cannot be awarded upon sums which are not payable under a written instrument and of which payment has been illegally delayed. *London Chatham and Dover Railway Company v South Eastern Railway Company* (1893) App Cas 429. A letter demanding interest on an outstanding debt from which the intention of the creditor to claim interest upon the date of payment is made clear is a sufficient notice to entitle the creditor to claim interest prospectively from the date of the letter. *Kuppusami Pillai v Madras Electric Tramway Company Ltd* 23 Mad 41. General intimation on tradesmen's account that interest after a period will be charged is insufficient as a demand. *Geake v Ross* 44 L J C P 315

Rate of interest due prior to adjudication

As soon as the debtor is adjudged insolvent his entire estate vests in the Court or the Receiver and his estate becomes liable to distribution at once. Ordinarily therefore interest ceases to run automatically and for the purposes of dividend the rate of interest for all creditors is a uniform rate of six per centum per annum. *Ganga Sahai v Mukaram Ali Khan* 24 A L J 441 97 IC 556 1926 A I R (A) 361

Sub section (2) Interest subsequent to adjudication

Subsequent interest though cannot be taken into account at the time of the first distribution of the dividends has to be paid out of the assets if sufficient and is therefore a part of the debt. *Muhammad Ibrahim v Ram Chandra* 48 All 272 24 A L J 244 92 IC 514 (1926) A I R (A) 289. It must be remembered even in the contingency of there being a surplus the Insolvency Court deals with the claim for payment of interest as a Court of Equity and according to rules of equitable computation for deferred payment but not according to the letter of the original contract which is
der Subbrayalu v Rowlandson
 estate is sufficient to pay off
 in the hands of the Official
 at 6 per cent to be paid on
 such proved or contract debts as expressly or impliedly carry interest as from the date of filing of the insolvency petition and will

commission on such sum that may then remain in nt *In Re Mahamed Shah* in the schedule have been paid off the creditors are entitled to a further amount by way of interest at the rate of six per cent per annum After this amount has been paid the surplus if any goes to the insolvent *Ganga Sahai v Mukaram Ali Khan* 24 A L J 441 97 I C 556 1926 A I R (A) 361 Where a debt has been proved the debt includes interest or any pecuniary consideration in lieu of interest The time at which the creditor claimed to prove is the time at which he filed his application to have his name inserted in the schedule Where there is a surplus after paying the debts in full the Court will be justified in awarding six per cent interest on the claim *Kanto Mohon Mullick v J C Galstain* 51 C L J 283 126 I C 754 1930 A I R (Cal) 547

Higher rate of interest

Under sec 48 (2) the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled is not prejudiced after all the debts prove have been paid in full *Mahammad Ibrahim v Ram Chandra* 48 All 272 24 A L J 244 92 I C 514 (1926) A I R (A) 289 Where after payment in full of all the debts proved in the insolvency with interest at the contract rate up to the date of adjudication and of interest from the date of adjudication at the rate of six per cent per annum on all such debts under sec 61 (6) there is still a surplus of assets left with the Official Receiver the creditor of the insolvent to whom money is due under a promissory note providing for a higher rate of interest than the statutory six per cent per annum is entitled to be paid interest at the contract rate for the period between the date of adjudication and the date of payment unless there is some special reason for reducing that rate The Insolvency Court has jurisdiction if a proper case has been made out to reduce the contract rate of interest between the parties *China Venkataramu v Lakshmanasuami* 1931 M W N 937 134 I C 169 1931 A I R (Mad) 729

Interest on debts payable in future

Debts payable in the future stand on a different footing in respect of interest We have already seen (vide sec 45) that such a debt is provable but because the creditor may get his money by way of dividend before it would have become due had there been no bankruptcy it is provided that interest at the rate of six per cent per annum is to be deducted by way of rebate from any dividend declared before his debt would have become due

Mortgagee's right to interest

The mortgagee according to law is clearly entitled to receive

of the proceed of the sale of the mortgaged property his principal, interest and costs. He is entitled to receive interest upto the date of payment. A mortgagee as mortgagee is not a person proving in the bankrupt's estate—he is a secured creditor and entitled to look to his security to realize the amount of the debt secured therein. *Jugal Kishore v Bankim Chandra*, 41 A 481 17 A L J 480 51 IC 192, *Ramasubba Raju v Sheshamma*, 1929 A I R (M) 242

The rule of Damdupat.

The rule of damdupat only exists so long as the relation of debtor and creditor exists but not when the contractual relation has come to an end by decree, the rule of damdupat is not applicable to the claim of a creditor when that claim is admitted in pursuance of an order made in insolvency proceedings, because the order amounted to a decree, *In the matter of Hari Lal Mullick*, 33 Cal 1269 10 C W N 884

49. (1) A debt may be proved under this Act by
 Mode of proof delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers

Review.

This section is based on Rules 2, 3 and 4 in the Second Schedule framed under sec 32 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, which are as follows —

(2) A debt may be proved by delivering or sending through the post in a pre-paid letter to the Official Receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt

(3) The affidavit may be made by the creditor himself, or by some person authorized by or on behalf of the creditor. If made by a person so authorized, it shall state his authority and means of knowledge

(4) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers if any, by which the same can be substantiated. The Official Receiver or trustee may at any time call for the production of the vouchers”

Proof by post.

“The English practice of proving by transmission of an affidavit

is obviously desirable and its introduction is safeguarded by the provision of section 25 — *Viceregal Council Proceedings to Act III of 1907*. The mode of proof by affidavit relates not only to the debts for which no decrees have been obtained but also in the case of debts for which decrees have been obtained a copy of which should be filed along with the affidavit. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more. *Re Archibald Gilchrist Peace* 26 CWN 653

Other modes of proof

Section 49 does not lay down a mandatory method of proving a debt. It merely lays down one of the modes in which a debt may be proved. *Firm Bhudermull Chandi Prasad v Firm Haji Moham mad Ali Jagannath* 19 PLT 364 173 IC 988 1938 AIR (P) 65. Sec 49 only specifies a simple mode of proof of the debt and does not exclude any other mode of proof. A debt is proved within the meaning of sec 33 of the Act when it is admitted by the judgment debtor in an insolvency proceedings. *Krishna Chandra Das v Jotindra Nath* 48 CLJ 574 114 IC 415 1929 AIR (C) 159. When a person obtained a decree against an insolvent subsequent to his adjudication and the Official Receiver was a party to the decree the debt must be considered to have been proved although the formal mode of proving a debt provided by the Act has not been adopted. In *Ramalinga Ayyar v Rayalu Ayyar* 53 Mad 243 58 MLJ 170 122 IC 341 1930 AIR (M) 356 the High Court observed that the decree which the respondent seeks to execute was obtained subsequent to the appellant's adjudication. It was obtained not only against the appellant but also against the Official Receiver who was impleaded as a party. It is the latter that under the rules has to admit or reject proof of debts. In this case he was himself added as a defendant and the decree was passed in his presence. Although the Act provides a formal mode of proving a debt which has not been here adopted we are prepared to hold having regard to the facts adverted to that the debt has been proved. A decree was passed in favour of the plaintiff after which the judgment debtor was adjudicated insolvent on his application filed pending the suit. The decree contained a direction that the plaintiff should prove his debt in insolvency. The decree was assigned and the assignee applied to the insolvency Court to be recognised as the insolvent's creditor and referred to the direction as to proving the debt in the decree. It was held that in the above circumstances the debt must be held to have been proved although the formal mode prescribed by sec 49 was not followed. *Ramalinga Ayyar v Subba Ayyar* 145 IC 764 1933 AIR (Mad) 168.

Effect of failure to prove

Under sec 352 of the C P C 1882 a creditor by omitting to

come in and prove his debt would not be debarred from executing his decree after the order of discharge *Harapriya v Shama Charan* 16 Cal 594 Under the present Act the suit is barred *Irshad Hussian v Gopi Nath* 17 A L J 374 49 Ind Cys 590 Where a creditor who did not prove his debt and who informed the bankrupt that he did not seek to prove it afterwards transferred it to an assignee who delayed proving the debt it was held that the creditor was estopped from proving and that the assignee was in no better position *Re Wickham* 34 T L R 158

Cost of Proof

A creditor shall bear the cost of proving his debt unless the Court otherwise specially orders (Rule 6 Bankruptcy Act 1914)

Proof of numerous claims

In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors (Rule 18 of the Calcutta High Court 21 of the Allahabad High Court and 9 of the Bombay High Court)

Rights of a creditor proving

Every creditor who has lodged a proof shall be entitled to see and examine the proof of other creditors before the first meeting and at all reasonable times (Rule 7 Bankruptcy Act 1914) If a creditor in the insolvency has lodged a proof of his debt and fulfilled all the requirements of section 49 the debt is proved within the meaning of the proviso to section 78 of the Act and the debt gets the benefit of sub sec (2) of sec 78 The word proved used in the Insolvency Act has a different meaning to that in the Evidence Act It does not mean that the debt must have been admitted by the Official Receiver under the Act or satisfactorily established before him *Lakshmi Bai v Rukmani Rao* 67 M L J 45 40 L W 199 1934 A I R (M) 465

Proof by a secured creditor

Rule 5 in Schedule II of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 runs as follows

The affidavit shall state whether the creditor is or is not a secured creditor and if it is found at any time that the affidavit made by or on behalf of a secured creditor omitted to state that he is a creditor the secured creditor shall surrender his security to the Official Receiver or trustee for the general benefit of the creditors unless the Court on application is satisfied that the omission has arisen from inadvertence and in that case the Court may allow the affidavit to be amended

upon such terms as to the repayment of any dividends or otherwise as the Court may consider to be just" The proof must be limited to the amount due for principal and interest at the date of the receiving order after deducting the proceeds of the realisation, and the proceeds cannot be applied in payment of interest subsequent to the receiving order although profits made and income received since may be set off against such interest, *Quartermain's case*, (1892) 1 Ch 639 For proof by secured creditor, vide sec 47 and notes thereunder

50. (1) Where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt

Disallowance and reduction of entries in schedule

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor

Review.

This is section 26 of Act III of 1907 and corresponds to Sch II rr 26, 27 of the Presidency Towns Insolvency Act and to Rules 23 and 24 of Schedule II to the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926 Under this section Courts have been invested with the power of expunging or reducing proofs which is exercised by the Courts in England," *Statement of Objects and Reasons to Act III of 1907*

Machinery in England for admission or rejection of proofs.

"The trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it If he rejects a proof he shall state in writing to the creditor the ground of the rejection" Rule 23 "If a trustee thinks that a proof has been improperly admitted the Court may on the application of the trustee after notice to the creditor who made the proof expunge the proof or reduce the amount" Rule 24 "If a creditor is dissatisfied with the decision of a trustee in respect of proof the Court may on the application of a creditor reverse or vary the decision," Rule 25 "The Court may also expunge or reduce a proof upon the application of a creditor

the trustee declines to interfere in the matter or in the case of a composition or scheme upon the application of the debtor Rule 26

Machinery in India for admission or rejection of proofs

In India the machinery provided for performing the functions of the Official Receiver in framing the schedule is the Court and those of the trustee in adding altering or expunging the proof is the Receiver, *Bcharla v Harsukhdas*, 25 C W N 137 61 Ind Cas 904 In *Khadir Shau v Official Receiver, Tinnevely* 41 Mad 30 45 IC 67, it has been held 'the Official Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule did not prevent the Court from entertaining an application by the Receiver under sections 26 and 36 of Act III of 1907 (now sections 50 and 53) to expunge the names of the creditors from the schedule Where the Receiver exercises his power in framing a schedule that is to say, altering or amending the schedule filed by the debtor, sec 50 is applicable, which lays down that where the Receiver thinks that a debt has been improperly entered in the schedule the Court may on the application of the Receiver expunge such entry Cl (2) gives power to the Court to do so in certain cases on the application of the creditor or of the debtor but nowhere is the power given to the Receiver to expunge a debt entered in the schedule of the insolvent *Muthu Swami Chettiar v Official Receiver North Arcot* 51 MLJ 287 97 IC 407 1926 M W N 935 (1926) A I R (M) 1019

Delegation of power by Court

The Official Receiver cannot be delegated with the power to review his orders under sec 5 If the Receiver thinks that a debt has been improperly entered in the schedule he may apply to the Court to expunge such entry or reduce the amount of the debt *Ahmed Haji Dossal v Mackenzie Stuart & Co* 105 IC 366 1928 A I R (S) 40 A creditor to the estate of an insolvent put in an application under sec 26 (now sec 50) to expunge certain entries of debts purported to be owing to some other creditors The District Judge called upon the latter to prove their debts They filed affidavits in support of their claims The District Judge then asked the Receiver, who was not an Official Receiver to take any evidence the creditors might adduce It was held that the procedure in delegating the taking of evidence to the Receiver was not proper, and the order should be set aside *Sattasala Hanumanthi v Taliseti Subbayar* 1921 M W N 109 61 IC 767

Enquiry by Court

The section simply says that in certain cases at the instance of

a Receiver or a creditor the Insolvency Court may order the expungement of an alleged creditor's name from the schedule or the reduction of the amount of the debt due to him. But there is nothing in the section which says that any question of title raised between two scheduled creditors will be decided by the Insolvency Court, *Pearey Lall v. Allahabad Bank*, 24 A L J 334 92 I C 14 (1926) A I R (A) 244. The deposition of the insolvent in public examination under sec. 14 (now 24) is not relevant evidence in an inquiry under sec. 26, (now s. 50), *Sattrasala Hanumanthi v. Taliseti Subbayar*, 1921 M W N 109 61 Ind Cas 767. "The Court has no power to expunge the name of a creditor where no fraud is proved or alleged in regard to his claim," *In Re Deucum Jeuraj*, 12 Bom 342.

Court's power to go behind a judgment

The trustee is not bound to accept or admit proof merely because it is supported by sworn testimony. He can apply to the Court to examine the creditor as to his proof. And the trustee, like the registrar, on the hearing of a petition may go behind a judgment. "The trustee's right and duty, when examining a proof for the purpose of admitting or rejecting it, is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or accounts stated with him can deprive the trustee of his rights. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him", *Per Bigham, J.*, in *Van Laun*, *In re Puttullo, ex parte*, (1907) 1 K B 162 and 163, affirmed by the C A in *Van Laun v. Chatterton*, (1907) 2 K B 23. *In Campbell, In re Seal ex parte*, (1911) 2 K B 992 a proof in respect of a loan by an unregistered money lender was rejected, though judgment had been obtained against the debtor, and he had promised to pay by instalments. A presumption of receipt of all consideration arising from a debtor's signature on a pro-note can only be available against the debtor personally, and cannot be invoked against the Official Receiver or a creditor in insolvency proceedings. An Insolvency Court can enquire into the consideration for a judgment debt *Ramlal v. Kashi Charan*, 26 A L J 241 108 I C 147. In an insolvency proceeding the Court has a right and duty to go behind any accounts stated, or covenant or judgment and in the interest of the other creditors get to the real character of the transaction, *Kanto Mohon Mullick v. J C Galstaun*, 57 C L J 283 126 I C 754 1930 A I R (Cal) 547.

Limitation to the powers of the Court.

Where the Official Assignee, admitting the proof of claim of a creditor of the insolvent, transfers insolvent's property to him by means of a registered sale-deed, his only remedy is to have the

deed set aside by means of a regular suit, although if the matter would have rested on a proof of claim only, and if no sale-deed had been executed, it would have been open to the Official Assignee to come to the Insolvency Court and to have the proof expunged. If the transferee was a stranger and was not a creditor of the insolvent there can be little doubt that a suit would be the only remedy, and it has been held that a sale by the Official Assignee or an Official Receiver is in no better position than by the insolvent himself. There is no section of the Insolvency Act which entitles the Court on an application under the Insolvency Act, to set aside a sale deed executed by the Official Assignee, *Official Assignee of Madras v. V. K. Natesa Chetty* (1929) A I R (M) 141.

Court's power of amending schedule of creditors after annulment of adjudication.

Wort J., in delivering judgment in *Kehmkarandas Jokhiram v. Chauthmal Bhagirath* I L R 16 P 754 175 I C 306, 1938 A I R (P) 225, observed "I think it is perfectly clear and indeed it is obvious that s 50 is one of those sections which govern the procedure of the administration of the debtor's assets in an insolvency. S 50 speaks of the receiver considering that a debt has been improperly entered in the schedule. If we look back to s 33 of the Act we shall see that it is the duty of the Court in certain circumstances to prepare a schedule of debts and in a sense therefore, s 50 gives a right to the receiver under sub s (1) notice being given to the creditors to ask the Court to expunge an objectionable debt. But I would repeat that s 50 is the procedure during insolvency and it seems to me quite clear therefore that when the insolvency has come to an end by annulment the procedure provided by the Act in an insolvency can no longer apply."

Insolvent's right to amend the schedule.

So long as insolvency exists the insolvent cannot be allowed to

case when the composition or scheme is accepted he can apply for expunging or reducing a debt entered in the schedule, *Ganga Sahai v. Mukarram Ali Khan*, 24 A L J 441 97 I C 556 (1926) A I R (A) 361. This case is based on the principle enunciated by Phillimore, J., in *Benoit, In re*, (1909) 2 K B 784 which lays down that as a rule the debtor cannot apply unless the composition or scheme has been accepted.

Appeal.

An appeal lies under sec 75 (2), schedule I, against an order disallowing or reducing entries in the schedule. Where as part of

the proceedings an enquiry has been held under sec 50, anybody prejudiced by the expunging or reducing of a debt, can in regard to that matter appeal as of right, *Ganga Sahai v Mukarram Ali Khan* 24 ALJ 441 97 IC 556 (1926) AIR (A) 361 In *Makhan Lal Gorindram v Bhagwan Singh Mistri* ILR 17 P 201 it was held on a construction of s 50 read with s 75, that a debtor is entitled to appeal against the order of the District Court declaring that certain debts have been proved by the creditor

51. (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver

Review.

This is section 34 of Act III of 1907 with the substitution of the clause 'date of the admission of the petition in place of date of the order of adjudication' in sub section (1) This section corresponds to sec 53 of the Presidency Towns Insolvency Act It is based on sec 40 (1) of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act, 1926 which runs as follows Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy of the debtor"

Principle of distribution in insolvency.

The policy and the object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active *Bouyer v Herr* (1895) 2 QB 337 73 LT 176 The principle that one creditor shall not take part

of the fund which would otherwise have been available for payment of all the creditors and at the same time be allowed to come in *pari passu* with creditors for satisfaction out of the remainder of that fund does not apply when that creditor obtained by his diligence something which did not and could not form part of that fund, *R H Cockerell & Ors v Theodore Dickens*, 2 MIA 353. Under sec 34 (of Act III of 1907) an execution creditor was entitled to the assets realised in the course of execution by sale or otherwise before the date of the adjudication order, *Gour Charan Ganga Charan Shah v Toyebuddin Ahmed* 23 CWN 461. Section 40 of the Bankruptcy Act, 1914, which enacts that an execution creditor shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy, unless he has completed the execution before the date of the receiving order, is a substantive enactment, and the right of the trustee thereunder is not limited to benefits of execution received by the execution creditor after the date to which the trustee's title to the bankruptcy property relates back under section 37 of the Bankruptcy Act, 1914, *In re P E and B E Kern*, (1932) 1 Ch D 555.

In *Exp Pillers, in re Curtoys*, (1881) 17 Ch D 653 (666), Lush, LJ says "By virtue of the adjudication of bankruptcy and the relation back of the trustee's title, all the property which the bankrupt had at the time when he committed the act of bankruptcy is vested in the trustee and becomes divisible among the creditors. The debt had, therefore, ceased to be due to the bankrupt and had become due to the trustee. Then a clause [sec 95 (3), Bankruptcy Act, 1869], was inserted for the protection of a creditor who after the commission of an act of bankruptcy of which he had no notice, had pursued his remedy, but it protects him only upon certain conditions. Goods seized under a *fi fa*, must not only have been seized but sold before the adjudication. The intention was that so long as the execution remained only a security for the debt it was not to be protected. Something more must - actual conversion of the security
v *Ram Chand* 29 Bom 405
64 and *In re Brels'ord*, (1932)

1 Ch D 24

In *In re Dickinson Ex parte Carrington & Co*, 22 QBD 187, a judgment creditor obtained an order appointing a receiver "to receive the stock in trade, and other property and effects" belonging to the judgment debtor, without prejudice to certain rights all further questions being reserved until further order of the Court. The receiver took possession of the goods under the order and continued in possession of them, until a receiving order in bankruptcy was made against the debtor. No part of the goods had been then sold. The debtor was afterwards adjudicated bankrupt. It was held, first that the order appointing a receiver did not make

the judgment-creditor a 'secured creditor' of the bankrupt within the meaning of sec 9 of the Bankruptcy Act, 1883, *secondly*, that, if it did, sec 45 applied, and the execution, not having been completed by sale before the date of receiving order, could not prevail against the title of the trustee in bankruptcy

Conflict of decisions under the old Act.

Under the old Act, III of 1907, there was a conflict of decisions regarding the interpretation of the words "before the date of the order of adjudication" in sub-section (1) of that Act. In *Rakhal Chandra Purkait v Sudhindra Nath Bose*, 46 Cal 991 24 C W N 182, it was held that "an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the pu of the insolvent liable to the claims of v Kshutish Chandra, 42 Cal 289, c 34 (now sec 51), restricts the operation of sec 16 (6), [now sec 28 (7)] A creditor who had attached a sum of money due to the insolvent before his estate vested in the Receiver appointed after the adjudication order is entitled to apply it exclusively in satisfaction of the debt though an interim Receiver was appointed" In *Paul Ram v Sheonath Pershad*, 2 P L J 235, it was held that "section 34 controls sec 16 of the Provincial Insolvency Act which directs that the title of the Receiver relates back to the date of the presentation of the insolvency petition The title of the decree-holder in respect of assets realised before the order of adjudication prevails over the title of the Receiver appointed on or after such date The order of adjudication relates back to the date of the presentation but this does not apply to the assets in the course of execution before the order of adjudication" In *Din Doyal v Gursaran Lal* 42 All 336 18 A L J 287 59 Ind Cas 67, it was held following *Srichand v Murarilal*, 34 All 628 and *Basarnal v Khemchand* 11 Ind Cas 433, that sec 16 (6) of the old Act [now sec 28 (7)], does not control sec 34 (1) But where property of the applicant in insolvency is sold in execution between the date of the application and of the order of adjudication, the property sold vests in the auction purchaser and not in the Receiver In *Muhammad Shariff v Radhamohan* 57 Ind Cas 760, it was held that under sec (1) of Act III of 1907 the Receiver was not entitled to any sums realised prior to the adjudication and that on the transferee of the attached decree accounting for sums realised subsequent to that order his proof in respect of the amount unrealised under the decree should be admitted

To set at rest this conflict of decisions in the different High Courts on the interpretation of the clause 'before the date of the order of adjudication' the clause 'the date of the admission of the petition' has been substituted This amendment is thus explained in the Report of the Select Committee, dated 24 9-19 This clause proposed to bring section 34 of Act III of 1907 into line with section 53 of the

Presidency Towns Insolvency Act, III of 1909. It has evoked considerable criticism particularly with reference to the difficulties of proving whether a creditor had notice of the proceedings or not. We, therefore, propose to restrict the right of creditors to assets realised before the date of the admission of the petition." See also *Achambit Lal v Chhanga Mal*, 32 Ind. Cas. 429

Application of the section.

Section 51 refers to the date of admission and not that of presentation of petition. Therefore, it does not deprive the creditor of the fruits of his decree in respect of moneys which are brought into Court between the date of the presentation of a petition for insolvency and the date of its admission, *Dayaram Menghraj v. Shrimati Sakhubai*, 130 I.C. 559 (1931) A.I.R. (S) 65. The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has subsequently been adjudicated an insolvent. So where no insolvency proceedings are pending against the judgment-debtor, and it is the decree-holder who is subsequently adjudicated an insolvent and there is a dispute not between the decree-holder and the judgment-debtor but between the original decree-holder and his assignee, the section is inapplicable, *Basheshar Nath v Baga Mal*, 120 I.C. 175 : 1929 A.I.R. (L.) 805. Where an application by a creditor for adjudication as insolvent of his debtor relying on sale in execution of his decree is dismissed, act of insolvency, namely, sale in execution of decree, having taken place subsequent to the filing of the petition, and where after confirmation of sale second application is made and granted, second insolvency proceeding cannot be regarded as continuation of the first, but is an entirely fresh proceeding based on a different act of insolvency. Hence the decree-holder is entitled to the money realised before the institution of that proceeding, *Maung Maung v. A. R. R. M. A. N. Chettyar Firm*, 126 I.C. 656 : 1930 A.I.R. (Rang.) 265.

The above view has been approved by the Calcutta High Court in *The Firm of Messrs D. N. Chatterjee & Co v Raj Kumar Mandal*, 37 C.W.N. 135 : 146 I.C. 597. 1933 A.I.R. (Cal.) 651, in which an application for adjudication of a debtor as an insolvent by a creditor, having been admitted and an *ad interim* receiver having been appointed the applying creditor made an application to the Court for the stay of a sale in execution of a money-decree obtained by another creditor. On this application, an order was made that the sale should take place but that the money realised should be kept in deposit to the credit of the Insolvency Court until further orders, which direction was complied with. The application for adjudication was finally dismissed on the ground that the application was defective and that there was violation of certain provisions as to service of notice. Thereafter a fresh application for adjudication was made by the same creditor and it was followed by an

application praying for the withholding of the payment of the money kept in deposit to the credit of the previous insolvency case. It was held that the later application was not a continuation of the previous one, that the money realised in the execution case cannot be said to be assets realised in the course of execution sale after the admission of the application for adjudication and that therefore sec 51 was not applicable.

Sub-sec. (1) ; Benefit of execution.

There is nothing in the
Insolvency Court jurisdiction

G C Chakravarti v E White

that if a creditor has proceeded to execute a decree he will not be entitled as against the receiver to the benefit of the execution except so far as he may have been able to realise as the assets before the admission of the petition for insolvency. If he has derived any benefit for insolvency was p as against the receiv

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IC 146 1936 AIR (P) 112 Where during the pendency of execution proceedings the judgment debtor has been declared insolvent, the decree holder can only claim such amount as has been realised in execution before the date of the admission of the insolvency petition, *Duni Chand v Jita Mal*, 35 PLR 408 149 IC 127 1934 AIR (L) 535 In order to entitle a person to the benefit of the execution of the decree against the property of a debtor (1) there must be the execution of the decree (2) against the property of the debtor, (3) in respect of assets realised in the course of the execution by sale or otherwise and (4) before the date of the admission of the petition. In *Suaminatha Ayyar v Official Receiver, South Malabar*, 57 Mad 330 65 MLJ 402 1933 MWN 996 38 LW 389 145 IC 999 1933 AIR (M) 703, it was held that sec 51 does vest the property which has been sold in execution of a decree for payment of money in the Official Receiver but it appears a reasonable interpretation of the word "benefit" to hold that it is the net realisation in execution after paying the costs. It would be

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MLJ 205 that where moneys are realised in the course of an execution by sale of the insolvent's property after the date of the admission of a petition for insolvency even an attaching decree-holder is not entitled to return the costs out of the moneys realised by him in such execution and derive the benefit of the execution as against the Official Receiver. No distinction can be made between an attaching creditor and other decree holders, so far as s 51 of the Provincial Insolvency Act is concerned. In the Full Bench

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Sub-sec. (1) ; Benefit of execution.

There is nothing in the Insolvency Act which would give the Insolvency Court jurisdiction to stay execution proceeding elsewhere. *G. C. Chakravarti v. E White* 40 C.W.N 336. What s 51 means is that if a creditor has proceeded to execute a decree he will not be entitled as against the receiver to the benefit of the execution except so far as he may have been able to realise as the assets before the admission of the petition for insolvency. If he has derived any benefit from that execution when the application for insolvency was pending, he can not keep that benefit to himself as against the receiver. *Terma Marwan v. Jokiram Surajmal*, 17 P.L.T 313 160 I.C. 146. 1936 A.I.R. (P) 112. Where during the pendency of execution proceedings the judgment-debtor has been declared insolvent, the decree-holder can only claim such amount as has been realised in execution before the date of the admission of the insolvency petition, *Duni Chand v. Jua Mal*, 35 P.L.R 408 149 I.C. 127. 1934 A.I.R. (L) 535. In order to entitle a person to the benefit of the execution of the decree against the property of a debtor (1) there must be the execution of the decree, (2) against the property of the debtor, (3) in respect of assets realised in the course of the execution by sale or otherwise and (4) before the date of the admission of the petition. In *Suaminatha Ayyar v. Official Receiver, South Malabar*, 57 Mad 330 65 M.L.J 402 1933 M.W.N 996 38 L.W. 389. 145 I.C 999 1933 A.I.R. (M) 703, it was held that sec. 51 does vest the property which has been sold in execution of a decree for payment of money in the Official Receiver but it appears a reasonable interpretation of the word "benefit" to hold that it is the paying the costs. It would be e-holder who has incurred the sale. Dissenting from the view in *Suaminatha Ayyar v. Official Receiver of South Malabar*, supra, it has been held in *Balasami Reddi v. Official Receiver Nellore*, (1939) 1 M.L.J 205, that where moneys are realised in the course of an execution by sale of the insolvent's property after the date of the 'vency, even an attaching decreee- n the costs out of the moneys and derive the benefit of the execution as against the Official Receiver. No distinction can be made between an attaching creditor and other decree-holders, so far as s 51 of the Provincial Insolvency Act is concerned. In the Full ?

Presidency Towns Insolvency Act III of 1909 It has evoked considerable criticism particularly with reference to the difficulties of proving whether a creditor had notice of the proceedings or not We therefore propose to restrict the right of creditors to assets realised before the date of the admission of the petition See also *Achambit Lal v Chhanga Mal* 32 Ind Cas 429

Application of the section

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case of *Subbaraya Goundan v. Virappa Chettiar Bank*, 1933 M.W.N. 920 . 38 L.W. 745 : 65 M.L.J. 719 : 146 I.C. 521 . 1933 A.I.R. (M.) 851, the insolvency petition was filed after the properties were sold in Court auction. The Official Receiver took no steps to set aside the sale. It was held that the assets having been realised before the date of the admission of the insolvency petition the Official Receiver cannot claim the benefit of the execution.

Assets.

Assets mean all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him, and it is said to be realised when by some process it is reduced into possession, that is to say, in a form in which it is available for immediate application towards the satisfaction of the decree which is being executed, *Sarabji v. Goundramji*, 16 Bom 91. It also means the sale proceeds of the property sold in execution of a decree, *Ramanatham v. Subramaniya*, 26 Mad 179. Rent realised by Receiver are assets realised, *Fink v. Maharaja Bahadur*, 26 Cal 772 'Assets' include any assets held by the Court irrespective of the manner in which they came into the possession of the Court and hence money brought voluntarily into Court is an asset, *Harī Charan v. Birendra Nath*, 35 C.L.J. 327. See also cases under sec 73. C P C

"Realised."

Where a debt due to a debtor by a third party is paid into Court, such payment amounts to realisation, *Srinivasa v. Sitaram*, 19 Mad 72 : 5 M.L.J. 151. Where property of a debtor is put to sale in Court auction, assets are said to be realised only when the entire purchase money is paid into Court by the auction-purchaser, *Hafez v. Damodar*, 18 Cal. 242. Assets cannot be said to be held by the Court available for rateable distribution until the whole of the purchase money has been deposited, *Maharajah of Burdwan v. Apurīa Krishna Rai*, 15 C.W.N 172 In the case of moveables the assets are said to be realised only on receipt of the entire purchase-money by an auctioneer from the purchaser in execution sale, *J. C Galstaun v. Umesh Chandra Banerjee*, 25 C.L.J. 303.

The wording of sec. 51 "assets realised in the course of execution by sale or otherwise" do not necessarily mean assets which have

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of the judgment-debtor was deposited with the Court Nazir having been realised by attachment before judgment. The decree-holders got their decree transferred to the very same Court and attached the money. They immediately applied for payment. The Nazir made a report noting the attachment in favour of the decree-holders and the learned Judge was of opinion that the decree-holders were

prima facie entitled to the money but instead of making the order straightaway, he thought fit of issuing a notice to the other side as to why the money should not be paid to the decree holders. Then a preliminary order was passed in favour of the decree holders. Soon after the order and before the hearing of the notice an application was filed to have the judgment debtor adjudged insolvent and an interim receiver was appointed who resisted the decree holders application. It was held that the decree holders under the said circumstances having presented their application for payment of the money with all due diligence coupled with the fact of noting of attachment in their favour were entitled to the said moneys both these facts tantamount to realisation within the meaning of sec 51.

The words before the date of the admission of the petition qualify the words "assets realised". They do not qualify the word sale and the assets can be said to be realised in execution only on the date on which the balance of the purchase money is deposited. They cannot be said to be realised in execution on the date when the deposit of twenty five per cent of the sale proceeds is made by the auction purchaser on the date of sale but if before the balance of the purchase money is deposited an application for adjudication of the judgment debtor is entertained the decree holder is not entitled to sale proceeds including even the twenty five per cent deposited to the exclusion of the judgment debtors other creditors as against the Receiver. *Ramanathan Chettiar v Subramania* 48 Mad 656 47 M L J 759 20 L W 872 85 I C 216 (1925) A I R (M) 248. In order that money attached in execution of a decree may be realised within the meaning of sec 34 (now sec 51) it must reach the Court which passed the decree and not when the Treasury Officer detained it for transmission to the Court. *Debi Pershad v O M Chene* 16 Ind Cas 84 9 A L J 797.

Date of Admission of Petition

The law nowhere says what is deemed to be the *date of admission* of the petition but there are some sections which afford guidance in the matter. The sections before s 18 of the Act relate to the presentation of the petition but s 18 provides that The procedure laid down in the Code of Civil Procedure 1908 with respect to the admission of plaints shall so far as it is applicable be followed in the case of insolvency petitions. The only provisions of the Civil Pro Code which relate to the admission of the plaint are Or 4 r 2 which provide that The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the Register of Civil Suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted. This is the first time that the word *admitted* is used in the order. Another section is s 21 Pro Ins Act which provides that at the time of making an order admitting the petition or at subsequent time before adjudication the Court may order the

to give reasonable security for his appearance until final orders are passed. Hence it was held on the authority of *Ramanathan Chettiar v Subramanian Chettiar* 48 M 656 47 MLJ 759 85 IC 216 1928 AIR (M) 248 that the date on which an applicant is asked to furnish security for his regular attendance in Court can be regarded as a date of admission of the insolvency petition. *Agar Chand v Prithi Singh*, 38 PLR 1148 1936 AIR (L) 885. The date of admission of petition does not relate back to the date of presentation in the absence of an express provision to that effect. Hence s 51, does not deprive the creditors of the fruits of their decrees in respect of moneys which are brought into Court between the date of the presentation of petition for insolvency and the date of its admission. S 51 refers to the date of admission and not to the date of the presentation of the petition, *Charanjit Singh v Sar dar Mohammad*, 1935 AIR (L) 690.

Attachment per se confers no right.

It must be taken that the attaching creditor does not obtain by his attachment any charge or lien upon the attached property and he cannot claim any priority by reason of his attachment in respect of the property attached as against the Official Assignee who represents not only the insolvent, but the whole body of the creditors. *Frederick Peacock v Madan Gopal* 6 CWN 576 (FB) *Harin Chandra v Joy Chand* 57 C 122 1929 AIR (C) 524. The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment only operates so as to give the judgment creditor certain rights in execution. It does not operate when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment. *Krishnaswami v Official Assignee of Madras* 26 Mad 673 *Bansilal v Kashinath*, 29 NLR 303 145 IC 685 1933 AIR (N) 229.

The mere factum of attachment was not sufficient to bring the creditor within the category of secured creditor. The attachment at the most only creates a species of temporary lien which continues until the insolvency petition is duly admitted. *Ram Rao v Wasudeo* 110 IC 893 (1928) AIR (N) 336. But where money belonging to a debtor has been attached, if the attaching Court and the custody Court are the same, there is a realisation in the course of execution by sale or otherwise' within the meaning sec 51 (1) of the Provincial Insolvency Act, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree holder who has applied to it for execution is ordered to be transferred to the credit of the attaching creditor's suit. Therefore a creditor who has attached money belonging

to an insolvent before the admission of the insolvency petition, is entitled to claim the benefit of the execution against the Receiver only if such an order has been made previous to the admission of the petition. *In re Assudamal Fatehchand*, 101 1 C 848 1927 A 1 R (S) 194, *Visanadhan Chetty v Arun Chellam*, 44 Mad 100 (FB), *Nachiappa v Subbiar*, 46 Mad 506 (FB). The attachment does not create any title in favour of the attaching creditor. It merely prevents alienation. In view of sec 51 of the Provincial Insolvency Act, an attaching creditor was entitled to be classed with other unsecured creditors on the basis of a rateable distribution of assets. *Haran Chandra v Joy Chand* 57 C 122.

Attachment before judgment confers no right

An attachment before judgment is not an attachment in execution of the decree for payment of money. *Makhan Lal v Gulzarmal*, 6 All 290. In *In Re Pollard*, (1903) 2 KB 41, Lord Justice Romer observed: "In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further and must obtain some order giving him a special right to or charge on a specific part of the property. Therefore the fact that the sequestrators had sequestered money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had only special charge thereon." Following *Re Pollard*, *supra* it was held in *Errikulappa Chetty v The Official Assignee of Madras* 39 Mad 903 32 1 C 190 that "when on the application made by the plaintiff under Or XXXVIII, r 5, CPC for attachment before judgment of certain properties belonging to the defendant, the Court issued summons to the defendant to furnish security for a certain amount or to show cause against it and further ordered that certain goods belonging to the defendant should be attached until further notice, and the defendant paid into Court the amount specified in the summons but subsequently became an insolvent the plaintiff had no charge on the money paid into Court as against the Official Assignee of the insolvent."

Where defendant's properties were attached before judgment in the plaintiff's suit by the Court which directed the attached properties to be released from attachment on the defendant's paying Rs 500 as security and after the same was paid and the properties released the defendant was adjudicated an insolvent under Act III of 1907 but not before the plaintiff's suit was decreed held the plaintiff acquired no charge or lien upon the money deposited as security for getting the attachment before judgment withdrawn and the Receiver in insolvency was entitled to have the money paid to him. The money not having been realised in execution of a decree prior to the adjudication order sec 34 of Act III of 1907 did not apply. *Pramatha Nath v Mohini Mohan*, 19 C W N 1200, *Purshotom Das*

David, 13 A L J 898, *Kashi Nath v Kanhya Lal*, 37 All 452, *H W Farmers v Couasji*, 14 A L J 236 33 Ind Cas 723 Where the assets have been realised in the course of execution by the sale or other wise as mentioned in sec 34 of Act III of 1907 before the order of the Official Receiver. *Abulhasan Ahmed*, 23 C W N 461

In the absence of an order by the Court for transfer of money realised by sale of the judgment debtor's property attached before judgment in another civil suit to the account of the judgment creditor or for its payment to him the amount in custody of the

before judgment, but is released on the defendant giving security, the security comprising certain items of the attached property the plaintiff on obtaining a decree is entitled to a preferential right and can execute the decree against the property given as security *Janaki v Ramaswami*, 56 I C 267 Where there has been an attachment before judgment but before the decree is passed the defendant is declared insolvent and the property then vests in the Official Receiver, the plaintiff gains no right by the sale of the property in the hands of the Official Receiver prev *117* I C 145 1930 A I R (S) 12 *117* vested in the Official Receiver is put to sale by the decree holder without notice to the Official Receiver and is purchased by him and the sale is confirmed and possession is delivered by the executing Court in spite of the irregularity having been brought to the notice of the Court the insolvency Court has power to annul the sale and delivery of possession, *Mukta Ram v Firm Ganga Ram* 13 Pat 30 146 I C 252 1933 A I R (Pat) 619

Receiver.

Receiver includes both *interim receiver* as well as receiver after adjudication see Notes under sec 52, *infra* Where property of an insolvent is sold in execution of a decree against him by another decree holder after the admission of an insolvency petition against him the insolvent's property or the sale proceeds so realised by sale vests in the insolvency Court under s 28 Provincial Insolvency Act, in the absence of a receiver being appointed in the insolvency proceedings The receiver is only an officer of the Court and until he is appointed the Court is entitled to represent the insolvent's estate for administration *Rangappa Gangappa v Ghanshyam Madho Tapi*, 1 I L R 1937 N 249 170 I C 383 1937 A I R (N) 193

Steps to be taken by the Receiver.

The Official Receiver has no *locus standi* as such in the execution

proceedings. He is merely an ordinary litigant who may be entitled to move the Court in the usual manner and the usual manner to move the Court is the presentation of a proper application which is to be heard in the presence of the parties. In a case in which the Official Receiver, after sending the telegram, never appeared in Court and all the proceedings taken by the Court were in his absence, they were held liable to be set aside on the application of the decree-holder on the ground that there was nobody present before it to prosecute the proceedings even if it be assumed that there was such an application, *Basheshar Nath v. Baga Mal*, 120 I.C. 175 : (1929) A.I.R. (L.) 805. In order to give effect to the section, it is necessary for the Receiver to make an application for the proceeds, in other words, they do not *ipso facto* belong to the Receiver or to the estate of the insolvent, *Jokhiram Surajmal Firm v. Chouthmal Bhagirath*, 9 Pat. 945 1931 A.I.R. (Pat.) 70.

Restitution or Refund.

The view expressed in *Din Muhammad v. Tara Chand*, 116 I.C. 192 : 1930 A.I.R. (L.) 39, namely, that "there is no provision in the Provincial Insolvency Act authorising Official Receiver to claim a refund of money realised by a decree-holder in execution of his decree after the date of the admission of a petition to adjudicate the judgment-debtor as an insolvent. Section 144, C.P.C. relates to restitution of a benefit received by a person in the event of a decree being varied or reversed and is inapplicable to a case like this, but the Official Receiver may institute a suit against the decree-holder for recovery of the money realised by him. The proper course for the Official Receiver was to apply under section 52 to the executing Court. The executing Court has got no power to direct the decree-holder to restore the amount," has been overruled in *Official Receiver, Jullundur v. Labhu Ram*, 14 Lah. 724 : 144 I.C. 580 : 1933 A.I.R. (L.) 477, where it has been held that under sec. 51 (1), the Receiver in insolvency is entitled to assets realised by a judgment-debtor in execution after the date of the admission of a petition by the judgment-debtor to be adjudicated an insolvent, sec. 52 being applicable to a state of affairs antecedent to what is contemplated by section 51 (1). Under sec. 4 of the Act, the insolvency Judge has full power to decide whether the Official Receiver is entitled to the assets realised by the decree-holder in execution of his decree against the insolvent and can order refund of the money paid to the decree-holder. Following this case it has been held in *Seshayya v. Rangiah*, (1939) 1 M.L.J. 203 that where the insolvent's property was sold in execution of a decree and the Court came to the conclusion that the realisation of the sale proceeds by the Official Receiver was not proper, the Official Receiver was entitled to a refund of the money paid to the decree-holder. *Id.*

Order for rateable distribution.

Where an order for rateable distribution has been passed under sec. 73, C.P.C the exception to section 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to the amount rateably distributed under the order. Where an order for rateable distribution was made but the decree-holders were prevented from drawing out the sums to which they were entitled thereunder by reason of litigation instituted by other creditors of the judgment-debtor and before the sums were actually drawn out, the judgment-debtor became insolvent, it was held that the sums in Court must be treated as the property of the decree-holder and not that of the judgment-debtor. As soon as the order for rateable distribution was passed the Receiver cannot recover from Court, *The Official Receiver, Tanjore v Venkatarama Iyer*, 42 M L J. 362 ; 1922 M.W.N. 51.

Sub-sec. (2) ; Rights of secured creditors.

In the case of an ordinary creditor, he will be entitled to the assets realized in execution of his decree if the assets are realised before the admission of the insolvency petition. But, in the case of a secured creditor, he could proceed with the execution of his mortgage-decree even after the admission of the insolvency petition and will be entitled to the sale-proceeds of the mortgaged property notwithstanding the pendency of the insolvency proceedings. It is not necessary that the executing creditor, in order to get the fruits of the execution proceedings, should have sold the property before the admission of the insolvency petition. His right to proceed with execution till he realizes the amount due to him is not taken away by the admission of an insolvency petition. It is therefore clear that the right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent, *The Official Receiver, Coimbatore v. Palanisami Chetti*, 48 Mad. 750. It has been held in some cases, e.g., in *Khazanchi Sha v Nizam Din*, 31 Punj. L.R. 506 ; 126 I.C. 174 ; 1930 A I R (L) 791 and *Mt. Jai Logi v. Alliance Bank of Simla Ltd*, 12 A L J. 113 128 I.C. 300 ; (1930) A.I.R. (L) 855, that a secured creditor can pursue his remedy on his security in the absence of Official Receiver from the array of parties. But in view of the Privy Council decision in the case of *Kalachand Banerjee v. Jagannath Marwari*, 54 I A, 190 : 54 C. 595, the above view of the Lahore High Court can no longer be supported.

Rights of creditors who acquire a lien.

Where, in an action on a bill of exchange, money was deposited in Court by the defendant to abide the event, and the matter was

submitted to arbitration, and before the award the defendant became bankrupt, it was held that the plaintiff was a creditor holding security, *Ex parte Banner*, LR (1874) 9 Ch 379, *Ex parte Bouchard*, (1897) 12 Ch D 26. So also if a defendant pays money into Court with a denial of liability and becomes bankrupt before hearing, the plaintiff is a secured creditor for so much of his claim in the action as may be admitted for proof in bankruptcy, *Re Gordon*, (1897) 2 QB 516. The same principle applies to money paid into Court as a condition of leave to defend under RSC 1883, Or XIV, and such money will be ordered to remain in Court until the 'event' is determined either by trial of the action or admission of a proof, *Re Ford*, (1900) 2 QB 211. The defendant was arrested before judgment and was ordered to be released from custody on depositing in Court a sum of money sufficient to meet the plaintiff's claim in the suit, under Or XXXVIII, r 2 of the CPC. There was subsequently an attachment of the money by a decree holder and an adjudication of the defendant as an insolvent. It was held that the money was paid into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour, and that the attaching creditor's and the Official Receiver's claims were subject to his liens *Ramiah Aiyar v Gopalier*, 41 Mad 1053.

In an appeal the defendant appellant obtained an order for recredit of the suit the decretal amount was adjudicated insolvent and was set aside with the appeal. On an order for recredit and payment to the decree holder of the money so deposited in Court, it was held that the amount was payable to the decree holder and not to the Official Assignee, *Chouth Mool v The Calcutta Wheat and Seeds Association*, 51 Cal 1010 84 IC 922 1925 A 1R (C) 416. Where money is deposited by a defendant as a condition precedent to the setting aside of a decree under O 37, r 4, CPC, the decretal amount is a charge on the deposit if final judgment is passed against the defendant. The case might be different if, instead of depositing money as a security, land were furnished as security. In such a case the title of the real owner of land would not be lost, *Gopalayyar v Therunengadan Pillai*, 38 IC 481. In *Purshottam Das v E B David*, 13 ALJ 893 30 IC 779, it was held that a decree holder was a secured creditor, the money set apart for him as a condition precedent for the setting aside of an *ex parte* decree being a security to him which he might draw and appropriate to his own use. "Where a sum is deposited by the defendant with the plaintiff's pleader (as when it is deposited in Court) under an order of the Court that the deposit is 'in part satisfaction of the money to which the plaintiff may be entitled' as a result of the action, such sum is not attached before judgment within the meaning of Or XXXVIII, r. 5, CPC. involving the consequences that in the event

of the insolvent being subsequently adjudged an insolvent, the deposit becomes available to the general body of the insolvent's creditors. The effect of the order is that the plaintiff is secured in obtaining satisfaction of his decree, if he obtains one and on a decree being obtained the plaintiff is entitled to be paid out of this sum forthwith in preference to the other creditors. *Gouranga Behari Basak v Manindra Nath Das Gupta* 37 C W N 475 58 CLJ 222 145 IC 826 1933 AIR (C) 625

Sub section (3), *bona fide* purchaser in execution sale.

Under section 43 (3) of the Bankruptcy Act an execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy and a person who purchases the goods in good faith under a sale by the Sheriff shall in all cases, acquire a good title to them against the trustee in bankruptcy. An order for the sale of mortgaged property having been made on the application of the mortgagee who had got a decree, and before the sale had taken place the mortgagor (judgment debtor) applied to be made insolvent under section 344 of the CPC (1882). Five months after the sale he was duly declared an insolvent under section 351. It was held that the subsequent declaration of the mortgagor's insolvency did not affect the sale or render it illegal. No consequences in derogation of the ordinary rights of judgment creditors follow from an application
Ishu or Lakshmidat
Gur Saran Lal 42

od faith purchases
 the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver. Where a purchaser of an insolvent's property in execution sale has been for valuable consideration without notice the purchaser from such a purchaser even with notice of the insolvency, acquires the right of the vendor and gets a good title under sec 34 (3) [now sec 51 (3)] as against the Receiver, *Madhu Sudhan v Parbati Sundari* 35 Ind Cas 643. Following this case it has been held in *Dinesh Chandra v Munshi Jahanali*, 39 C W N 424 that sec 28 (2) is controlled by sec. 51 (3). A *bona fide* purchaser in good faith of an insolvent's property at an execution sale held after the order of adjudication acquires a good title against the Receiver in Insolvency even though such purchaser may be the decree holder himself. In a case when the decree holder was not aware of the insolvency proceedings against the judgment debtor, the execution sale of the latter's properties after the order of adjudication cannot be held to have been a nullity by reason of non service of notice under Order XXI r 22 CPC. There is nothing in the section to suggest that the sale is null and void and that the title obtained in the property purchased in execution does not vest in the purchaser. *Jokhiram Surajmal Firm v Chouthmal Bhagirath*, 9 Pat 945 (1931) AIR (P) 70. When

an auction sale has taken place, the property itself no longer vests in the Court or the receiver, but under sec 51 the sale proceeds are at the receiver's disposal. But in some cases he could apply for setting aside the sale under Or 21, r 90 CPC, *Kishan Suarup v Mukadi Lal*, 1934 A L J 857 1934 A W R 557 1934 A I R (All) 252

When the decree holder brings to sale the property of the judgment debtor in execution of his decree and the sale is held after the admission of the insolvency petition against him at the instance of another creditor and no intimation is sent to the execution Court and the Court in ignorance of the insolvency proceedings holds the sale, the sale will not be void unless the purchaser purchases it with the knowledge of insolvency proceedings. Sec 52 must be read in conjunction with s 51 of the Act as s 51 qualifies s 52 with the result that even if such a sale is held, the benefit accruing from the sale namely the sale proceeds shall be entirely at the disposal of the Insolvency Court for distribution amongst the creditors, if they are realised after the date of admission of the petition. *Rangappa Gangappa v Ghanshyam* I L R 1937 N 249 170 I C 383 1937 A I R (N) 193

Where the judgment debtor is declared an insolvent he has no longer any interest in the property which can be sold and the Court has no jurisdiction to sell the property without making the Official Assignee a party to the proceedings. Where, therefore, insolvent's property is sold in execution of decree against the insolvent, question of good faith is irrelevant because the execution proceedings are a nullity after the order of adjudication which dates back to the petition. The essence of good faith is that the purchaser should not know of the defect in his title. If he does then he loses his protection. Where, therefore, the decree holder purchaser

By reason of the provisions of sec 28 (7) of the Act, the title of an auction purchaser who purchases a property of the debtor after admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed whereupon he gets an indefeasible title. But if an order of adjudication is made, such purchaser, unless he be a purchaser in good faith cannot claim any title against the receiver. *Jogendra Nath Kundu v Jogneswar Mandal* I L R 63 C 178, 39 C W N 1289 158 I C 574 1935 A I R (C) 612. By the combined operation of ss 28 and 51 it is clear that a sale of the property until the date of the order of adjudication is not prohibited in spite of the presentation and admission of the insolvency petition but the creditor is not given the benefit of the remedy had by him. But the law protects the title of the bona fi

auction purchaser to the property sold in auction because of s 51(3). If therefore a purchaser can say that the purchase was made in good faith in spite of the fact that there has been an order of adjudication subsequent to the sale his title to the property will remain unaffected. Therefore the doctrine of relation back of the title of the Official Receiver is subject to the exception enacted in s 51(3). *Mamidi Chinn Venkata Srinaya v Nekhanti Suryanarayana* 1938 M W N 841 1935 A I R (M) 906. The plain meaning of s 51(3) of the Act is that in every case execution sale of a debtor's property whether before or after admission of the insolvency petition the bona fide purchaser acquires a good title to the property which holds good against the Official Receiver and the right which the Official Receiver gets by relation back from the order of adjudication to have vested in him all the property which the debtor had at the date of insolvency petition will not prevail against the purchaser in good faith at an execution sale held prior to adjudication. Strangers to a suit are justified in believing that the Court has done that which it ought to do and no purchaser at a Court sale would be safe if he was bound to enquire into the accuracy of the Court's conduct of its own business. *Muthan Chettiar v Venkatesuami Nacker* 59 M 928 1936 M W N 753 44 L W 194 71 M L J 170 1936 A I R (M) 819.

An application by a receiver in insolvency praying that an execution sale of a property of the judgment debtor held after the adjudication

of the insolvent judgment debtor in the latter's interest. Consequently not only an appeal but also a second appeal would lie from an order made on such an application. *Dnesh Chandra Roy Choudhury v Munshi Jahanali Biswas* 39 C W N 424.

When decree holder is the auction purchaser

There is nothing in the provisions of the Provincial Insolvency Act to preclude a decree holder from proceeding with the sale with the knowledge of the insolvency and purchase the property himself. Notice of insolvency to the decree holder cannot connote to him want of good faith. The only disability under which he lies is that he will not be entitled to the benefit of execution that is he can not set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser and share

Sale after adjudication

Sec 51 (3) can only refer to all cases of execution sales held

before adjudication. It cannot operate in cases of sales held after adjudication for the two reasons viz (1) that sec 51 comes in the Insolvency Act amongst a set of provisions dealing with the effect of insolvency (i.e. adjudication) on antecedent transactions and (2) that after adjudication the debtor has no property which can be sold in execution. Hence a Court executing a decree has no power to sell a judgment debtor's property after the judgment debtor has been adjudicated insolvent. Such sale is inoperative and the fact that the Official Receiver was given a notice in the execution proceedings in such case does not make him bound by the sale. That is a question of procedure only. *Bachu Mallikarjuna Rao v Official Receiver Kistna* ILR 1938 (M) 1063 1938 AIR (M) 449

Effect of foreign adjudication on execution proceedings in India

A prior attachment of a debtor's property in execution of a decree for money is not avoided by the subsequent adjudication of the debtor by a foreign Court. In execution of a money decree obtained by the appellant against his judgment debtors he attached in December 1926 in the Madras High Court a preliminary decree for partition which had been passed by the High Court in favour of his judgment debtors. In September 1928 an order was made by the District Court at Secunderabad adjudicating as insolvents the said judgment debtors. The question having been raised as to what effect was to be given by the Madras Court to adjudication order of the Secunderabad Court in competition with the prior attachment of the decree in the Madras Court it was held by the Privy Council that the District Court at Secunderabad was a foreign Court in relation to the Courts of British India and that the prior attachment in India was not avoided by the subsequent adjudication of the foreign Court. *Anantapadmanabhaswami v Official Receiver Secunderabad* 60 IA 167 56 Mad 405 64 MLJ 562 1933 MWN 374 1933 ALJ 692 37 CWN 553 57 CLJ 418 35 Bom LR 747 142 IC 552 1933 AIR (PC) 134

52 Where execution of a decree has issued against

Duties of Court
executing decree
as to property
taken in execution

any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency

petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an

adequate part thereof for the purpose of satisfying the charge.

Review.

This is section 35 of Act III of 1907 and corresponds to sec 54 of the Presidency Towns Insolvency Act, and is based on section 41 of the Bankruptcy Act, 1914

Amendment.

The clause "an insolvency petition by or against the debtor has been admitted," has been substituted in place of an order of adjudication has been made against the debtor" in Act III of 1907 and the clause "the costs of the suit in which decree was made" has been newly added. These amendments are thus explained in the Select Committee Report, dated 24th, September, 1919. "We provide at the same time by a new clause amending sec 35 of the Act that the costs of the suit as well as of the execution shall be a first charge on property delivered by the Court under the section to the receiver."

Object of the section.

The object of the section is to stay the execution proceedings in all the Courts against the estate of the insolvent by operation of law as soon as an application for insolvency has been admitted, to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of the receiver for equal distribution to the general body of creditors. The difference between secs. 34 and 35, (now secs 51 and 52) is that if the creditor has been able to realise the whole or part of his dues by due diligence before a receiving order is made he will be allowed to reap the benefit of his diligence (sec 51), otherwise all creditors are equally entitled to participate (sec. 52), and to achieve this object all Courts have been directed to stay all execution proceedings as soon as it is informed that a petition for insolvency by or against the judgment debtor has been admitted. After an adjudication in insolvency an attachment of property though made before adjudication ceases to have any effect and the property vests in the receiver, and if no receiver is appointed the property vests in the Court, *Gound Das v Karan Singh*, 40 All 197. The object of section 52 is not to give an advantage to the insolvent but to prevent individual creditor deriving unfair advantage over other creditors and to place the property in the hands of a receiver for equal distribution to the general body of creditors. This section, no doubt, gives a right to the insolvent to make such an application but it is obvious that the application must be made for the general body of creditors and not for the insolvent. *Tirpat Thakur v Ram Perakash Das*, 12 Pat L T. 103 125 I C 783 : 1930 A I R. (Pat) 406

Notice and application to the executing Court

It is the duty of the sheriff when served with notice of a receiving order to hand over on request the goods or their proceeds to the Official Receiver but if the Official Receiver does not make the request it is his duty to sell (although sec 40 Bankruptcy Act 1914 will deprive the execution creditor of the benefit of execution) and the trustee cannot afterwards impeach the sale *Woolford's Estate Trustee v Levy* (1892) 1 Q B 772. Before an executing Court can stay sale of judgment debtor's property under sec 52 two conditions must be satisfied. They are firstly that notice should have been given to the executing Court of the admission of the insolvency petition and secondly that the application should have been made to that Court for delivery of the property to the Receiver *Ram Gopal Ram Parsad v Gulua Mal Ghasiram* 128 1 C 292 1930 A I R (Lah) 851. The Receiver is to give notice of the admission of the insolvency petition to the executing Court and may request the executing Court to deliver up the property seized in execution. There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by sec 52 to direct the property if in its possession to be delivered to the Receiver. If no such application is made the executing Court is at liberty to sell the property and the sale being legal cannot be impeached by the Receiver or the creditors *Rolla Ram v Ram Labhya Mal* 6 L L J 232 80 1 C 509. sec 51 qualifies sec 52 which must consequently be read in conjunction with sec 51. If no notice is received by the executing Court and that Court in ignorance of the insolvency proceedings holds an execution sale the sale though held after the admission of the insolvency petition will not be void unless the purchaser in execution purchases the property with knowledge of the insolvency proceedings. But the benefit accruing from the sale namely the sale proceeds will be entirely at the disposal of the Insolvency Court for distribution among the creditors if they are realised after the date of the admission of the insolvency petition. The Insolvency Court can call upon the decree holder to deposit the sale proceeds if he has drawn the same out of Court towards the decree debt *Rangappa Gangappa v Ghanshyam* 1 L R (1937) Nag 249 170 1 C 383 1937 A I R (N) 193.

But in *Anantharama Iyer v Velah* 30 M L J 611 34 1 C 829 it has been held that the executing Court is bound to stay the sale if it had only the notice of the admission of the insolvency petition and when no application for delivery of the property under attachment has been made. In that case A was adjudged insolvent on the 17th August 1911. In execution of a decree against him

on the 21st January, 1911 certain properties were attached. The Receiver of the insolvent's estate applied to the Court on the 2nd March 1912 to stay the sale on the ground that A has been declared insolvent. But the sale nevertheless took place and the property was purchased by the second respondent. The Receiver thereafter applied to the Court for setting aside the sale. It was held under sec 47, C P C that the sale was altogether irregular and the Court in holding the sale after it has been brought to its notice that the judgment debtor had been adjudged an insolvent, acted if not without jurisdiction at any rate with material irregularity in the exercise of its jurisdiction, held further that the second respondent acquired no title to the property of the judgment debtor had at the time of the sale no be sold and that neither sec 34 no

affected the case. So also in *Mahatubhai* 30 Bom LR 455 109 IC

, it has been held that 'on a mere notice of the admission of a petition for adjudication of the judgment debtor, the executing Court was bound to stay the sale'. Following this case it has been held in *Mahendra Kumar Baisya Saha v Dinesh Chander Roy Choudhury* 60 Cal 696 57 CLJ 381 37 CWN 392 that a sale of a judgment debtor's property in execution of a decree against him by the executing Court is void as against the receiver when the executing Court is before the sale apprised of the pendency of insolvency proceedings against such judgment debtor in the Insolvency Court although no application for delivery of the property may have been made by the receiver. Therefore it follows as has been observed by Rankin, CJ in *Mohutosh Dutta v Rai Satish Chandra Choudhuri Bahadur*, 35 CWN 971 1932 A I R (C) 203 that sec 52 is applicable only where notice is given to the Court in time and before the sale has already taken place.

If no application is made to the Executing Court under section 52

the sale of the property. There is nothing in the section to indicate that the executing Court is prohibited from doing what it is obliged to do and its power to sell the property remains unaltered and unaffected' as has been observed by Lord Esher in *Trustees of Woolford's Estate v Lory*, (1892) 1 Q B 772 (780). The sale by the Court is *prima facie* valid. *Mamidi China Venkata Sruaya v Nekkanti Suryanarayana*, 1938 MWN 841 1938 A I R (M) 906.

It is only when an application is made to the executing Court for the delivery of the property, that the Court is required by sec 52 of the Act to direct the property if in its possession to be delivered to the Receiver. In the absence of such an application

the Court is at liberty to sell the property *P M Chettyar Firm v A K A C T A L Chettyar Firm*, 13, R 534 1935 A I R (R) 317

Receiver includes interim Receiver.

Whether the term "Receiver" used in sec 52 is restricted to adjudication or will apply to an interim
tion 20 is not quite clear Nor is it
under the section is restricted to one
made by the insolvent or any one else

But it is perfectly clear that an application under sec 52 to an
executing Court to deliver property to the Receiver can only be
a valid application if the Receiver had been clothed by Insolvency
Court with powers to take possession of the insolvent's property,
Arunachalam Chettiar v Naganna Naicker, 23 M L W 513 94 I C
126 (1926) A I R (M) 606

In *Lyon Lord & Co v Virbhandas*, 19 S L R 35 95 I C 705
1926 A I R (S) 199, it has been held that the Receiver referred to
in sec 52 is the Receiver appointed under paragraph (1) of sec 56
of the Act after the passing of the order of adjudication and not an
interim Receiver appointed under sec 20 of the Act The power
to apply for an order under sec 52 for transfer of property from
the custody of the Court to that of the Receiver or the power to
sell a part of the property to pay off a charge created by sec 52
cannot be conferred on an interim Receiver for the preservation
and management of the property pending decision of the Court
So also in *Ram Gopal Ram Prasad v Gulua Mal Ghasiram* 1930
A I R (Lah) 851, it has been held that sec 52 contemplates a
Receiver with power to sell Such power is possessed only by a
Receiver appointed after adjudication and not by a Receiver
appointed *ad interim* But this view has not been accepted as
correct by the same High Court in the case of *Madho Ram Budh
Singh v Raj Kishan*, 1932 A I R (Lah) 471 where it has been held
that a Receiver referred to in section 52 is not the Receiver
appointed after adjudication and an application under sec 52 by
an interim Receiver is competent, inasmuch as sec 52 as it stands
contemplates that presentation of an application not after adjudi-
cation but at any earlier stage, i e as soon as the petition is
admitted

In *Mohitosh Dutta v Rai Satis Chandra Chaudhuri Bahadur*, 35
C W N 971 1932 A I R (Cal) 203 Rankin, C J, observed that an
interim Receiver unless he comes under sec 52 of the Provincial
Insolvency Act is not competent to maintain an application under
sec 47, C P C as he cannot be said to be in any sense the represen-
tative of the judgment-debtor In *Sivaswami Odayar v Subramania
Aiyar*, 55 Mad 216 62 M L J 68 1932 A I R (Mad) 95, it has
been held that "section 52 as amended is peremptory in its terms
and contemplates the presentation of an application not after

adjudication but at an earlier stage, that is, after an insolvency petition has been admitted. At that stage the only Receiver that can be in existence for the purpose of applying is the interim Receiver. The Receiver referred to in sec 52 is not Receiver appointed after adjudication and an application under sec 52 by an interim Receiver is quite competent'. The words 'has been admitted' in sec 52 clearly show, that the word 'receiver' used later on in the section must include an interim Receiver. On the admission of a petition there can be no question of a receiver until the debtor has been declared insolvent. *Firm Ghanshyam Das Hanuman Prasad v Jainaram Verman*, 1934 All L R 389 1934 A I R (All) 444. According to sec 52, as now amended there is no difference between a Receiver appointed after adjudication and an interim Receiver so far as the right of a decree holder in a simple money decree to execute his decree by attachment and sale of the insolvent's property is concerned and such property vests in the interim Receiver in the same manner as in a receiver appointed after adjudication, *Bishan Singh v Gurmukh Ram*, 34 P L R 41. It has been held in *Madho Ram Budh Singh v Receiver of Firm Radha Kishen & Sons* 14 L 63, that in its present amended form sec 52 contemplates presentation of an application not after adjudication but at any early stage that is to say, as soon as the insolvency petition has been admitted, and the Receiver referred to in the section as not the Receiver after adjudication and an application by the interim Receiver is competent. *Muthan Chettiar v Veni Kutsuami Naicken* 59 M 928 1936 M W N 753 44 L W 194 71 M L J 170, 1936 A I R (M) 819, *Laxmi Oil Mill Co v Sukhdeo Kahyalal* 31 N L R (Sup) 212 161 I C 661 1936 A I R (N) 120.

Power of Insolvency Court to stay sale.

When after certain properties of a debtor have been attached in execution of a decree, an insolvency against him is admitted, it is the executing Court and not the Insolvency Court which may entertain an application and make an order under sec 52 of the Provincial Insolvency Act, directing the properties to be delivered to the Receiver and to be sold by him for realising the costs of the suit in which the decree was made and of the execution. When in such circumstances the Insolvency Court, on an application by the petitioning creditor, makes an order staying the execution proceedings and thereafter on an application by the attaching decree-holder makes another order directing the Receiver to sell the properties for realising the costs of the suit and the execution, the proper order for the Insolvency Court to make, is either to direct the Receiver to make an application to the executing Court in order to obtain the necessary order under sec 52 or to vacate the stay order so that the attaching decree holder may apply to the executing Court for sale of the properties, *Mathuresh Chakravarti v T R Mills & Co Ltd*, 38 C W N 1122 1935 A I R (C) 150.

Duty of executing Court on receipt of notice.

Where an interim Receiver moves the Court under section 52 to adjourn a sale in execution of a decree against the insolvent the executing Court must stay the sale and direct delivery of the property to the interim Receiver. It is justified purchaser under been confirmed by a Court, which was required peremptorily by the statute to stay its hand and to transfer the attached property to the Receiver, *Sivasami Odayar v Subramania Aiyar*, 55 Mad 316 62 MLJ 68 1932 AIR (Mad) 95. It should be noted that a sale of a judgment debtor's property in execution of a decree against him by the executing Court is void as against the Receiver when the executing Court is, before the sale, apprised of the pendency of insolvency proceedings against such judgment debtor in the Insolvency Court, although no application for delivery of the property may have been made by the Receiver, *Mahendra Kumar Baisya Saha v Dinesh Chandra Roy Chowdhury* 60 C 696 37 CWN 381 57 CLJ 381. In an application under s 52 of the Provincial Insolvency Act, where the conditions prescribed therein have been fulfilled, the executing Court has no other duty to perform than to direct the delivery of the property in question to the receiver, and is no longer competent to investigate or decide questions of title in dispute between the insolvent judgment debtor and any other co judgment debtor or stranger. *The Official Receiver, Kistna v Gogineni Kodandaramayya*, 58 M 1056 1935 MWN 499 68 MLJ 681 157 IC 826 1935 AIR (M) 65.

Property in possession of the Court.

The opening words of sec 52 refer to attachment of any kind of property which is saleable and need not be confined to movable properties alone. Where immovable property is attached in execution of a decree it is commonly stated that the property is in the custody of the Court and there is no reason to suppose that the Legislature meant that the attaching decree holder would have a charge for his costs where movable property is attached but he would be entitled to no such relief if immovable property is attached by him. The true construction therefore, is that sec 52 refers to the case of attachment of all kinds of property and is not confined to movable property alone, *Haras Chandra v Joy Chand* 57 C 122 1929 AIR (C) 524, *Sivasami Odayar v Subramania Aiyar*, 55 Mad 316, *Azizuddin Ferozedin v Niamant Ali*, 31 PLR 944 129 IC 213 1930 AIR (L) 970. Sec 52 refers to property which would include both movable and immovable property of the debtor. It contemplates the delivery of the property in the possession of the Court and thereby restricts its operation to such movable which is seized by attachment or in such other manner as to

possession to the Court *Lyon Lord & Co v Virbhandas* 76 Ind Cas 380 1924 AIR (S) 69 95 IC 705 19 SLR 35 (1926) AIR (S) 199 The effect of attachment of an immovable property under sec 64 C P C is that the property attached is kept *custodia legis* during the period of attachment and therefore, the Court which attaches the property and purports to sell it is in possession within the meaning of sec 52 and must stop the proposed sale and direct the property to be delivered to the Receiver *Mahasukh Jhaverdas v Valibhai Fatubhai* 30 Bom LR 455 109 IC 152 (1928) AIR (B) 177 *Laxmi Oil Mills Co v Sukhdeo Kanhaiyalal Firm* 31 NLR (Sup) 212 161 IC 681 1936 AIR (N) 120

But there is no warrant for holding that property, which is not even attached is in the possession of the Court By no fiction of law can it be held that the property which a judgment creditor is seeking to bring to sale, on the ground that the decree creates a charge upon it is property in the possession of the Court Section 52 does not therefore apply in such a case, *Ethirajulu Chettiar v Official Receiver, Nagapatam*, 56 Mad 453 64 MLJ 119 37 LW 114 1933 MWN 43 141 IC 817 1933 AIR (Mad) 152 Under sec 52 the Court executing the decree is to deliver possession to the Receiver and no one else, and where there is no Receiver in existence till after the sale in execution of a decree the Court executing the decree cannot be said to have acted under sec 52, *Sahu Durga Saran v Beni Pershad* 1933 ALJ 1342 146 IC 832 1933 AIR (All) 559 Debts due to the debtor which are attached by the issue of prohibiting order under Or XXI r 46 (1) (a), C P C do not fall within the purview of the section *Lyon Lord & Co v Virbhandas* 76 IC 380 1924 AIR (S) 69 95 IC 705 19 SLR 35 1926 AIR (S) 199 Section 52 deals entirely with property which has not been brought to sale and is inapplicable to a case where the property has been brought to sale *Swaminatha Aiyar v The Official Receiver South Malabar*, 57 Mad 330 65 MLJ 402 1933 MWN 996 33 LW 389 145 IC 999 1933 AIR (M) 703

Section 52 does not apply to decree holders obtaining security in execution for the satisfaction of their money decrees The exemption from the operation of this section which must be understood to have been given to secured creditors must be extended to money decree holders who have obtained securities in the course of execution *Official Receiver, Tanjore v Nagaratna Mudaliar* 49 MLJ 643 (1925) MWN 871 81 IC 377 (1926) AIR (M) 194 In *Daulat* 32 PLR 180 133 IC in appeal ordered that proceedings against the property of the judgment debtor on condition that the judgment debtor executed a registered mortgage deed of the land attached in favour of the decree holder for his benefit The mortgage deed was accordingly executed The decree holder succeeded in the appeal

late proceedings In the meantime the judgment-debtor was adjudicated an insolvent on the application of the other creditors of the judgment-debtor It was held that the decree-holder was the person for whose benefit the mortgage-security of the judgment-debtor's attached property had been created and hence he had become a secured creditor and was, therefore, entitled to a preferential right to the security over the other creditors as well as the Official Receiver who had subsequently come in

Costs of suit and execution.

On delivery of the property by the executing Court to the Receiver the decree holder is entitled only to the costs of the execution both under Act III of 1907 and under the Bankruptcy Act, 1914 Under Act V of 1920 if a receiving order is made between the seizure of goods and the completion of execution the creditor is not, of course, entitled to retain any advantage by it, but he is not bound to bear the cost of the suit in which the decree is made together with the costs of the execution upto the date of the delivery of the goods, and these have been made a first charge on the goods or any money obtained by the Court in the course of the execution whether handed over to the Official Receiver or not The Official Receiver or the trustee may sell the goods to satisfy the charge. "Where attachment has been revived under Or 21, r 63, C-P-C, the proceedings in suit which led to the order of attachment should be considered as proceedings in furtherance of execution and the expression 'costs of execution' should have a liberal interpretation so as to include the costs of the suit brought under Or 21, r 63 of the Code in which the creditor succeeded in having the order under r 60 releasing the property from attachment set aside," *Haran Chandra v Joychand*, 57 C 122 1929 A I R (C) 524 Under sec 52 of the Provincial Insolvency Act, a creditor is entitled to have the entire costs decreed to him as also costs incurred by him in execution proceedings paid to him first out of the sale proceeds of the properties attached by him and subsequently released in favour of the Receiver in insolvency. When only some items of such properties are sold by the Receiver, the creditor is entitled to have his entire costs paid out to him first and not to have his costs apportioned among all the properties *Abhoy Charan Bhattacharjee v Sachindra Nath Das*, 43 C W N 421

Effect of sale in execution after admission of petition for Insolvency.

Where the property has been sold before the order of adjudication and before the executing Court had knowledge of the insolvency proceedings, and there is no application to have the property delivered to the Receiver, the executing Court has jurisdiction to continue the execution proceedings *Laxminarayan*

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Costs of suit and execution

On delivery of the property by the executing Court to the Receiver the decree holder is entitled only to the costs of the execution both under Act III of 1907 and under the Bankruptcy Act, 1914. Under Act V of 1920 if a receiving order is made between the seizure of goods and the completion of execution the creditor is not, of course, entitled to retain any advantage by it but he is not bound to bear the cost of the suit in which the decree is made together with the costs of the execution upto the date of the delivery of the goods, and these have been made a first charge on the goods or any money obtained by the Court in the course of the execution whether handed over to the Official Receiver or not. The Official Receiver or the trustee may sell the goods to satisfy the charge. "Where attachment has been revived under Or 21, r 63, C.P.C. the proceedings in suit which led to the order of attachment should be considered as proceedings in furtherance of execution and the expression 'costs of execution' should have a liberal interpretation so as to include the costs of the suit brought under Or 21, r 63 of the Code in which the creditor succeeded in having the order under r 60 releasing the property from attachment set aside," *Haran Chandra v Joychand*, 57 C 122. 1929 A I R (C) 524. Under sec. 52 of the Provincial Insolvency Act a creditor is entitled to have the entire costs decreed to him as also costs incurred by him in execution proceedings paid to him first out of the sale proceeds of the properties attached by him and subsequently released in favour of the Receiver in insolvency. When only some items of such properties are sold by the Receiver, the creditor is entitled to have his entire costs paid out to him first and not to have his costs apportioned among all the properties. *Abhay Charan Bhattacharjee v Sachindra Nath Das* 43 C W N 421.

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v *Bhikamchand* 1 L R 1936 Nag 41 163 1 C 127 1936 A I R (N) 117

By operation of sec 25 (1) the title of the auction purchaser who purchased the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency petition is dismissed he gets an indefeasible title. But if the order of adjudication is made he can not claim any title against the receiver. An exception however has been made by Legislature in favour of purchasers in good faith in all cases (sec 51 cl 3) *Jagendra Nath Kundu v Jogneswar Mondal* 1 L R 63 C 176 39 C W N 1289 1935 A I R (C) 612. In *Muthan Chettiar v Venkitusuami Naicken* 1 L R 59 M 928 1936 M W N 753 44 L W 194 71 M L J 170 1936 A I R (M) 819 it has been held that s 52 enables a receiver appointed either before adjudication or after adjudication to get possession of the property of the debtor which is subject to attachment and when he applies to the executing Court the latter is bound to direct the property of the debtor in the custody of the Court to be delivered only to the receiver. And as necessary implication the Court is likewise bound to stay the sale of the attached property in execution in view of the peremptory provisions of s 52. But a sale in execution in defiance can not be held to be null and void. The sale confers a good title on a purchaser in good faith although the sale proceeds would have to go to the receiver for the benefit of creditors generally and not merely for the benefit of the executing creditor. There is nothing in s 52 which qualifies the very emphatic language of s 51 (3). The sale is not bad even if no notice is given to the Official Receiver before sale. *Narasimha murthi v The Official Receiver West Godavari* 1 L R 59 M 438.

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of transfer, be voidable as against the receiver and may be annulled by the Court

Review

This is section 53 of the Presidency Bankruptcy Act III of 1907 with the word void as it stood in sec 36 of Act III of 1907. It is amended by the Bankruptcy Amendment Act 1920 which corresponds to sec 55 of the Insolvency Act 1920. It corresponds to sec 36 of Act III of 1907 in place of the word void as it stood in sec 36 of Act III of 1907. The reason

for this change is thus explained in the Select Committee Report "It is settled law that the word 'void' in section 36 of the present Act means voidable only, and we have made this clear"

Amendment.

By section 6 of the Insolvency Law (Amendment) Act X of 1930, the words 'on a petition presented' have been inserted after the words 'is adjudged insolvent'

Object of the section

The general policy of the law of bankruptcy is to secure an even distribution of the insolvent's estate among his creditors. It has, therefore, been enacted that on adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver and shall become divisible among the creditors [sec 28 (2)]. By the expression "the whole of the property of the insolvent" is meant not only the property he is ostensibly seized and possessed of at the date of the presentation of the petition but also those which he has transferred to others with the intention of putting them nominally in the name of the others while retaining the beneficial interest in himself and thereby defeating the claims of his creditors. Insolvency Courts are therefore, armed under this section, with the power to annul fraudulent transfer of property made within two years of his insolvency, so that it may be available for distribution among the creditors. It has therefore, been observed in *Draupadi Bai v Gound Singh*, 65 I C 334, that 'besides property which was the insolvent's at the time of adjudication, property which had ceased to be his by transfer within two years before adjudication may also be made to vest in the Court and become divisible among the creditors by an order of annulment under sec 53. The annulment has the effect of divesting the transferee and vesting the property again in the insolvent. It then vests under sec. 28 (2) in the Court."

Application of Sec. 53.

The section comes into play only after adjudication. It deals with one of the effects of insolvency on antecedent transactions. A transfer of property made by the insolvent prior to his adjudication can, at the time of passing the order of adjudication, be annulled. *Ameshwar Lall v Anil Prasad & Co*, 1937 A I R (P) 134, a creditor applied to the insolvency Court for adjudication of a debtor on the ground that the debtor has made some transfers of his properties for inadequate consideration with a view to defeat or delay his creditors. It was held by the Insolvency Court, that transfers were bona fide transactions and the petition for adjudication was dismissed. On appeal it was held by the High Court

that the case was not approached with due regard to law on the subject. The consideration namely, the transfers being for inadequate consideration can properly arise only *after* and if the order of adjudication is made and proceedings for annulling the transfer are taken at the instance of the receiver or the creditor

Transfer of property.

The transfers referred to in sec 53 of the Provincial Insolvency Act appear to be only voluntary transfers or transfers as defined in the Transfer of Property Act. It is a question whether a fraudulent revenue sale is covered thereby *Usharani Debi v Shib Kumar Das*, 41 CWN 368. Transfer of property includes a transfer of an interest in property and the creation of any charge upon property [vide sec 2 (1)(f)]. Under sec 5 of the Transfer of Property Act, IV of 1882, as amended by Act XX of 1929, transfer of property has been defined to mean "an act by which a living person conveys property in present or in future, to one or more other living persons, or to himself and one or more other living persons, and 'to transfer property' is to perform such act". Sec 5 of the Transfer of Property Act has been amended to make it clear that a transfer can be made by a person to himself, as for instance, by a person making a settlement or trust in which he constitutes himself a trustee. "Under sec 42, sub sec (1) of the Bankruptcy Act every settlement—using the term to include any conveyance or transfer of property—is voidable at the instance of the trustee in bankruptcy if made within ten years before the settlor becomes bankrupt" *Ringuood*, p 141. It was held by the Court of Appeal in the case of *Re Spackman*, (1890) 24 QBD 728 that the assignment must be by deed, and not a mere declaration of trust or other dealing with the property. But the same Court afterwards held that the words "conveyance or assignment" must be construed as extending to and including the various methods of dealing with property to which conveyances usually have recourse, having regard to the nature of the subject matter, although such methods may not be conveyances or assignments in the strict sense of the words.

' Besides a feoffment, there were certain means by which an estate of freehold could be conveyed at common law without livery of seisin. But none of these was available without actual entry upon the land. Thus fines and recoveries were considered in the light of common assurances of freeholds. Again if a free holder in fee let his land to a tenant for years or at will who entered into actual possession only the mere right of freehold and fee remained with the forner, and this, being an incorporeal hereditament was transferable at common law by deed. An estate of freehold might be conveyed from a rightful owner to any one who had obtained actual possession of his land either with or without his privity by deed of confirmation of the estate to him. Also if two men of equal estate agreed to exchange lands

this might be completed at common law by entry without formal livery of seisin. And a life tenant in possession might surrender or give up his estate to a person entitled immediately after his death to the free livery'—Williams on Real Property, 11th ed., 1007, 1008. Partition among the members of a joint family of property within the meaning of sec 53 is in fraud of creditors. Official Liquidator v. Official Receiver, P L R 245, 123 I C 286, 1930. would include a transfer made by a decree and such transfer can, therefore, be annulled on the ground that it was fraudulent. *Isamoddin v. Ajmoddin* 38 Bom L R 255, 162 I C 659, 1936 A I R (B) 176. In a proceeding under sec 53 to set aside a transfer it would be a good defence to plead that the insolvent was merely a benamdar and that the transfer in question was really a reconveyance to the real owner, 58 M L J 35 (Notes).

Conditions for avoidance of transfer.

The provisions applicable to the case of a transfer by an insolvent in favour of a person other than a creditor are contained in sec 53. *Isuar Das v. Ladha Ram*, 62 Ind Cas 924. In order that a transfer may be annulled under the provisions of this section the following conditions are required to be fulfilled: (1) that the transfer is not made before and in consideration of marriage, (2) that the transfer is not made to a purchaser of immovable property in good faith and for valuable consideration, (3) that the transferor has been adjudged insolvent within two years from the date of the transfer. Where the vendees are not shown to be connected in any way with the insolvent and *prima facie* from the evidence the transaction does not seem to be a colourable one, nor does any question of fraudulent preference arise, the sale nor having taken place within three months before adjudication, the case comes under sec 53 and the sale should not be annulled, *Ishar Das v. The Official Receiver*, 1930 A I R (Lah) 135.

Transfer before and in consideration of marriage.

Transfers made before and in consideration of marriage are protected. But where there is evidence of an intent in the mind of both the parties to the marriage to defraud and delay creditors and to make the property a joint property, the transfer is not protected. *Bulmer v. The wife of Bulmer*, 29 An. Ante nuptial settlement cannot be set aside unless it can be shown that not only was fraud intended by the husband when he executed the settlement but also that the circumstances are such that the Court is justified in coming to the conclusion that the husband intended to defraud his creditors.

wife are jointly parties to the fraud *Ramsay v Calvert* 15 C W N 209 (Notes) A transfer by an insolvent of a portion of his property within 2 years prior to his insolvency to his wife not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration is void as against the receiver and the property comprised in the transfer is liable to be distributed among the general body of creditors *Bhut Nath v Biraj Mohini* 28 C L J 536 49 Ind Cas 78

Transfer for dower debt

According to Mahomedan law a Mahomedan wife is not entitled as of right to demand the payment of her deferred dower debt and cannot enforce such a claim but if she does demand it and if the husband think fit to pay it or to make a transfer of property in her favour in lieu thereof he is legally competent to do so and such transfer is valid in law *Khadiji Bibi v Shah Mohammad Zahir Alam* A W N (1901) 64 *Suba Bibi v Balgobind* 8 All 178 *Seth Nemi Chand v Mst Maluk Begam* 5 I C 316 *Mangal Rai Hira Lal v Sakina Begam* 1934 A L J 64 3 A W R 191 Transfer of property in lieu of dower debt after marriage is not a transfer before and in consideration of marriage and so it is liable to be annulled under sec 53 if it be proved to have been effected with a view to defraud the creditors and that to the knowledge of the wife *Muhammad Habib ullah v Mushtaq Husain* 39 All 95 In *Sarb Krishan v Official Receiver* I L R (1938) Lahore 502 on 27th July 1934 a Mahomedan received a notice from some of his creditors for the payment of their debts On 3rd August 1934 he sold a house by a registered deed to his wife for a consideration of Rs 1500 which included the deferred dower He was adjudged insolvent on his own petition The Official Receiver applied under s 53 of the Provincial Insolvency Act for a review of all the cases on the books at that point in so far as the consideration for the transfer was the deferred dower it was tainted with fraud and therefore the whole transaction transferring the house was set aside

Gift to wife

A husband transferred his share in his family dwelling house to his wife without consideration and the husband was adjudicated insolvent within 3 months from the date of the transfer The wife transferred the property It was held that even assuming that the transferee had purchased the property for valuable consideration and without notice of the adjudication of the insolvent the transfer to the purchaser by the wife subsequent to adjudication was void as the transfer by the husband to the wife prior to the insolvency was found to be fictitious and benami *Lakshmiya v Rai Kessori* 20

C W N 554 A wife is entitled to establish her title to the property transferred for valuable consideration to her by her husband more than a year before he was adjudicated insolvent. Transfers of this kind, if they don't fall under sec 53 of the T P Act, would in the absence of any provision to the contrary be valid transfers, *Mariappa Pillai v Raman Chettiar*, 42 Mad 322 10 MLW 59 52 Ind Cas 519. Where a deed of gift of immovable property in favour of wife was secretly executed at a time when the failure of the firm of which the donor (husband) was a partner was in sight, if not actually imminent, and the matter was kept secret till the firm had been declared insolvent and the lady never obtained possession of the properties and no convincing explanation was attempted to justify the transaction, it was held that the title did not pass from the donor to the donee, *Official Assignee v Bidya Soonderi*, 30 CLJ 428. Where the insolvent made a gift of a small room to his wife more than two years before the adjudication and most of the debts were incurred after that gift which was by a registered deed, the subsequent creditors who must be presumed to have been aware of it, are not prejudiced in any way by the gift, and the gift cannot be said to have been made fraudulently in order to defeat the creditors *Mst Jamuna Devi v Official Receiver, Campbellpore*, 38 PLR 67 163 IC 956 1936 AIR (L) 593.

Purchaser or encumbrancer.

A purchaser is one who gives a *quid quo pro*. So, the word includes not only a person who has bought something by a contract of purchase and sale, but also one who has given some valuable consideration. Where a father surrendered his interest in certain leaseholds so as to induce his son to assign his life policy to trustees his children he was held (1888) 20 QBD 732. On *Henry Stanyon*, 70 Ind Cas

253 25 OC 291 1923 AIR (O) 80, in which it was held that the trustees were not transferees for consideration it was argued in *Choudhury Sharfuz Zaman v Deputy Commissioner, Barakanki*, 79 Ind Cas 888, that the deed of trust executed by the insolvent within two years from the date of his adjudication was void. The appellate Court in appeal held "sec 53, and subsequent sec 55 which is inserted for the protection of *bona fide* transactions are both copied almost verbatim from the English Bankruptcy Act. It is, therefore, natural to assume that the words 'purchaser' and 'encumbrancer in good faith' which are taken direct from that Act have the same meaning as they have in English Courts. It has been ruled in *Hance v Hardinge* (1888) 20 QBD 732 that 'purchaser' in the Bankruptcy Act is used in the wider sense commonly given to the term in English law and not in the mercantile sense of a person who has bought something by contract of purchase and sale. It is the view of the Madras High Court in a ruling cited in *Official*

Receiv. Trichinopoly v Somasundaram Chettiar 34 Ind Cas 602 30 MLJ 415 that the English interpretation of the word purchaser applies also to the Indian law of insolvency. In that ruling it was held that the trustees can be regarded as purchasers whereas in the English ruling referred to a father was regarded as a purchaser from his son although in neither case was there any question of contract of sale.

Good faith

It is said in *Twyne's case* (1601) 1 Smith's Leading Cases 11 Ed p 1 a good consideration does not suffice if it be not *bona fide*. As was observed by the Judicial Committee in *Corlett v Radcliffe* 14 Moo PCC 121 each case must depend upon its own circumstances and in all the question is one of fact whether the transaction was *bona fide* or was a contrivance to defraud creditors. It may however be stated generally that a deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act it is not sufficient to render a deed valid that it should be made upon good consideration. *Chidambiram v Srinuasa* 37 Mad 227 (PC) 18 CWN 841 (PC). In deciding whether a particular transaction was entered into *bona fide* or not it is an error to take each fact which militated against the *bona fides* of the transaction separated from the rest of the facts and proceedings to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. *Seth Ghansham Das v Uma Prasad* 23 CWN 817 (PC) 50 IC 264. *Dina Nath v Ghulam Akbar* 34 PLR 647 143 IC 286 1933 AIR (L) 631. The words good faith should be taken to mean the absence of knowledge on the part of the person with whom the transaction has taken place of the presentation of the insolvency petition. *Surjya Kumar Naik v Besoy Kumar Hazra* 41 CWN 105.

The mere fact that valuable consideration has passed for a transfer by a debtor does not necessarily lead to an inference of good faith also. In considering the *bona fide* nature of transfers each fact dealing with the *bona fides* of the transaction is not to be separated from the rest of the facts but the facts should be considered in relation to such others and weighed as a whole. In order to prove good faith it is necessary for the purchaser to show that there was real intention of the debtor to pass ownership and of himself of acquiring it. *Narayan v Nathu* 10 NLJ 12 103 IC 486 1927 AIR (N) 166. A purchase for value not made in good faith i.e. where the purchaser is privy to the intention to defeat creditors is void under the Bankruptcy Act. *Re Maddeter* (1884) 27 Ch D 523. There is a suspicion of fraud where an insolvent executes a deed of gift only four days before filing his application for adjudication.

whatever the declaration in the deed of gift may be, *Husaini v Muhammad Zamur Abadi*, 74 Ind Cas 802

Where a mortgage by an insolvent made in favour of a creditor for a substantial cash consideration contemporaneous with the mortgage is impeached under sec 36 (now sec 53) the real test of the *bona fides* is as follows did the lender intend that the advance should enable his debtor to carry on his business and had he a reasonable ground for believing that it would enable him to do so? If that was the intention of the mortgagee the transaction is unimpeachable. But if the mortgagee knew that the mortgagor would not be enabled to carry on his business, if the mortgage was merely a device for defeating creditors, the transaction was not *bona fide* *F F Campbell & Co v Mithomal Duarkadas*, 9 SLR 65

Proof of Good Faith.

To determine whether a transfer is made in *good faith* or *mala fide* is to consider the state of mind of the transferor or the intention with which the transfer was made. If the object of the transfer was to defeat and delay the creditors the transaction is void. If the transferor is possessed of other properties over and above the subject matter of the transfer, the Court will not readily infer fraudulent intention in such circumstances. *Chandmull Sardarmull v Satya Churn Daw*, 42 CWN 34. "Intent to defeat or delay the creditors" or having a "view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances. If a man who is in serious pecuniary difficulties, his debts surpassing his assets, transfer a considerable portion of his properties or transfers properties in favour of some of the creditors having made no provision for the payment of debts due to others a Court may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor. *Baynath Rameshwar Lall v Atal Prasad Kumar*, 17 PLT 857 168 IC 140 1937 AIR (P) 134

Where an insolvent executes a sale deed in favour of his relation in order to defraud his creditors and retains possession of his property sold, an intent to defraud creditors, should be imputed to the vendees also. A sale made with intent to defraud creditors is wholly void even when there has been a part payment of the consideration, *Palaniappa v Official Receiver, Trichinopoly*, 25 Ind Cas 948. Where an insolvent transfers property and the question is whether in so doing he acted in *good faith* the fact that there has been valuable consideration for the transfer adequate to the occasion, would negative the inference that there was absence of good faith in spite of the fact that the transfer was in favour of a relation, *J M Lucas v Official Assignee, Bengal*, 24 CWN 418

The mere fact that a purchase of property which has the

of defrauding or delaying the vendor's creditors was for good consideration is not enough to protect the purchaser. It must also be shown that he acted in good faith. But the mere fact of the indebtedness of the vendor or knowledge on the part of the purchaser that the sale may defeat or delay creditors is not sufficient to negative the *bona fides* of the purchaser. If there was good consideration and the intention to part with the whole interest is proved and it is not shown that the transfer was a mere cloak for retaining a benefit to the vendor it is valid against the creditors. But if the object of the transfer is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution then the transfer is not in good faith, *Kamini Kumar v Hirulal* 23 C W N 769. Where the purchaser was not aware that the transferor was on the brink of insolvency, or that there were other creditors who had unsatisfied claims against the transferor or that the property transferred was the only property of the transferor the purchaser is a purchaser in good faith and he is protected under sec 53. *Sholapur Spinning & Weaving Co., Ltd v Pandharinath* 30 Bom L R 839 (1928) A I R (B) 341.

In *Jukes, re Official Receiver* (1902) 2 K B 58, Wright, J said 'I cannot help thinking that if a creditor takes the whole or substantially the whole of debtor's property in payment of a past debt knowing that there are creditors he cannot be said to be acting in good faith, *Daulat v Panduram*, 55 Ind Cas 67. *Bhagat Ram Bindra ban v Puran Chand*, 33 P L R 1058 140 I C 528 1933 A I R (L) 53. In satisfaction of pre existing debts a debtor transferred to his creditor some jewellery and some immovable property by way of mortgage. The value of the property transferred was not greater than the value of the debts which were liquidated. At the time of the transfer the creditor was unaware that there were other creditors of the transferor. The debtor was thereafter adjudicated insolvent. It was held that the transaction being *bona fide* and for value could not be impeached. *H Hagemester v U Po Cho* 12 Rang 625. Within 3 months prior to the presentation of a petition in insolvency the insolvent nominally sold a property in favour of a person with the direction to discharge a mortgage of the property. The adjudication which followed was annulled by the District Court on a composition but was restored on appeal. Pending the appeal a near relation of the insolvent, who was aware of the proceedings purchased the property from the original vendee and paid up the mortgage. It was held that the purchase was not made in good

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solely for a past debt without providing for his other creditors to whom he was heavily indebted, and that too by means of an ante-dated transfer, and the transferee, a relation of the transferor, takes

the transfer knowing all the circumstances, he is not a transferee in good faith within the meaning of section 55 of the Presidency Towns Insolvency Act (corresponding to section 53 of the Provincial Insolvency Act) and his transfer is liable to be cancelled under the section if the transferor is adjudged insolvent within two years of the transfer, *Official Assignee, Madras v Shaik Moudeen Routhier*, 50 M 948

Purchaser in good faith.

Is it the good faith of the transferor or the transferee that is required to be established in order to protect a transaction as *bona fide* under this section? There is no reason for holding that the words "in good faith and for valuable consideration," qualify the word "made" and not the words "a purchaser or incumbrancer." Both under the English law and the Indian law transactions can be upheld by any person making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent intention on the part of the bankrupt. In *Butcher v Stead*, (1875) L R 7 H L 839, Lord Hatherley observed "I think the Legislature intended to say that if you, the debtor, for the purpose of evading the operation of the Bankruptcy law and in order to give fraudulent preference, make this payment or discharge, it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him." In *Gopal v Bank of Madras*, 16 Mad 397 it has been held that mere fraudulent intent of the vendor cannot avoid the deed if the purchasers were free from that fraud. Cf *In Re Johnson Golden v Gillam*, L R 20 Ch D 389, *Moulal v Uttamjagjandas*, 13 Bom 434. If the transaction is a real and not a fictitious one, it is not brought within the section, unless the receiver proves that the transferee knew that the transferor was insolvent when the transfer was made, even where the transfer is of the whole available assets. *K P A P Chettiar Firm v U Maung Maung*, 1934 A I R (Rang) 208 following *Pope v Official Assignee, Rangoon*, 60 I A 362 12 Rang 105 (P C) 39 L W 1 (P C) 58 C L J 471 66 M L J 1 36 Bom L R 137 146 I C 743 1934 A I R (P C) 3. Where sales are effected between persons who are related to each other in order to defraud creditors, it necessarily follows that the vendee no less than the vendor was actuated by motive to defraud creditor and that renders the sale wholly void, *Chidambaran Chettiar v Sami Aiyar*, 30 Mad 6. The Receiver or the Official Assignee has to prove not that the insolvent was acting fraudulently or in bad faith, but he has to prove that either the transferee or the purchaser gave no value or consideration for the transfer and if there is consideration for the transfer, then the receiver has to prove that there was no good faith on the part of the transferee. It is not necessary that both parties to the transaction should act in good faith. Mere fraud on the part of the insolvent is not enough. What is required under the section is the fraud or want of good

faith on the part of the transferee. When a transaction is between the insolvent and the guardian of the minors, who are the transferees, the fraud of the guardian cannot be deemed to be the fraud of the minors. *Balubhai Mahanlal v. Kalyanji N. Chhabhai*, I L R (1939) B 1 40 Bom. L R 884. 1938 A I R (B) 449. So far as section 53 is concerned it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent. *Kullappa Reddiar v. Veerappa Chettiar* 1938 A I R (M) 285. It, therefore follows that no transfer of property is voidable under s 53, if the transferee only has acted in good faith. It is not necessary that both transferor and the transferee should act in good faith in order that the transfer may be valid. *Rama Nanda Pal v. Pankaj Kumar Ghosh* I L R (1938) 2 Cal 275. 1938 A I R (C) 417.

Valuable consideration

'Valuable consideration' has been explained in Stroud's Judicial dictionary as meaning money or money's worth and 'valuable' as

insolvent transferred his entire property worth not less than Rs 18,000 by way of sale in favour of a relation for Rs 12,000 when he was in embarrassed circumstances. The title deeds were not in possession of the alienee but were with the insolvent and the property also remained in possession of a relation of insolvent's wife. Out of the consideration of Rs 12,000, Rs 8,000 were alleged to have been paid before the sub registrar and the rest of the amount was covered by a previous pro-note. The alienee though a businessman did not produce account books showing the advance of the money nor did the insolvent show how he spent that large amount. It was held that the sale was a fictitious transaction. *Dina Nath v. Ghulam Akbar*, 34 P L R 647. Where, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something such acts or abstinence or promise is called a consideration for the promise [sec 2 (d) of the Contract Act]. A valuable consideration in the sense of the law may consist either in some right interest, profit or benefit accruing to one party, or some
given, suffered or under
10 Exch 162, *Muham*
428, *Ashidbai v. Abdulla*

In *In re Pope, Exp Dicksee*, (1908) 2 K B 169, it was held that, in order to constitute a person a purchaser, it is not necessary that either money or physical property must be given by him. It appears to be reasonably clear that the mere existence of a debt from A to B, is not sufficient valuable consideration for the giving of a security from A to B to secure the debt. If such security is given, it may, of course, be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given is sufficient consideration. On the other hand where there is no communication of the security, when there is no express agreement, and there are no circumstances from which the Court can infer any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all, *Wigan v English & Scottish Law Life Assurance Association*, (1909) 1 Ch 291. On an agreement not to enforce the debt owing by the bankrupt to the creditor at the time of the deposit of the notes the deposit of the notes amounts clearly to a transaction for valuable consideration, *In re Wethered Exp Salaman* (1926) 1 Ch 167.

Both *Hance v Hardinge*, (1888) 20 Q B D 732 and *Official Receiver, Trichinopoly v Somasundaram Chettiar*, 30 MLJ 415 34 IC 602, consider the question of valuable consideration. In the English ruling it is stated that the father, in good faith, to induce his son what he ought to do for his family, did enter into a dealing with his son and gave valuable consideration. In the Madras case it was held that "a responsibility taken by a person to whom properties are transferred in consideration of his taking onerous work seems to fall within the expression valuable consideration". In a suit to set aside a mortgage in favour of the appellant under sec 53 of the Provincial Insolvency Act it was found that the very alienation by mortgage was an act of insolvency. The mortgage was dated 10.4.1920 and was for Rs 6,000, discharge of prior debt Rs 2,500 and cash Rs 3,500. The mortgagee discharged the prior debt to the extent of Rs 1,000 and the cash was found not to have been paid. It was also found that the dominant intention under-

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When a debtor within 2 months prior to his adjudication as an insolvent executed an unregistered deed under which he purported

to transfer the whole of his property movable and immovable to a trustee for the purposes of realising its value and distributing the proceeds among his creditors it was held (1) that the deed was liable to be set aside in its entirety under section 53 inasmuch as the trustee in such a case is not a purchaser in good faith and for valuable consideration (2) that the deed was not valid even with regard to the moveables and that the Official Receiver was entitled to possession of the entire property *M W Elliott v Kopprupu Subiah* 26 L W 248 105 I C 138 A surrender in favour of land lord by the insolvent raiyat is not for valuable consideration when there is a contract for sale within the cognisance of the former for valuable consideration in favour of a third party *Syed Mahamed Malia v Chowdhury Mahamed Ismail Khan* 46 C L J 168 The insolvent executed a mortgage deed in respect of his property in favour of his father in law and his son shortly before an application was made by his creditor to adjudicate him insolvent The mortgagees were not in a financial position to invest the amount in a mortgage and the insolvent was not able to account for the amount alleged to have been received by him from the mortgage it was held that the mortgage was fictitious and fraudulent *Bhanyan Ram v Official Receiver Muafferghar* 27 P L R 513 99 I C 708 (1926) A I R (L) 621

An insolvent executed a mortgage in favour of a third person to make payment to his creditors It was found out that only a small portion of the consideration was paid to the creditors and the major portion was found to be fictitious It was held that in the above case the whole mortgage should be declared void and that the case was governed by sec 53 and not by sec 54 *Radha Kushen Tirath Ram v Fateh Mohamad* 33 P L R 905 137 I C 800 1932 A I R (Lah) 455 If a person tricks the would be insolvent into giving him a mortgage by a representation that he would settle with his other creditors the transfer is liable to be annulled under sec 53 *A K R M M C T Chettyar Firm v Maung Ba Chut* 128 I C 589 1930 A I R (R) 315

Transfers within two years—Relation back

Before the insertion of the expression on a petition presented between the words adjudged insolvent and the words within two years in section 53 by the Insolvency Law (Amendment) Act X of 1930 there was a conflict of judicial opinion as to whether for the purpose of annulling a transfer made by the insolvent within two years the period of two years should relate back from the date of the order of adjudication or from the date of the presentation of the petition on which the adjudication order was made In *Rakhal Chandra Purkait v Sudhindra Nath Bose* 46 Cal 991 24 C W N 172 52 I C 744 T V *Sankara Narain v Alagiri* 35 M L J 296 1918 M W N 487 24 M L T 149 42 I C 283 *Sheonath Singh v Munshiram* 42 All

433 18 A L J 449 55 I C 941 *Rachamadugu Rangiah v Appaji Rao* 51 M L J 719 1926 M W N 972 99 I C 241 it was held that an application to set aside a voluntary transfer lies under sec 53 even if the transfer was more than two years before the date of adjudication provided it was within two years before the date of the presentation of the petition

But the contrary view was held in *Jokhan Sing v Deputy Commissioner of Fyzabad* 23 I C 924 *Ghulam Muhammad v Panna Ram* 72 I C 433 1924 A I R (L) 374 *Nagindas Dayabhai v Gordhandas Dayabhai* 49 Bom 730 27 Bom L R 967 88 I C 941 1925 A I R (B) 480 *Official Receiver v Tirthadas Meenaram* 97 I C 321 1926 A I R (S) 66 *Maung Pe v Maung Po Htein* 6 Rang 193 110 I C 361 1928 A I R (R) 148 *Hemraj v Krishna Lal* 10 Lah 106 111 I C 8 1928 A I R (L) 361 where it was decided that the doctrine of relation back that is contained in section 28 (7) cannot be imported into section 53 and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under section 53

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amendment was under consideration by the Legislature On the
18th February 1930 a Bill was introduced in the Legislative Assembly to amend the law relating to insolvency The Bill was passed into law as the Insolvency Law (Amendment) Act X of 1930 and received the assent of the Governor General on the 20th March 1930 By sec 6 of the said Act it is provided In sec 53 of the Provincial Insolvency Act 1920 after the words is adjudged insolvent the words on a petition presented shall be inserted The reason for the above amendment is explained in the Notes on Clauses to the said Bill in the following terms Section 53 of the Provincial Insolvency Act has given rise to conflicting judicial decisions as to whether *terminus a quo* for the calculation of the period of two years referred to therein should be the date of the order of adjudication or the date of the presentation of the insolvency petition The view that the *terminus a quo* should be the date of the presentation of the petition is in pursuance of the policy underlying the Act and the contrary view leads to an abuse of the provision by dishonest and litigious debtors The clause gives effect to the former view

A transfer of property of the description given in sec 53 made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication can be annulled by the court under section 53 of the Act at the instance of the Official Receiver

by reason of the amendment of sec 53 by Act X of 1930. By the insertion of the words "on a petition presented" after the words "adjudge insolvent" in that section, the doubt as to the construction of the section on this matter has been set at rest by the Legislature. The amendment made by Act X of 1930 has a retrospective effect and will apply to the pending proceedings, *Veerappa Chettiar v Subramania Ayyar*, 52 Mad 123 (FB), *Pichamma v The Official Receiver, Cuddappah*, 54 Mad 12 (FB) 59 MLJ 686 1930 MWN 882 32 LW 454 1930 AIR (M) 834. The amendment made by Act X of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. R made an application for insolvency on the 21st November, 1928 and was adjudged an insolvent on the 8th March, 1930. R had executed a deed of gift in favour of his son on the 17th December, 1927. An application for getting the deed of gift annulled under sec 53 was made on the 5th September, 1930. It was held that the decision of the case was governed by sec 53 as amended by Act X of 1930, *Abdul Hafiz v Mool Chand*, 9 OWN 529 1932 AIR (Oudh) 77.

But in *Jada Ram v Farzullah Khan*, 1934 AIR (Peshwar) 30, it has been held "So far as the NWF Province the law prior to the amendment by Act 10 of 1930 was that the period of limitation was to be considered from the date of adjudication. The amendment can therefore only affect transaction which came into existence after it and the transaction before the date of amendment and over two years old at the adjudication order is not within time. The Legislature may by express provision give a retrospective effect to any legislation, but the general principle of the construction of statutes is that in the absence of such provision, an Act is not intended to have retrospective effect."

Transfers are not void but voidable.

In sec 36 of Act III of 1907 the word used was 'void' which has been changed to the word 'voidable' in Act V of 1920. The reason for the above change was explained by the *Select Committee Report* in the following terms "It is settled law that the word 'void' in section 36 of the present Act means voidable only, and we have made this clear." "That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal," *Jangi Lal v Jaddu Ram*, 1919 CWN Pat 105 (FB) 4 Pat LJ 24. "The transfer falling under section 36 (now 53) remains valid unless and until set aside at the instance of the Receiver. The word 'void' means voidable," *Mirappa v Raman Chettier*, 42 Mad 322 10 MLW 59 52 Ind Cas 519. A transfer of property falling under sec 53 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver, *Sharfuz Zaman v Sir Henry Stanyon* 70 Ind Cas 253 1923 AIR (O) 80.

Receiver's right to possession of the property transferred.

A certain person applied to be adjudicated insolvent. While his application was pending a petition was filed setting forth that shortly before the filing of the application the insolvent had executed a registered sale whereby he purported to sell certain property to the present appellant and asking that if an adjudication as insolvent was made an enquiry should be held as to the genuineness of the sale. No orders were passed on the application but, when the adjudication as insolvent was made, the Court appointed a Receiver of the property sold by the insolvent to the appellant, it was held, that so long as the sale was not annulled the Receiver had no authority against the appellant and further that a Receiver could not take possession of the insolvent's property, *N N S Court*, 4 Bur LJ 56 89 IC 61

Jurisdiction of the Court to avoid transfers during insolvency.

Unless a person is adjudged an insolvent an Insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void. *Mul Singh v Lakshmi Devi*, 95 IC 1055 (1927) AIR (L) 95. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation in an application under sec 53, *Chowdappa Gounder v Kathaperumal Pillai*, 50 MLJ 602 (1926) AIR (M) 801. Under section 36, (now sec 53), the Court has jurisdiction to deal with alienations made by the debtor of properties situated outside its local limits and such provision is not affected by the provisions of sec 16 of CPC, *Lalji Sahay v Abdul Gani*, 15 MWN 253 12 CLJ 452. In *Draupadi Bai v Gobind Singh*, 60 Ind Cas 334, the question arose 'has the Court power to annul the transfer and divest the transferee of properties situated in a foreign territory?' It was held "it seems that the Legislature cannot have intended to give the Court any such power. The Court of the foreign territory would not recognise the annulment of a transfer of immovable property situated therein and validly effected according to form required by its own law."

Jurisdiction of the Court to avoid transfers after annulment of adjudication

Where an adjudication is annulled under sec 43 the insolvency proceedings automatically come to an end except so far as they are kept alive by order passed under sec 37. Such "acts" in the insolvency which have not been completed at the time of annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court direct their continuance. An enquiry under sec 53 begun prior to the annulment stops short where it is at the date of the annulment but

by reason of the amendment of sec 53 by Act X of 1930. By the insertion of the words "on a petition presented" after the words 'adjudge insolvent' in that section, the doubt as to the construction of the section on this matter has been set at rest by the Legislature. The amendment made by Act X of 1930 has a retrospective effect and will apply to the pending proceeding, *Veerappa Chettiar v Subramania Ayyar*, 52 Mad 123 (FB), *Pichamma v The Official Receiver Cuddappah*, 54 Mad 12 (FB) 59 M L J 686 1930 M W N 882 32 L W 454 1930 A I R (M) 834. The amendment made by Act X of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. R made an application for insolvency on the 21st November, 1928 and was adjudged an insolvent on the 8th March, 1930. R had executed a deed of gift in favour of his son on the 17th December, 1927. An application for getting the deed of gift annulled under sec 53 was made on the 5th September, 1930. It was held that the decision of the case was governed by sec 53 as amended by Act X of 1930. *Abdul Hafiz v Mool Chand*, 9 O W N 529 1932 A I R (Oudh) 77.

But in *Jada Ram v Faizullah Khan*, 1934 A I R (Peshwar) 30 it has been held 'So far as the N W F Province the law prior to the amendment by Act 10 of 1930 was that the period of limitation was to be considered from the date of adjudication. The amendment can therefore only affect transaction which came into existence after it and the transaction before the date of amendment and over two years old at the adjudication order is not within time. The Legislature may by express provision give a retrospective effect to any legislation, but the general principle of the construction of statutes is that in the absence of such provision, an Act is not intended to have retrospective effect."

Transfers are not void but voidable.

In sec 36 of Act III of 1907 the word used was "void" which has been changed to the word "voidable" in Act V of 1920. The reason for the above change was explained by the *Select Committee Report* in the following terms "It is settled law that the word 'void' in section 36 of the present Act means voidable only, and we have made this clear." 'That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal,' *Jangi Lal v Jaddu Ram*, 1919 C W N Pat 105 (FB) 4 Pat L J 24. The transfer falling under section 36 (now 53) remains valid unless and until set aside at the instance of the Receiver. The word 'void' means voidable. *Mirappa v Raman Chettiar*, 42 Mad 322 10 M L W 59 52 Ind Cas 519. A transfer of property falling under sec 53 of the Provincial Insolvency Act remains valid unless and until set aside at the instance of the Official Receiver, *Sharfuz Zaman v Sir Henry Stanyon*, 70 Ind Cas 253 1923 A I R (O) 80.

Receiver's right to possession of the property transferred.

A certain person applied to be adjudicated insolvent. While his application was pending a petition was filed setting forth that shortly before the filing of the application the insolvent had executed a registered sale whereby he purported to sell certain property to the present appellant and asking that if an adjudication as insolvent was made an enquiry should be held as to the genuineness of the sale. No orders were passed on the application but, when the adjudication as insolvent was made, the Court appointed a Receiver of the property sold by the insolvent to the appellant, it was held that so long as the sale was not annulled the Receiver had no authority against the appellant and further that a Receiver could not be appointed as to part only of the insolvent's property, *N N S Chetty Firm v The Bailiff, District Court*, 4 Bur LJ 56 89 IC 61 (1925) AIR (R) 224

Jurisdiction of the Court to avoid transfers during insolvency.

Unless a person is adjudged an insolvent an Insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void. *Mul Singh v Lakshmi Devi*, 95 IC 1055 (1927) AIR (L) 95. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation in an application under sec 53. *Choudappte Gounder v Kathaperumal Pillai*, 50 MLJ 602 (1926) AIR (M) 801. Under section 36, (now sec 53), the Court has jurisdiction to deal with alienations made by the debtor of properties situated outside its local limits and such provision is not affected by the provisions of sec 16 of CPC, *Lalji Sahay v Abdul Gani*, 15 MWN 253 12 CLJ 452. In *Draupadi Bai v Gobind Sing* 60 Ind Cas 334, the question arose 'has the Court power to annul the transfer and divest the transferee of properties situated in a foreign territory?' It was held 'it seems that the Legislature cannot have intended to give the Court any such power. The Court of the foreign territory would not recognise the annulment of a transfer of immovable property situated therein and validly effected according to form required by its own law'

Jurisdiction of the Court to avoid transfers after annulment of adjudication.

Where an adjudication is annulled under sec 43 the insolvency proceedings automatically come to an end except so far as they are kept alive by order passed under sec 37. Such "acts" in the insolvency which have not been completed at the time of annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court direct their continuance. An enquiry under sec. 53 begun prior to the annulment stops short where it is at the date of the annulment but the

Court has the power at the time of annulling the adjudication to give a direction to continue the enquiry *Prima facie* if the adjudication is annulled the insolvent is placed *status quo ante* the insolvency, *Bhadramma v Parateesam Ayyararu*, 63 M L J 414

Jurisdiction of the Court to annul transfers on death of debtor.

When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under section 17 and the Court passed an order that the estate of the debtor should thereby be adjudged as insolvent and an Official Receiver was appointed to administer if the Official Receiver or creditors can invoke the power of the Court to set aside the settlements and alienations voidable under section 53 and 54. The order of adjudication though passed against the estate of the deceased is against the deceased himself and transfers by him are liable to be set aside under sections 53 and 54, *Subbiah Aiyar v The Official Receiver, Tinnevely* 63 M L J 727 37 L W 75 1933 A I R (M) 25

Exclusive jurisdiction of Insolvency Court to annul transfers

After an adjudication order the Insolvency Court is the only Court competent to set aside the transfer *Mirappa v Raman Chettier* 42 Mad 322 10 M L W 59 52 Ind Cas 519 Where on an application under sec 53 of the Provincial Insolvency Act, made by a Receiver to the Insolvency Court, for adjudicating certain transfer to be fraudulent and to cancel the same, notice was issued to the plaintiff but as the latter failed to appear in Court, the case was decided against the plaintiff *ex parte* and subsequently, the plaintiff having unsuccessfully applied to have the *ex parte* order set aside, brought a separate suit in the Civil Court for declaration of her ownership of the property in dispute, it was held that the suit was barred under sec 4 of the Insolvency Act "It is manifest that the plaintiff had no right of separate suit in the Civil Court to set aside the order passed by the Insolvency Court," *Kaniz Fatima v Naram Singh*, 24 A L J 897 (1927) A I R (A) 66 But there is nothing in the Provincial Insolvency Act to prevent the creditors and, therefore, the Receiver from proceeding under sec 53 of the Transfer of Property Act if they wish though they have another remedy under sec 53 of the Provincial Insolvency Act, *Official Receiver, South Kanara v Bastiao Souza*, 23 M L W 643 95 I C 300 (1926) A I R (M) 826

In *Dronadula Srinamulu v Ponakurra*, 45 M L J 105 1923 M W N 306 72 Ind. Cas 805 1923 A I R (M) 641, it was argued that sections 36 and 37 (now sections 53 and 54) confer a limited jurisdiction upon the Insolvency Courts and that to hold that the Court possesses the power to set aside a deed of mortgage executed

by the insolvent four years previous to the date of adjudication will be inconsistent with the assumption involved in the said sections. It was held that "these two sections enact special rules of substantive law to be followed by the Court in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the general law, and is to be applied only in cases which come up before the tribunals exercising powers conferred by the Insolvency Act. A comparison of the terms of sec 53, Transfer of Property Act with the terms of sec 36 (now sec 53) of the Insolvency Act will make the point clear. A settlement made by a person whose solvency is beyond question, but who, owing to unforeseen circumstances, becomes an insolvent within two years from the date of the settlement, cannot be set aside under the general rule, viz, sec 53 of the Transfer of Property Act, but can be annulled under this section 53 of the Provincial Insolvency Act. Sections 53 and 54 of the Insolvency Act don't really deal with the jurisdiction of the Insolvency Courts but rather lay down rules of evidence."

A Court exercising insolvency jurisdiction under Act V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law including such questions as are raised by sec 53 of the T P Act, *Shikri Prasad v Aziz Ali*, 44 All 71. The Insolvency Court is the only Court which has jurisdiction to go into the question raised under section 53 and decide the same and the parties should not be referred to the Civil Court for determination of such questions, *Hriday Krishna Adya v Osmanali Mandal*, 58 Cal 1352 136 IC 143 1932 A 1 R (Cal) 151. Where on an application by an Official Receiver an ex parte order has been passed by a Court under section 53 of the Provincial Insolvency Act, power to set aside made out, *Gobindo* 381 1927 A 1 R.

Validity of a transaction raised by the Official Assignee, on the ground that it is collusive, fraudulent, and not in good faith or for valuable consideration and any question raised therein under sec 57 of the Presidency Towns Insolvency Act (corresponding to sec 53 of the Provincial Insolvency Act) can only be determined by the Insolvency Court and not by a Civil Court. Thus where on a suit on a mortgage, executed by the insolvent, the Official Assignee challenges the transaction on the above grounds, a decree ought to be given in such mortgage, leaving it open to the Official Assignee to apply to the Insolvency Court to set aside the transaction *Surya Kumar Naik v. Bijoy K. Hazra*, 41 CWN 105.

Jurisdiction to go behind a judgment.

Sec 53 does not limit the expression "voluntary transfer" to

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any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of device that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property. In *Kanaya Lal v Official Receiver* 100 IC 742 a reference was made to arbitration of a so called dispute about certain property between an insolvent and his sons. The award of the arbitrators thereon was to the effect that the property of the insolvent was subject to a charge of Rs 4 000 in favour of his sons and subsequently a decree was passed on confession of the insolvent in favour of his sons on the basis of the award. It was held that the transaction amounted to a voluntary transfer within the meaning of sec 53 of the Provincial Insolvency Act and that it did not cease to be so merely because it was evidenced by a decree passed on confession of judgment by the insolvent. In *Re Naramdas Sunderdas ex parte the Official Receiver* 93 IC 331 (1926) AIR (S) 133 it was contended that a transfer effected by decree of the Court is not within the contemplation of sec 53. It was held that a consent decree has no greater sanctity than a contract between the parties and it could not have been the intention of the Legislature to deprive the Receiver or trustee in Bankruptcy of his cheap and speedy remedy of moving the Insolvency Court to do justice between the parties in cases where the debtor has resorted to the device of not only deceiving his creditors but deceiving the Court by submitting to a decree when there was no real contest between the parties. Sec 4 of the Act vests in the Insolvency Court the power to decide all questions which the Court deems expedient or necessary for the purpose of making complete justice or making a complete distribution between the parties.

Delegation of jurisdiction

It is clearly undesirable that where a matter has to be decided on trial the Court should not hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings and it is further undesirable that it should delegate its duty to a person such as the Official Receiver whose interest and duty may conflict in the conduct of the proceedings. *Krishna Iyer v Official Receiver Trichinopoly* 1925 AIR (Mad) 381. The Official Receiver is not a Court but a mere executive officer. He is not entitled to take evidence in an enquiry under sec 53 though ordered by the District Judge. *Venkatarama Chetty v Angathayammal* 38 LW 896 146 IC 204 1933 AIR (Mad) 471. An application for an adjudication that a mortgage deed by the insolvent was not a binding transaction is an application to declare the instrument void as against the Receiver under sec 53 and such applications are to be decided by the Court and not by the Receiver as against whom the instrument is sought to be declared void as this would in effect make the Receiver judge in his own case.

Muthusami Chettiar v Official Receiver North Arcot 51 M L J 287 (1926) A I R (M) 1017 It is not competent for the Court to send the case to a Munsiff for an enquiry *Upendra v Brindaban* 33 Ind Cas 188 In proceedings under sec 36 (now sec 53) the Court is bound to take evidence and cannot rely on statements made before the Receiver *Chinna v Kumarachakravarathi* 36 Ind Cas 906, *Abdul Aziz v Khirode* 41 Ind Cas 411 Where a Receiver reported to the District Judge that a certain mortgage made by an insolvent was liable to be set aside the Judge cannot refer to a Munsiff for report whether the mortgage was bona fide but must decide it himself *Jagannath v Lachmandas* 12 A L J 889

Although in *Krishna Iyer v Official Receiver* 1925 A I R (Mad) 381 it was held following *Jamab Bibi v Hyder Ally* 43 Mad 609 that if by the consent of parties the enquiry is held by the Official Receiver their consent was sufficient to validate the procedure employed the view was not accepted in *Venkatarama Chetty v Angathayammal* 38 L W 896 146 I C 204 1933 A I R (Mad) 471 where it has been laid down that consent of parties cannot give the Official Receiver a jurisdiction to adjudicate on the claim which jurisdiction he does not in law possess

Who can apply for annulment

A petition for the annulment of any transfer under sec 53 may be made by the Receiver or with the leave of the Court by any creditor who has proved his debt and who satisfies the Court that the Receiver has been requested and has refused to make such petition *Vide* section 54A and notes thereunder Sec 54A does not abrogate sec 58 and must be read subject to the provisions of that section The words voidable against the receiver in section 53 must therefore in view of sec 58 be read as voidable against the receiver of the Court as the case may be and a creditor is entitled to move the Court to take action under sec 53 where a receiver has not been appointed *Sitaram v Musst Nathibai* 1933 A I R (N) 365 Where the Court is summarily administering the estate any creditor may move the Court to take action under sec 53 or 54 *Mt Bechni v Sheikh Sadique* 9 Pat 839 129 I C 129 1931 A I R (Pat) 14 even if a claim under Or XXI r 58 has been allowed *Rangammal v Vardappa Naidu* 1935 M W N 524

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38 L W 896 146

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Limitation for application for annulment.

The period of limitation prescribed by Art 181 of Schedule I to the Limitation Act is confined to applications under the CPC, and does not apply to an application under section 36 (now section 53), of the Provincial Insolvency Act made by the Official Receiver No period of limitation is prescribed for such an application, which may be made at any time during the pendency of the insolvency proceedings *Durayya Solagan v Venkataram Naicker*, 60 Ind Cas 123 Whet

the Court chooses to take action under this section or is moved by the Receiver or by a creditor it is not bound by any period of limitation and Art 181 of Sch I of the Limitation Act has no application to such a proceeding *P Ramaswamia v Subramania Iyer* 79 Ind Cas 443 1925 AIR (M) 172 *Durjai Sing v Kunj Lal* 75 Ind Cas 995 1924 AIR (Lah) 553 *Hemraj Champalal v Ramkrishna Ram* (1917) 2 PLJ 101

Computation of the period of two years

If a transfer by an insolvent of his property happens more than two years before the date of the presentation of the petition it will come within sec 53 provided that the period of two years prescribed in the section expires on a holiday and the petition for adjudication is presented on the next working day *Narayan Ayyar v Official Receiver South Malabar* 1933 MWN 1049 1934 AIR (M) 294 The starting point in the computation of the period of two years is in case of execution sales the date of the sale and not the date of the confirmation thereof *Kanai Lal Nandy v Tinkari De* 37 CWN 535 57 CLJ 148 145 IC 429 1933 AIR (Cal) 564 and in case of voluntary transfers the starting point is the date of the registration of the deed of transfer and not the date of its execution *Sarvathada Iswaryya v Kurubasubbanna* 40 LW 413 1934 MWN 784 67 MLJ 380 1934 AIR (M) 637 *Muthiah Chettiar v Official Receiver Tinnevely* 64 MLJ 382 141 IC 101 1933 AIR (Mad) 185 *U Ba Sein v Maung Sau* 12 Rang 263 1934 AIR (R) 216 although it has been held in *Ratan Chand v Smail* 1933 AIR (L) 821 that the period begins to run from the date of execution and not from the date of registration

Scope of enquiry under section 53

Sec 36 (now sec 53) is wider in scope than sec 53 of the TP Act Under sec 36 it was not necessary to prove or show that the transfer was made with intent to defeat or delay creditors All that was necessary to show was that the transfer was made within two years of the adjudication of insolvency unless it was a transfer made before and in consideration of marriage *Muhammad Habibulla v Mostaq Hossain* 39 All 95 See also *Dronadula Srinanula v Ponakavira* 45 MLJ 105 1923 MWN 306 72 IC 805 (1923) AIR (M) 641 Section 53 does not apply to transfers made by an insolvent subsequent to his adjudication but only to transfers made by him previous thereto *Hayet Muhammad v Bhowanidas* 26 PLR 397 90 IC 1037 1926 AIR (L) 146 Section 53 applies when the existence of transfer is admitted on the other hand section 4 applies if the transfer or the existence of right claimed by the objector is denied by the Receiver *Ma da Ram v Jagan Nath* 123 IC 539 1930 AIR (L) 180 Sec 53 applies to a transfer not only to a stranger but also in favour of a creditor *Muthiah Chettiar v Official Receiver Tin*

notably 64 M L J 382 1933 M W N 312 37 L W 130 141 I C 101 1933 A I R (M) 185 *Bhagat Ram Bndriban v. Purnan Chandel* 33 P L R 1058 140 I C 598 1933 A I R (L) 43 A transfer by a Court Sale in execution is not entirely outside the scope of sec 53 *Ranabrahman v. Gudimalla Andalamma* 34 L W 547 1931 M W N 287 1931 A I R (M) 597

It is not open to an objector and it is not a good defence to an application to annul a transfer under section 53 and 54 to say that the debtor ought not to have been adjudged insolvent and that the order of adjudication is illegal and void. The proper procedure for annulling an order of adjudication is either by way of appeal against that order or by taking appropriate proceedings under sec 35 and not by way of objection to a proceeding for setting aside the transfer under secs 53 and 54 *Periammal v. The Official Receiver, Coimbatore* 1930 M W N 651 It is an erroneous exercise of the Court's power to pass an order annulling a transfer at the time of passing an order of adjudication *Chenchayya v. Bapayya* 62 M L J 177 32 L W 66 1932 A I R (Mad) 233

Avoidance of transfers by transferees

It was previously held that sec 53 applies only to transfers by the insolvent and not to transfers by transferees of the insolvent. The language of the section seemed to favour this view since it is the transferor who is the insolvent. The section was held to be aimed at donees under settlements and not at *bona fide* purchasers or mortgagees from them. It was also held that though the transfers by the transferees of the insolvent could not be impeached under sec 53 it was erroneous to jump to the conclusion that they could not be impeached in insolvency proceedings at all (i.e. they could be impeached under sec 4) *Sudha v. Nanak Chand Daulat Ram* 7 L L J 160 88 I C 89 1925 A I R (L) 295 *Jagannadha Aiyar v. Narayana Aiyangar* 52 I C 761 *Madharam Nair v. The Official Receiver, Tinnevely* 51 M L J 228 97 I C 918 1927 A I R (M) 58 *Gound v. Sonba* 121 I C 633 1930 A I R (N) 34 *Lakshipriya v. Ratkisson* 20 C W N 554 *Hayat Muhammad v. Bhounidas* 26 P L R 397 90 I C 1037 1926 A I R (L) 146

But the above view has not been accepted in later decisions. In *Guntura Pullayya v. The Official Receiver of Kistna* 1932 M W N 821 *Madhavan Nair J.* observed. The opinion in *Madharam Nair v. The Official Receiver, Tinnevely* 51 M L J 228 that on the words of sec 53 it is not open to the Official Receiver to attack a transfer from the transferee of the insolvent does not apply where the transactions in question including the alienation made by transferee from the insolvent are all attacked as links in a chain of fraudulent and connected transactions intended to screen property from the claims of the creditors. In proceedings

sec. 53 the further transactions by the transferee can be set aside where it depends on the bona fides of the sale deed by the insolvent and are consequential thereon but cannot be questioned on a ground peculiar to themselves and independent of the attack on the main action." Generally it is incompetent for the Court in proceedings under sec. 53 to require into the validity of transfer by transferee from insolvent but in proceedings properly framed under this section it may be convenient and sometimes necessary to have the parties before the Court whose interests will necessarily be affected by the decision. It would indeed be extremely inconvenient and expensive if when transfers are sought to be avoided under sections 53-55, transfers from these transferees even though the sub-transfers were subsequent to the petition or to the order of adjudication, could maintain that they should not be impleaded and that the Receiver should proceed against them by a separate suit. Such a rule would make proceedings in insolvency practically interminable and still more ineffective than they already are. The power of the Court under sec. 4 to decide all questions arising in insolvency is undoubted and it is only a matter of discretion whether the procedure under the Act should be adopted or a suit be directed. *Cudamharam Pillai v. Subramania Aiyar* 1932 A.I.R. (Mad) 513. It has been laid down in *Ata Muhammad v. Official Receiver*, 16 L. 1013 156 I.C. 1018 1935 A.I.R. (L) 368 that if the original transfer by an insolvent is voidable under sec. 53 of the Provincial Insolvency Act, the transferee cannot avoid the operation of sec. 53 by merely passing on the property to some other person. If the original transfer made by the insolvent is voidable, as against the Official Receiver, the subsequent transfer by the transferee cannot stand and can be annulled under sec. 4 of the Act. It is said that the superstructure cannot remain suspended in the air if the foundation is removed.

Avoidance of transfers by transferees from transferees.

Although sec. 53 does not in terms apply to a transferee from a transferee of the person adjudged an insolvent, it does not follow therefrom that a subsequent transferee cannot be bound at all by an order of annulment under the section. At the same time it must be remembered that except where the transfer by the insolvent was wholly fictitious and it was not intended that the property should in fact pass to the transferee, the transfer for the time being is valid, though voidable at the option of the receiver, and the subsequent annulment cannot be equivalent to a declaration that the transfer was void *ab initio*. If a transferee from an insolvent transfers property to a third party and no interest passes to the transferee then the transfer is void *ab initio* and subsequent transfers can never be protected because the foundation of their title does not exist. There would be no

necessity for the receiver to have such a transfer annulled under sec 53, he can ignore it and treat it as a nullity. But if the transfer was not wholly fictitious and bogus and the intention of the parties was that property should in fact pass to the transferee then it is discretionary with the Court to annul it under sec 53 of the Act, the provisions of which are not so mandatory as those of sec 54 (1). The question of good faith and payment of consideration as well as that of care and precaution, will have to be considered by the Court. *Amir Ahmad v Sayid Hasan*, I L R 57 All, 900 1935 A L J 573 1935 A W R 536

Jurisdiction to annul transfer from transferees.

The result of subsections (2) and (7) of sec 28 is that the vesting of the property in the receiver dates back to the date of the application for insolvency, but there is no provision in the Act under which the vesting of the property dates back to a previous transfer made by the insolvent. So it has been observed in *Amir Ahmad v Sayid Hassan* I L R 57 All, 900 "as the annulment made by the Court does not date back to the original transfer and can, at the very most, date back to the date of the application for insolvency, it would follow that a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled under sec 53 of the Act," but if it is either absolutely void from the very beginning or voidable under s 53 of the T P Act, it can be declared to be void or avoided either in a separate suit or in a proceeding under sec 4 of the Provincial Insolvency Act.

A subsequent bona fide purchaser whether protected

If the title of a purchaser is void as against the trustee—as it is if acquired through any unprotected transaction made after the act of Bankruptcy which marks the commencement of the Bankruptcy—the purchaser cannot confer good title upon any one else, even though the second subsequent transfer was made *bona fide* and for valuable consideration without any notice of any available act of bankruptcy, and before the date of the receiving order unless by purchase in market overt or otherwise a legal title to the property is acquired which would be good as against the true owner. A purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property against the settlor's trustee in Bankruptcy, even though the purchase is subsequent to the act of bankruptcy to which the title of the trustee relates back, *Re Hart*, (1912) 3 K B 6 and *Re Gunzburg*, (1920) 2 K B 426. A purchaser in good faith and without notice, from a donee of property whose title is subsequently declared fraudulent and void gets a good title against an execution creditor or a trustee in Bankruptcy, *Harrods Ltd v Stanton*, (1923) 1 K B 516. In *Subhan Asari v The Official Receiver*

Tinnelley, 1934 M W N 681, the official receiver sued to set aside a transfer in favour of the first respondent under sec 53. It was found that though the transfer was fraudulent the first respondent had further transferred it to the third respondent a *bona fide* transferee for value. It was held that though the official receiver could not recover the property, the order of the District Judge directing the first respondent to pay Rs 600, the unpaid portion of the consideration of Rs 900 was a proper order. In *In re Vansittart*, (1893) 2 Q B 377 a husband made a voluntary settlement of certain diamonds on his wife. The wife pledged before the husband's bankruptcy the diamonds with jewellers. The jewellers' title was not defeated by the voluntary settlement. There the jewellers had no notice of the voluntary settlement, but the mere fact that a *bona fide* purchaser or mortgagee has notice that he is dealing with a person who claims under a voluntary settlement will not defeat his title, if at the time there is no bankruptcy and he has no notice of an available act of bankruptcy or of a fact which might avoid the settlement or of the settlor's insolvency. In *re Brall* (1893) 2 Q B 381. In *Basharat Ali Shah v Ram Ratan* 1 L R 1938 (L) 439 1938 A I R (L) 73, a Mahomedan transferred certain properties to his wife in lieu of dower but more than two years before his adjudication as insolvent. The property was mortgaged by the wife and in execution of the mortgage decree it was purchased by B. It was found that the transfer in favour of the wife was fraudulent. The Official Receiver thereafter applied to avoid the transfer. It was held that the transfer in favour of the wife was voidable and not void and was liable to be set aside under sec 53, but only without impairing the rights of a *bona fide* transferee for valuable consideration. As the rights of B had come into existence before the application for avoiding the transfer in favour of the wife was made by the Receiver, the transfer in his favour must stand. Obviously the Court would decline to exercise its discretion if the transferee were to satisfy the Court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was therefore not necessary to add any sub-section to section 53 corresponding to sub-section (2) section 54. *Amir Ahmed v Sayid Hasan* 1 L R 57 All 900. Vide sec 55 *infra*. The dictum in *Re Girish Chandra Seal*, 40 C W N 1012 that where a transfer by an insolvent prior to his insolvency is declared void as being without consideration such invalidity operates from the date adjudication and any subsequent transfer by the transferee of the insolvent, after adjudication with notice thereof does not pass any title to the subsequent transferee even when the transferee happens to be a *bona fide* transferee for value does not apply when the subsequent transferee is a *bona fide* purchaser for a valuable consideration without notice. In *Ram Das v Lachmi Narain* 1937 O W N 1234 166 I C 210 1937 A I R (O) 129, a person subsequently adjudicated insolvent sold two houses to his brother and the latter in his turn sold

one of the houses to a third person. While the transfer of the houses by the insolvent to his brother was annulled as fraudulent the transfer by the brother of one of the houses to the third person was not annulled as it was not fraudulent and with regard to the right of the Receiver to realise its price from the brother it was held on the authority of *Nand Gopal Das v Batuk Prasad Gupta* 1932 A I R (All) 78 that the Receiver is not entitled to claim the aid of the law to recover the price as he could not claim any higher title than the insolvent. Though there is no clause to be found in sec 53 corresponding to clause 2 of sec 54 the reason for the difference has been explained in *Ex parte Brown In re Vansittart* (1893) 2 Q B 377 and following that decision it has been held in several cases that a second transferee who bona fide takes a transfer for value from one whose transfer offends against sec 53 will invoke the protection of the equitable rule in favour of transferees for value without notice. *In re Carter and Kenlerdenis Contract* (1897) 1 Ch 776. *In re Hart Ex parte Green* (1912) 3 K B 6. *Atair Ahmad v Syid Hasan* 57 All 900. *Official Receiver Trichinopoly v Muhammad Meera Sahib* 1937 2 M L J 378 46 L W 439 1937 M W N 1090 1937 A I R (M) 872.

Nature of Proceeding in Court

A proceeding under sec 36 (now sec 53) of the Act is not in the nature of a suit. It is only an incidental proceeding in the course of a more comprehensive one for adjudging a person insolvent, *Lalji Sahay v Abdul Ganj* 15 C W N 253 12 C L J 452. When a Receiver seeks to set aside a transfer he should file a written statement (similar to plaint in ordinary suits) setting forth the grounds on which the transfer is challenged the transferee should put in a written reply and the proceedings should continue very much as in a suit. Such matter should not and could not be disposed of in a summary way. *Channu Lall v Luchman Sonar* 39 All 391. In a case where it was alleged that the insolvent had sold his property before the insolvency merely with intent to defraud and delay his creditors a full enquiry between the Receiver and the debtor and his family on the transaction and in the main the provisions of the CPC are applicable to such enquiry and there ought to be sworn testimony and the same care used with regard to documents and the admission and rejection of documentary evidence as in a suit. *Shukri Prasad v Ha'ir Ali* 44 All 71 19 A L J 867 63 I C 601.

Subsequent transferees must be impleaded to be bound by annulment

In order to apply s c 53 the condition precedent is a finding that the transfer was other than one made in good faith.

Tinnerley, 1934 M W N 681, the official receiver sued to set aside a transfer in favour of the first respondent under sec 53. It was found that though the transfer was fraudulent the first respondent had further transferred it to the third respondent, a *bona fide* transferee for value. It was held that though the official receiver could not recover the property, the order of the District Judge directing the first respondent to pay Rs 600 the unpaid portion of the consideration of Rs 900 was a proper order. In *In re Vansittart*, (1893) 2 Q B 377 a husband made a voluntary settlement of certain diamonds on his wife. The wife pledged before the husband's bankruptcy the diamonds with jewellers. The jewellers' title was not defeated by the voluntary settlement. There the jewellers had no notice of the voluntary settlement but the mere fact that a *bona fide* purchaser or mortgagee has notice that he is dealing with a person who claims under a voluntary settlement will not defeat his title, if at the time there is no bankruptcy and he has no notice of an available act of bankruptcy or of a fact which might avoid the settlement or of the settlor's insolvency. In *re Brall* (1893) 2 Q B 381. In *Basharat Ali Shah v Ram Ratan* 1 L R 1938 (L) 439 1938 A I R (L) 73, a Mahomedan transferred certain properties to his wife in lieu of dower but more than two years before his adjudication as insolvent. The property was mortgaged by the wife and in execution of the mortgage decree it was purchased by B. It was found that the transfer in favour of the wife was fraudulent. The Official Receiver thereafter applied to avoid the transfer. It was held that the transfer in favour of the wife was voidable and not void and was liable to be set aside under sec 53, but only without impairing the rights of a *bona fide* transferee for valuable consideration. As the rights of B had come into existence before the application for avoiding the transfer in favour of the wife was made by the Receiver, the transfer in his favour must stand. 'Obviously the Court would decline to exercise its discretion if the transferee were to satisfy the Court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was therefore not necessary to add any sub section to section 53 corresponding to sub section (2) section 54. *Amir Ahmed v Sayid Hasan* 1 L R 57 All 900. *Vide* sec 55 *infra*. The dictum in *Re Girish Chandra Seal* 40 C W N 1012 that where a transfer by an insolvent prior to his insolvency is declared void as being without consideration, such invalidity operates from the date adjudication and any subsequent transfer by the transferee of the insolvent after adjudication, with notice thereof does not pass any title to the subsequent transferee even when the transferee happens to be a *bona fide* transferee for value does not apply when the subsequent transferee is a *bona fide* purchaser for a valuable consideration without notice. In *Ram Das v Lachmi Narain* 1937 O W N 1234 166 I C 210 1937 A I R (O) 129, a person subsequently adjudicated insolvent sold two houses to his brother and the latter in his turn sold

there is consideration for the transfer, then the Receiver has to prove that there was no good faith on the part of the transferee. It is not necessary that both parties to the transaction should act in good faith. Mere fraud on the part of the insolvent is not enough. What is required under the section is fraud or want of good faith on the part of the transferee. *Balubhai Mohanlal, v Kalyani Nichhabhai*, 11 R (1939) B 1 40 Bom LR 884 1938 AIR (B) 449. The circumstances under which the deed came to be execu-

he enters into a voluntary settlement to make it fraudulent, if he does it with a view to his being indebted at a future time it is equally fraudulent and ought to be set aside. A man can commit what may be called compendiously 'anticipatory fraud' and effect the transfer of his properties with a view to get into debts and prevent the creditors getting at his property. If the transfer was really intended to be carried out and was made *bona fide* for saving himself, the transferances show that the s from the reach of

his future creditors the transfer would be a fraudulent one, *Official Receiver, Tanjore v Vedappa Mudaliar*, 47 MLJ 431 1924 MWN 506 82 Ind Cas 450, 1924 AIR (Mad) 865. In view of the Privy Council decision in *The Official Receiver v P L K M R Chettyar Firm*, 58 1 A 115 9 Rang 170 (PC) 35 CWN 577, the Receiver has got to prove absence of good faith and want of valuable consideration in order to avoid a transfer made by an insolvent within two years of his insolvency. In order that a transfer should be excluded from operation of sec 55 of the Presidency Towns Insolvency Act (s 53 of the Provincial Insolvency Act) there are two essential elements in the transaction that must be proved, (1) that it was made *bona fide*, and (2) that it was made for valuable consideration. If the Official Assignee proves that the transfer was made within two years of the insolvency and also that it was made either not *bona fide* or without valuable consideration, he is entitled to obtain an order setting aside the transfer, upon the ground that it has been proved that the transfer under consideration does not contain both the elements that are requisite for its validity, as against him and therefore it falls to be set aside under sec 55, *Official Assignee v Subala*, 14 R 109 161 IC 435 1936 AIR (R) 98.

Presumption of fraud.

In *Dronadula Sriramulu v Ponakavira*, 45 MLJ 105 MWN 306 the view was entertained that "wherever a transfer or preference of a creditor on the one hand, and creation of a transferor or the debtor on the other hand are into contiguity, the law peremptorily requi

for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of the debtor to a third party and the receiver is aware of the subsequent transfer the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest in the property left. The proceeding should therefore be by the receiver against the person who is now claiming title to the property and if the receiver chooses to proceed against the first transferee only who has no interest left in the property and obtains an order against him either *ex parte* or after contest he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title. No doubt under section 4 (2) of the Act the decision of a question of title is binding on all claimants against the debtor and all persons claiming under claimants. But if the first transferee has ceased to have any interest in the property at all he can not be regarded as a claimant against the debtor so as to make a decision obtained against him binding on the second transferee who is the person in whom the property has vested for the time being. All adjudications as between the receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments *in rem* and are binding on the whole world but when a dispute as to title to property arises between the receiver and a stranger to the insolvency proceedings the decision would be binding on the person against whom it is given and not against the whole world. *Amir Ahmad v Sayid Hasan* ILR 57 All 900 1935 A L J 573 155 IC 684 1935 A I R (All) 671

Notice to transferee

Where a question arises whether a transfer should or should not be annulled under this section it is requisite that the transferee should have proper notice that proceedings were contemplated under this section and a proper opportunity to put his case before the Court. *Jugalpada v Ganes Chandra* 44 Ind Cas 168. The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside. *Upendra v Brindaban* 33 Ind Cas 188.

Issues to be proved

1. — — — — — the Official Receiver under S 53 or s 55 Presidency Towns Insolvent Act of 1909 that the transfer of property by the insolvent transferee but upon the Official Receiver's objection the transaction was not *bona fide* and for value and was in consequence voidable against him. The Receiver or the Official Assignee has to prove that either the transferee or the purchaser gave no value or consideration for the transfer and if

Madras v Shaik Moideen Routhen, 50 Mad 948, *Mt Bechni v Sheikh Sadique* 9 Pat, 839

Contrary to the uniform practice in all Courts in India of throwing the onus on the transferee to prove good faith and valuable consideration for the transfer as set forth in the cases cited above the Privy Council has ruled that where a transfer of property made by a person within two years of his insolvency is challenged the onus is on the Receiver to prove that the transaction is voidable against him and not on the transferee to prove that it is good and valid. *The Official Receiver v P L K M R Chettyar Firm* 581A 115 9 Rang 170 (P.C.) 35 CWN 577 53 CLJ 373 60 MLJ 652 1931 ALJ 444 33 Bom LR 867 34 LW 36 131 IC 767 1931 AIR (P.C.) 75. On the authority of this ruling it has been held in *Subramanian Chettur v The Official Receiver of Madura*, 1932 MWN 59, that in an application under sec 53 to set aside an alienation made by an insolvent the onus of proof is on the Official Receiver. It does not lie on the transferee to show that the transfer was made in good faith and for valuable consideration. 'The burden of proof is upon the Receiver to show that the transfer sought to be impugned had not been made in good faith and for full consideration,' *P K Banerjee v Mangal Prasad* 1932 ALJ 53 1932 AIR (All) 243 *Umesh Chunder Seal v G H Falkner*, 36 CWN 337. In proceedings under sec 53 the burden of proof is on the party who questions the bona fides of the sale deed that is, on the Official Receiver or the creditors who want to question the sale deed, *Gunturu Pullaya v The Official Receiver of Kistna* 1932 MWN 821. The burden of proving that the transactions questioned by the Official Receiver are liable to annulment on the grounds mentioned in sec 53 is upon him. *Ram Ditta Mal v Official Receiver Lahore*, 15 Lah 294, *Pope v Official Assignee Rangoon* 12 Rang 105 (P.C.), *Susarmoy Sen v Bibhuti Bhusan Jana* 37 CWN 675 1933 AIR (Cal) 689. In a proceeding under sec 53 the onus lies upon the applicant to prove that the transfer was not made in favour of a purchaser or encumbrancer in good faith and for valuable consideration. *H Hagemester v U Po Cho* 12 Rang 625, *Bhagat Ram Bindrabai v Puran Chand* 33 PLR 1058 140 IC 598 1933 AIR (L) 43 *Amlok Sao v Dhondha* 29 NLR 164 144 IC 844 1933 AIR (Nag) 188 *Ramchandra Sonaram v Prithwise Narain Sarkar*, 14 PLT 739 145 IC 524 1933 AIR (Pat) 564. When a transfer is questioned by a receiver in insolvency under sec 53 the initial burden is always on him to prove that the transfer was not in good faith and for valuable consideration. Where in course of discharging such burden he proves that the transferee had knowledge of the insolvency, the burden shifts. *Usharani Devi v Shib Kumar Das*, 41 CWN 368.

Discharge of onus by the Receiver.

In a proceeding to set aside a fraudulent transfer under sec. 53 of

to be made, enquiry is altogether excluded, and the inference will not be allowed to be displaced by any contrary proof, however strong. The Insolvency Court shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors. The presumption to be made is absolute or irrebuttable like the presumption contained in sec 112 of the Evidence Act", and in *Official Receiver, Tanjore v Vidappa Mudaliar*, 47 MLJ 431 1924 MWN 506 1924 AIR (M) 865, it was held that "under sec 53 every transaction which an insolvent enters into within two years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and a *bona fide* one". But after the Privy Council decision in *The Official Receiver v P L K M R Chettyar Firm*, 58 IA 115 9 Rang 170 (PC) 35 CWN 577 131 IC 767, the above views can no longer be maintained. The presumption under the English law as to the intent when the whole of property of the insolvent is transferred is not applicable under the Provincial Insolvency Act which specifically sets forth that a certain intent is necessary to bring the act within the meaning of the statute, *Chettyar Firm v Ma Ngue Yon*, 1933 AIR (R) 216.

Onus of proof.

In a long series of decisions it had been uniformly held that in cases where the Receiver challenges as fraudulent and void any transfer made by the insolvent within two years before his insolvency the onus was upon the transferee to show that the transaction was in good faith and for valuable consideration. Though ordinarily the burden of proving that a transaction is a fraudulent and collusive one, intended to defeat or delay the creditors and is merely *benami* is upon the person who asserts it, yet under the Insolvency Act this onus was shifted on the transferee and not upon the Receiver though he asserted it. The person impeaching a transaction by the insolvent had only to prove that it took place within two years of the insolvency of the transferor, and when this

the transferee to establish sought to maintain, *Syed Maul Khan*, 46 CLJ 169, CWN 865.

Basiruddin m v Yusoof, 36 IC 903.

Girdharilal v Saratkissen nee, Madras v Sambanda

Gopal v Ramkrishna 62

1C 289, *Bansilal Agarwal v Rangalal Agarwal* 1923 AIR (Nag)

97, *Gopal Rao v Hiralal* 83 IC 246 1925 AIR (N) 225, *Official*

Receiver v Lachmi Bai, 92 IC 5 1926 AIR (S) 140, *Durga Das*

v Kundan Lal, 26 PLR 812 91 IC 4 1926 AIR (L) 307,

Basant Bai v Nanh Mal 23 ALJ 792 89 IC 357 1926 AIR

(A) 29, *Narayan v Nuthu*, 1927 AIR (N) 166, *Official Assignee*,

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the lower Court *Bankim Chandra Maity v Dinesh Chandra Roy Choudhury* 40 C W N 731

Receiver's report is no evidence

In *Basanti Bai v Nanh Mal* 23 A L J 792 89 1 C 357 (1926) A I R (A) 29 an application was made by a creditor stating that the houses which had ostensibly been sold by the insolvent were part of his assets and should be taken over by the Receiver. This application was sent to the Receiver with directions to take proceedings after an enquiry. The Receiver submitted a report stating that the transfers were fictitious and did not appear to have been made in good faith or for valuable consideration. The District Judge annulled the sales under sec 53 without taking any further evidence relying solely upon the report of the Receiver. The learned Judge had not before him the statement on oath of the Receiver or of the creditor or even of any of the witnesses mentioned in the Receiver's report. He had however the report of the Receiver which he treated as part of the evidence in the case. The High Court in setting aside the order of the District Judge in appeal held in our opinion the report of the Official Receiver in connection with an enquiry under sec 53 or 54 is not by itself legal evidence. It is to be noted that wherever it was intended by the Legislature that the report of an Official Receiver should be treated as evidence in the case an express provision is made in the section dealing with that matter. We may draw attention to sections 38 and 42 of the Provincial Insolvency Act. No such provision however is to be found in secs 53 and 54. We must therefore hold that the report of the Receiver is not *per se* legal evidence on which a finding can be based.

In *Hriday Krishna Adya v Osmanali Mandal* 58 Cal 1352 1932 A I R (Cal) 151 the Receiver had taken the statements of various people who appeared before him and submitted a report to the effect that a certain transfer by the insolvent to the defendant within two years of the date of his adjudication was not in good faith nor for valuable consideration. The Insolvency Court did not take evidence but was content with the report of the Receiver and the statements of the parties who had appeared before the Receiver. No evidence in the legal sense of the term was taken by the Insolvency Court. The Court came to the conclusion that an order under sec 53 being of a summary character, it was not desirable to make such an order. But he referred the Receiver to the Civil Court for determination by means of a suit of the questions raised in his report. It was held that the Insolvency Court is the only appropriate tribunal which can determine the question raised under sec 53. The report of the Receiver in insolvency should be treated as an application for action under sec 53 and the matter has got to be investigated in evidence to be produced in Court.

the Provincial Insolvency Act the burden of proof is on the Official Receiver. Such burden of proof can only be discharged by showing circumstances from which strong inference can be drawn that the transfer impugned was made either *mala fide* or in the absence of valuable consideration. And when the Official Receiver discharges the *prima facie* burden which lay upon him, then it is for the transferee to explain the case which gave so many and so obvious grounds for suspicion, and show that there was in fact an explanation for the transfer which the Court could deem to be satisfactory. When a transfer is shown to have taken place directly after the insolvent had been served with a summons and is one of two transfers by which he got rid of all his immovable properties and the other has been admitted by the transferee to be a fraudulent one and the transfer was to a mere child, the circumstances certainly required a very full explanation to avoid the inference of fraudulent transfer. *U Ba Saing v Ma Shem* 1936 A I R (R) 506. Where the sale by the insolvent takes place only 11 months before the application for insolvency and the circumstances give rise to presumption as to want of good faith on the part of the vendee it is for the vendee and the insolvent to rebut the presumption and prove that the insolvent's financial position was sound at the time of the sale and the vendee acted in good faith. *Bhag Mal v Lala Kishen Lal* 1937 A I R (L) 441. Under sec. 53 the onus of proving that the transfer was made in good faith is no doubt, on the Official Receiver and this onus remains constant throughout the trial in the sense that whatever evidence has been called and whatever the stage the proceedings may have reached it is for the official receiver to satisfy the Court that the affirmative which he seeks to prove has been established. If, however, the official receiver proves a case which in the absence of any special explanation as a sufficient *prima facie* case the burden of adducing cogent evidence in rebuttal is on his opponent. If in adducing such rebutting evidence a doubt is created in the mind of the Court as to which version to accept, then the official receiver fails to discharge the burden. But if the *prima facie* case made out by him remains unanswered or if the answer given is such as to fall short of creating any serious doubt in the mind of the Court then the burden of proof laid upon the official receiver is discharged. *Maung Hmoot v Official Receiver, Mandalay* 14 R 704 170 I C 471 1937 A I R (R) 276.

The onus of proving that a transaction is not in good faith and voidable under s 53 of the Provincial Insolvency Act is on who asserts that it is so. Where a transaction is shown to be voidable under s 53, the onus was wrongly placed on the mortgagees to prove that the transaction was a *bona fide* transaction and for consideration but when it was found that there had been no prejudice on account of the reversal of procedure, the Court declined to interfere with the judgment of

ment of sec 4 in the present Act V of 1920, the Insolvency Court is not merely confined to the consideration of any transaction within two years as provided in sec 53 but to any transaction whether before or within two years from the date of adjudication which has the effect of putting the property *benami* and not available to creditors *Kochu Mahomed Tharagon v Sankaralinga Mudaliar* 40 M L J 219 62 Ind Cas 495 See also *Bhagwant v Munim Khan* 8 Ind Cas 1115 6 N L R 146 *Seonath Sing v Munshiram* 42 All 433 18 A L J 449 *The Official Receiver West Godavari v Sagiraju Subbayya* 37 L W 508 64 M L J 397 1933 M W N 206 146 I C 530 1933 A I R (M) 527

In *Atmaram v Dayaram* (1929) A I R (S) 94 it was argued that where the transfer was made in the purview of sec 53 of the Act section 4 is not applicable in any case it would be an improper exercise of jurisdiction vested in the Insolvency Court to entertain an application under that section when it is statute barred under another section of the same Act. The Court held that section 4 is a general section. It is doubtless true that sec 53 prescribed a period of two years for the entertainment of an application to set aside certain transfers. But it cannot even for a moment be contended that the Legislature by enacting this section impliedly intended to deprive the debtor or the creditor, as the case may be, of their right to have such transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation prescribed by the Limitation Act. If that be so there is no reason why the same relief should not be afforded to them by the Insolvency Court under sec 4 of the Provincial insolvency Act. In *Ram Ditta Mal v Official Receiver Lahore* 15 Lah 294 it has been held that under sections 4 and 53 an Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent. Section 53 of the Act does not control or restrict the jurisdiction conferred upon the Court by sec 4 to decide all questions of title. See also *Jahanuar Sultan v Sa'dar Ali Khan* 142 I C 97 1933 A I R (Pesh) 46

Annulment of transfers must be based on legal evidence and not on suspicion or surmises

In *Sriman Chunder D. v Gopal Chunder Chuckerburty* 11 M I A 28 (43) Lord Westbury has observed "undoubtedly there are in the evidence circumstances which may create suspicion and doubts may be entertained with regard to the truth of the case made by the appellant but on matters of this description it is essential to take care that the decision of the Court rests not upon suspicion only. In delivering the judgment Lord Westbury said: "Shib Kumar Das judge in annulling the transfers on the ground of mere suspicion and as

Jurisdiction to annul transfers more than two years old.

Under the old Provincial Insolvency Act, III of 1907, a Receiver could not question a transaction under sec 36 (now sec 53), which was several years old. His proper remedy was to institute a suit under sec 53 of the T P Act. A judgment declining to adjudicate upon such a matter could not operate as *res judicata*, *Gaura v Nawab Mohammad*, 64 Ind Cas 523. But under the present Act an Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of the Insolvency Act—where, for example, a trustee is given a higher title than the original debtor. But the Insolvency Court also has to apply and to decide all questions of general law including such questions as are raised by sec 53 T P Act. A decision on a question whether an insolvent three years before sold his property merely with intent to defraud and delay his creditors, is a decision on a question of title within the meaning of sec 4 of the Insolvency Act and is appealable under sec 75 (2) *Shukri Prasad v Hafiz Aziz Ali*, 44 All 71 17 19 A LJ 862 63 Ind Cas 601.

Where originally the Receiver applied under sec 53 of the Provincial Insolvency Act for the annulment of a transfer made by the insolvent alleging that it was fictitious and effected with a view to delay or defeat creditors, and the Insolvency Court, finding that the transfer had taken place more than two years prior to the adjudication of the insolvent, treated the Receiver's application as an application for a Receiver's order, as one under sec 53 of the Insolvency Act, and ultimately found that the transfer was not binding on the Receiver or the insolvent, held per Sulaiman J. (Mookerjee, J., dissenting) that the Insolvency Court had acted within jurisdiction and it had full power to decide all questions of title or priority and to declare that certain property belongs to the insolvent and that any person putting forward a claim to it is not entitled to it. Per Mookerjee, J. "an Insolvency Court has no jurisdiction to entertain an application of the Receiver to declare an ostensible transfer void within the meaning of sec 53 of the Insolvency Act if the transfer took place more than two years before the adjudication," *Hari Chand Rai v Mou Ram*, 48 All 414 24 A LJ 495 94 IC 429 (1926) AIR (A) 470.

The point again arose for consideration by a Full Bench of the Allahabad High Court in *Haji Anwar Khan v Mohammad Khan*, 51 All 550 (FB) 27 A LJ 155 113 IC 819 (1929) AIR (A) 105 (FB) and the opinion of the majority of the Judges of the Full Bench in regard to the question submitted to them, viz., "whether an Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of sec 53," was that the question should be answered in the affirmative. By the enact

(M) 672 D u Dial v Sundar Das 65 PR 1919 51 IC 720 Where a transfer is set aside as being in fraud of creditors the transferee can be allowed to prove his debt as an unsecured creditor to the extent of the consideration which has been held to have been paid and used for payment of a joint antecedent debt of the insolvent. *Amr Chand v Manohar Lal*, 34 PLR 127 141 IC 336 1933 AIR (L) 211 A decision of an Insolvency Court setting aside insolvent's transfers for want of valuable consideration under s 53 operates as *res judicata* and hence such transferees are not entitled to prove their debts before the Official Receiver as unsecured debts. Cash items of consideration in transfers set aside by the Insolvency Court advanced at the time of execution of a fraudulent transfer cannot be allowed to be proved as a debt as the same is advanced for the purpose of carrying out the fraud. *Mal Chand v Ram Jas* 1939 AIR (L) 145

Decision under sec. 53 is *res judicata*.

It is true that there is no authority to the effect that insolvency proceedings can be subject of *res judicata* but there is ample authority for the proposition that sec 11, CPC is not exhaustive and that as stated by the Privy Council in *Ram Kripal Shukul v Mt Rup Kaur* 11 IA 37 36 All 240 "the law is that a judgment (i.e. a previous judgment) is binding on the parties to the judgment (i.e. a previous judgment) under Act X of 1877 (now sec 11 CPC) and on the principles of law. If it were not binding there would be no end of litigation." This is manifestly so and is especially applicable to insolvency proceedings. Were it otherwise it would be impossible for any one whose possession of property received from an insolvent had been unsuccessfully impeached as a fraudulent transfer or preference to be able to sell that property or even to enjoy its proceeds with any sense of security. This is a position which is clearly opposed to the principle '*nemo bis vexari debet*'. The Privy Council has reaffirmed their statement of the law in *Hook v The Administrator General of Bengal* 48 IA 187 48 Cal 499 and *Ramachandra Rao v Ramachandra Rao* 49 IA 129 45 Mad 320 the latter a case under the Land Acquisition Act. On the authority of the above cases it is held that the doctrine of *res judicata* is applicable to proceedings in insolvency, *Rangappa v Rangappa*, 56 Mad 395 63 MLJ 778 140 IC 461 1933 AIR (M) 9, *Mal Chand v Ram Jas*, 1939 AIR (L) 145

But where an application for annulment was made by a creditor and it was held that the creditor had no *locus standi* and on the merits the transaction was held not invalid, a subsequent application by the Receiver to set aside the transaction was not barred by the previous application. *U Tha Tlang v Mahomed Isaq* 128 I 592 1930 AIR (R) 332 In *Chenchayya v Bapayya* 62 I 177 32 LW 66 138 IC 31 1932 AIR (M) 233 the partners were declared insolvent on a creditor's petition. The

has been pointed out in a recent case under s 53 of the Provincial Insolvency Act *Susarmoy Sen v Bibhuti Bhusan* 37 CWN 675 (678) that it may raise suspicion but as has been pointed out by the Judicial Committee mere suspicion is no ground on which to rest a judicial decision and in fact it has been held to be a treacherous ground for legal decision. As has been pointed out by their Lordships of the Judicial Committee in *Muhammad Mehi Hasan Khan v Mandir Das* 34 All 511 17 CWN 49 (PC) suspicion though a ground for scrutiny could not be made a foundation of a decision. The fact that there are certain circumstances appearing in the evidence on the side of the alienee which in the absence of an explanation would offer ground for suspicion is not sufficient for coming to the conclusion that the alienation falls under sec 53. The burden of proving want of good faith on the part of the alienee is not discharged by mere vague allegations of fraud but only by establishing circumstances from which it can be reasonably inferred that the alienee acted in bad faith and that there was no valuable consideration for the alienation *Kullappa Reddiar v Veerappa Chettiar* 1938 AIR (M) 285.

Power of Court to award mesne profits on annulment under sec 53

If a transfer is annulled under sec 53 it was clearly voidable until annulled and therefore the transferee was not in wrongful possession and is not liable for mesne profits *Balkrishna v Digambar Das* 31 NLR (Sup) 178 161 IC 689 1936 AIR (N) 139.

Effect of annulment of transfers

Where a transfer is annulled by the Court the property reverts to the transferor and his property becomes vested in the Receiver and available for distribution to the creditors generally. In *Re Farnham* (1895) 2 Ch D 800. If a person in whose favour a sale is executed by an insolvent pays off a mortgage on the transferred property he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him even though the sale is set aside under sec 53 as fraudulent and void as in *Seth Jaskaran* 82 Ind Crs 488.

a sale was annulled by the Insolvency Court as offending against sec 53 and the vendee had paid off some debts of the vendor the rest of the consideration being fictitious no charge can be allowed on the property to the extent of the debts. Under such circumstances a vendee is entitled to rank as a creditor to the extent of the consideration he has paid. Secured creditors have a charge on the property and unsecured creditors are entitled to share in the assets of the insolvent. *Aiyangar v Offc*

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act of insolvency was the fraudulent execution of a mortgage and it was prayed that the alienations be declared void. The Court passed an order of adjudication and annulled the transfers. It was held that the order declaring the transfer void was without jurisdiction. The Court in such cases should not avoid alienations until moved by the Official Receiver under sec 53 or by an aggrieved party. Such an order was an erroneous exercise of the Court's power and cannot constitute *res judicata*.

Appeal.

An appeal lies against an order annulling a voluntary transfer under sec 75 (2), Schedule I. But no appeal lies from an order refusing to annul a transfer under sec 53 without the leave of the District Judge or of the High Court under section 75 (3). *Puran Chand v Ram Chandra Gupta* 33 P L R 65 132 I C 539 1931 A I R (L) 651. No second appeal lies in respect of an application under sec 53, *Alagiri Subba Naick v The Official Receiver, Tinnevely* 54 Mad 989. *Ramasami Nayakar v Venkatasami Naicker* 38 L W 494 65 M L J 298 145 I C 876 1933 A I R (M) 653. *Chet Ram Ram Rachpal v Atma Ram* 34 P L R 960. *Juan Ram v Official Receiver, Ambala*, 37 P L R 224 1935 A I R (L) 708.

Revision

Where the order of the lower Courts are vitiated by a mistaken notion as regards the law relating to the onus of proof under sec 53 of the Provincial Insolvency Act the High Court can interfere in revision under sec 75 (1) of the Act. *Subramanian Chettiar v The Official Receiver of Madura* 1932 M W N 59. Where the trial Judge has taken an erroneous view as to the law in regard to onus and where his mind is coloured by that view and he is thereby disabled from weighing evenly the evidence and thus the said party is placed at a disadvantage as the direct result of the trial Judge's error, the High Court can interfere in revision to set aside the judgment of the lower Court. *Chudambaram Pillai v Subramania Ayyar*, (1932) 36 L W 219 140 I C 674 1932 A I R (Mad) 513.

54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

Avoidance of preference in certain cases

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

Review.

This is section 37 of Act III of 1907 and corresponds to sec. 56 of the Presidency Towns Insolvency Act and is based upon sec. 44 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926, which is in these terms "(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceedings taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy. (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (3)

Object of the section.

The object of the Bankruptcy law being the equal division of the bankrupt's estate amongst his creditors, the bankruptcy law contains an enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will be set aside and, and the money or property will be brought into bankrupt's estate "The object of sec. 37 (now sec. 54) is to protect the interest of the whole body of creditors over whom an undue preference has been given in favour of other creditors. The same principle applies to a transaction which sought to be impeached under sec. 231 of the Companies Act so that a disposition of a company's property cannot be impeached on the ground of preference to one creditor over the rest of the body of creditors. A transfer made by a company but is a debtor cannot impeach a transfer made by the company on the ground of undue preference" *Ram Suarup v. Jagat Ram*, 2 Lah. 102. 59 Ind Cas 977.

Application of the section.

The law provides that every conveyance or transfer by a debtor of his property, every charge made by him thereon, every payment made by him, every obligation incurred by him and every judicial proceeding affecting his property taken or suffered by him, is fraudulent and void against his trustee in bankruptcy, provided four condi-

tions be fulfilled. These conditions are —(1) The debtor must at the date of the transaction be unable to pay from his own money his debts as they fall due (2) the transaction must be in favour of a creditor or of some person in trust for a creditor (3) the debtor must have acted with the view of giving such creditor a preference over his other creditors (4) the debtor must be adjudged bankrupt on a bankruptcy petition presented within three months after the date of the transaction sought to be impeached. *Sharp v Jackson* (1899) A.C. 419. *Ma Khin Pu v Official Receiver Mandalay* 1928 A.I.R. (R.) 166. *Kalinath v Ambica Prasad* 41 Ind. Cas. 399. *Mohandas v Tikamdas* 10 S.L.R. 123. Sec. 54 does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor a dominant factor in deciding the fate of the transaction. *Dina Nath v Labhu Ram* 33 P.L.R. 255. 1932 A.I.R. (L.) 321. In *Johnson v Fesenmeyer* (1858) 25 Beav. 88 the Master of the Rolls stated the following principle. If a man is insolvent and disposes of a portion of his property in favour of a *bona fide* creditor although upon the case of bankruptcy and although this fact be known or believed by both parties it may be a perfectly valid and legal transaction. To render it invalid there must be a disposition on the part of the insolvent to favour that particular creditor and this is generally shown by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor although he knows that the debtor is insolvent presses and insists upon having a security for his debt and the debtor yields to that pressure and gives the security although it may be well known to both at the same time that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent the transaction in my opinion is perfectly valid. It is well settled that apart from the law of bankruptcy a creditor may take a transfer although he is fully aware that other creditors are thereby defeated and even when proceedings at their instance are pending. What the law contemplates is the defeating or the delaying of creditors by which is meant the whole body of creditors and so long as there is even a single creditor who takes the benefit it cannot be said that the transaction amounts to fraud. all the creditors not having been defrauded. *Mushahar Sahu v Lala Hakim Lal* 43 C. 521 (P.C.). In short the preference of one creditor to another even though fraudulent in the law of insolvency cannot be impeached under the general law. That principle is recognised in sec. 53 of the T.P. Act. By the amending Act of 1929 the section has been remodelled and the third paragraph of sub-section (1) which runs as follows has been added. Nothing in the sub-section shall affect any law for the time being in force relating to insolvency. *D. Samsetti Venkanna v Official Receiver East Godavari* 68 M.L.J. 57. 1935 M.W.N. 114. 41 M.L.W. 723. 157 I.C. 539. 1935 A.I.R. (M.) 250. Undue

preference is a ground for setting aside a transaction under the insolvency law and the law of insolvency cannot be applied unless the transferor is adjudged insolvent. If instead of calling 'a transfer of property' by a transferor in favour of a creditor 'undue preference' you call it "a transfer to defraud creditors" then that principle does not apply if there is no suggestion that there is a screening of property. It is not the debtor that is going to benefit but it is the creditor by the transfer in his favour. One creditor is perfectly entitled to get in or secure his debt in the best way that he can think of and as was pointed out in *Hakim Lal v. Mooshahar Sahu* 1 L.R. 34 C. 999 (1014) he is under no obligation to regard the interests of other creditors. See also *Mushahar Sahu v. Lala Hakim*, 1 L.R. 43 C. 521 (P.C.) *Chidambara Ayyar v. Suaramakrishna Ayyar* 1935 M.W.N. 834, *Nogendra Nath v. Pramatha Nath Guha* 43 C.W.N. 575.

Section 54 has nothing to do with the publicity or secrecy of the transaction for it contemplates payment of money and incurring of other obligations which do not require registration in law and need not be made openly at all. The Legislature has deliberately dealt more leniently with a favoured creditor than a voluntary transferee and the former can escape if the preference is given more than three months before the application for insolvency was filed. *Ramananda Paul v. Pankaj Kumar Ghosh*, 1 L.R. (1938) 2 C. 275 1938 A.I.R. (C) 417.

Jurisdiction to annul ceases on annulment of adjudication.

In *Bagi Ram v. Chanan Mal*, 10 L.L.J. 180 108 I.C. 603 1928 A.I.R. (L) 453 and in *Jethaji Peraji Firm v. Krishnappa* 52 Mad. 648, it was held that an order of annulment of adjudication does not *ipso facto* put an end to insolvency proceedings. In the latter case *Reilly, J.*, observed 'If the Court orders under sec. 37 that the property of the debtor shall vest in a receiver, the insolvency proceedings will continue while the receiver's work goes on. That being so, there is no difficulty in the receiver continuing to prosecute in those circumstances a petition under sec. 54 after the adjudication has been annulled under sec. 43'. But this view has not been accepted as of law in the Full Bench case of *Receiver*, 11 Rang. 287 where it has been held that the annulment being passed under sec. 43 the Court ceases to have jurisdiction to entertain, hear or determine an application by the receiver to have a transfer of property set aside under sec. 53 or sec. 54 whether such application was presented before or after the order of annulment. In making a vesting order under sec. 37 the Court may impose conditions relating to the property of the debtor but not of any other person. In vesting the property of the debtor in an appointee the Court cannot order that he should continue the liquidation of the debtor's assets on its

same terms and conditions as those on which the receiver in insolvency would have been entitled to carry out the liquidation of his estate if the insolvency had still been subsisting *Panna Lal v Official Receiver*, 53 All 313 referred to

Jurisdiction to annul transfers is unaffected by discharge

A discharge marks the termination of any insolvency proceedings so far as the insolvent is concerned *Jetanjil Mamooji v Ghulam Hussain* 12 SLR 20 47 IC 771 An order under sec. 41 does not put an end to the insolvency proceedings *K P S P P L Firm v C A P C Firm* 7 Rang 126 11 IC 582 1929 AIR (R) 168 R M M Firm v Hla Bu 5 Rang 623 One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge An order under sec 41 of the Act does not put an end to the proceedings in the insolvency *Roue v Tan Thean Taik* 2 Rang 643 It therefore follows that the Insolvency Court has jurisdiction to entertain hear or determine an application by the Receiver to have a transfer of property set aside under sec 53 or sec 54 whether such application was presented before or after the order of discharge

Difference in the scopes of secs 53 and 54

There is a radical difference between sec 53 and sec 54 In sec 54 the Court is not concerned with the motive of the transferee but only with that of the debtor It is he who is said to have given the preference and whether the transferee acted in good faith or not is immaterial Where however the three months limitation contemplated by sec 54 has expired it is open to the transferee to prove that whatever the motive of the transferor may have been he on his part has acted in good faith And where the consideration of the transfer is a pre debt the transferee stands in a better position than otherwise He has his own interests to serve and owes no duty to the other creditors to protect their interests He in the absence of any statutory limitations imposed by the law of bankruptcy is as much at liberty to secure the repayment of his debts by superior diligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose *Hakim Lal v Mushahar Sahu* 34 Cal 999 6 CLJ 410 11 CWN 998 *Official Receiver v Lachmi Bai* 9 IC 5 (1926) AIR (S) 140 Section 54 deals with a fraudulent preference by the debtor himself and the question for consideration of the Court is as to his dominant motive only Under sec 53 the law requires that whatever be the dominant motive of the transferor if the transferee had acted in good faith he is protected The general words in section 53 declaring all transfers void subject to certain

exceptions, cannot, therefore, be controlled by the specific mention of certain transfers which are declared void by sec 54, *Re Narain Das Sunderdas, ex parte the Official Receiver*, 93 IC 331 (1926) AIR (S) 133. In *Desamesetti Venkanna v Official Receiver, East Godavari*, 68 MLJ 57 1935 MWN 114 41 MLW 723 157 IC 559 1935 AIR (M) 250 the question arose as to what are the respective spheres of secs 53 and 54 Provincial Insolvency Act. It was said that it is the latter section that deals with fraudulent preferences. If, therefore, a transfer in favour of a creditor cannot be annulled under s 54, the prescribed period of three months having elapsed, can the provisions be circumvented by recourse being had to s 53 which allows the longer period of 2 years? The answer must be decidedly in the negative. It was however said that it does not follow from this that the fact that the transfer is in favour of a creditor necessarily takes it out of the reach of s 53. In addition to valuable consideration, that section insists upon good faith and where the creditor transferee is shown not to have acted *bona fide*, the transfer can be annulled. But in considering the question of good faith under s 53, that element which relates to fraudulent preferences must be eliminated, that is to say, the knowledge, for instance, on the part of the transferee creditor that the other

itself constitute bad faith
in Specie Bank 29 CWN
heikh Mohideen, 50 M 948,
 1933 AIR (L) 43, *The*

Official Assignee of Madras v Bangy Abdul Razack Sahib 1915 MWN 332. The facts of the 1915 MWN 352, one of the four cases cited above bring out this point very clearly. Had the value of the property been equal or nearly equal to the amount of the debt the transaction would have been upheld. *Sadasiva Ayyar J*, says that in that event the creditor would be a vendee in good faith but it was found that the property was worth much more than the debt and that the creditor intended to get a larger benefit than that to which he was entitled, in those circumstances the sale was annulled. Other cases may be conceived where the transaction is not a real one (see the recent judgment of the Privy Council in *Harry Pope v The Official Assignee, Rangoon* 60 LA 362 12 R 105,) as, where though the sale is ostensibly in favour of a creditor there is some benefit reserved to the debtor, or again, where a third party, i.e., some person other than the transferee is really intended to take the benefit, such cases of bad faith tainting the transfer, while being unconnected with fraudulent preference which comes within the mischief of s 54 are nevertheless within the ambit of s 53 (See the observation of *Krishnan Pandalai, J* in *Narayana Iyer v Official Receiver, South Malabar* 1933 MWN 1049)

Sub-sec. (1) : Unable to pay debts as they become due

Contemplation of bankruptcy is a necessary condition, since the

Transfer to a surety.

If the person whom the debtor intends to benefit is a surety for him, the payment by the debtor of the guaranteed debt will not be a preference. The payment be made to the creditor, (1888) 5 Morr, 55, *Re Warren Exp* 18, though it may be so if the payment is made directly or substantially to the surety, *Exp Read Re Paine*, (1897) 1 Q B 122. A person who stands surety for the payment of a debt by the insolvent is a creditor within the meaning of this section *Rodrigues v Ramaswami* 40 Mad 783. A surety, as such, is clearly a creditor as soon as he pays the money on his behalf. Where the insolvent was unable to pay his debts as they became due from his money, and the person in whose favour the transfer was made was a creditor, and the effect of the agreement to transfer was to pay the transferee the major portion of the debt due to him by the transfer, so that the properties might not go into the general fund to be divided rateably amongst all the creditors, it was held that the transfer is void as a fraudulent preference, *Siddik Ahmed v M K M Firm* 1923 A I R (Rangoon) 149 79 Ind Cas 813.

Transfer must be "with a view of giving that creditor a preference"

The word "preference" as used in sec 54 does not connote priority in respect of a debt. That no doubt is one meaning of the word "preference" but it means in the context of the *favouring of one creditor to the detriment of others*. In the sense of one creditor being given priority the result of the transaction is always a preference of that creditor. "Preference" in that sense is the occasion for moving of the Court under section 54 *Arinachellam Chettiar v Official Receiver, Tanjore*, 1925 M W N 561 22 M L W 134 49 M L J 562 91 I C 522 1925 A I R (M) 1089. The authorities such as *Sharp v Jackson*, L R (1899) App Cas 419 show that the word 'preference' imports and involves freedom of choice, and that no transfer which is not voluntary in the sense that it is a free act of the insolvent is a preference which under this Act is to be deemed fraudulent and void as against the Official Assignee, *Madho Ram v The Official Assignee*, 27 C W N 611 see also *N P R M P Adakammis Achu v The Official Assignee*, 11 Rang 489. As has been held in *Re Hiralal Mondal Ex parte Sm Lilabati Dassee* 40 C W N 1031, a transfer of properties by an insolvent by means of an assignment and a conveyance, in order to be fraudulent preference must be made with the view of giving a creditor a preference over other creditors and it must be shown that at the time when the transfer was made the transferor was unable to pay his debts. The words "with a view of giving that creditor preference" in s 54 should be interpreted to mean that what

debtor did was an act of free will and that his dominant intention in performing the act was to prefer such creditor. The mere fact that the transaction was effected by the debtor when he was in imminent expectation of bankruptcy is not sufficient to prove intention to give fraudulent preference. The word "preference" imports a free choice and it is necessary for the Official Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the creditor. Where however the setting aside under s 54 of certain other previous transfers of property of considerable value by the debtor indicates an element of fraud or undue preference and indicates want of honesty towards the creditors as a body and where after the making of the subsequent transfers which are challenged under s 54 by the Official Receiver only a paltry sum of Rs 5000 is left with the debtor to pay debts worth about Rs 51000 the only inference which can be drawn is that the subsequent transfers were made with a view of giving the transferee creditors a preference over other creditors. *Rathi Mal v Kunj Behari Lal* 1936 AWR 1149 1937 ALR 71 166 IC 801 1937 AIR (All) 4

Where a debtor in order to save himself from exposure and proceedings in Court and in order to appease the creditor made an equitable mortgage in his favour can it be said that under these circumstances the mortgage was created with the view of giving preference to that creditor over the other creditors? The Court held I think not. In a similar case of a mortgage in favour of the Punjab National Bank a similar question arose and Wilberforce J held the dominant motive in making the transfer was to save himself from exposure or from a criminal prosecution and in such a case the law regards only the motive of the debtor. It cannot be held that the transfer was voluntary or amounted to a fraudulent preference. *Puran Chand v Puran Chand* 1923 AIR (Lahore) 652. To ascertain whether the giving of a preference to a particular creditor i.e. putting that creditor to a better position relatively to the other creditors was the dominant view in the debtor's mind the proper test to be applied is was the act done voluntarily a question the solution of which depends primarily on the enquiry from which party did the proposition originate. A voluntary disposition is an act moving from the debtor a voluntary payment is a payment made simply by the act and will of the party making it. In every case the state of the mind of the debtor is the paramount consideration the intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns. *Nrjundranath v Asutosh* 19 CWN 157. See also *Angappa Chetty v Nanjappa* 18 MLJ 189 2 MLT 57.

The section has no application to a lease granted for long consideration shortly before the filing of an insolvency petition.

unless the object thereof is to give preference to one creditor over the other. If the lease is found merely a *benami* transaction the insolvent still retaining possession of the property leased it can be voided *Desraj v Sagarmull* 38 All 37.

Test to determine fraudulent preference.

A preference to a creditor to come within the prohibition of sec 37 (now sec 54) must be shown to have been fraudulent with reference to the state of mind of the debtor *Nripendra Nath Sahu v Ashutosh Ghosh* 19 CWN 157 20 CWN 420. The test for determining whether a transfer or payment made by a debtor in favour of or to a creditor does or does not amount to a fraudulent preference is whether the transfer or payment is voluntary. If the dominant motive of the debtor in making the transfer is to save himself from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference *Puran Chand v Punjab National Bank Ltd* 3 UPLR 6 59 Ind Cas 578. The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference but also on the state of mind of the person who made it. In other words the test is did the debtor execute the deed with a view to protect himself or with a view to benefit the creditor *Arincheellam Chettiar v Official Receiver Tanjore* 1925 MWN 561 22 MLW 134 49 MLJ 562 91 IC 522 (1925) AIR (M) 1089 *Ranga Reddi v Official Receiver Anantapur* 46 LW 895 1937 MWN 1219 (1937) 2 MLJ 808 1938 AIR (M) 177.

Where the object of the transfer was under the cloak of a company newly floated to remove the assets of the bankrupt from the reach of the creditors and to retain for the bankrupt the benefit of them as principal shareholder and thereby defeat and delay his creditors and where only one creditor incidentally obtained a benefit from the transaction by the allotment of certain shares of the newly floated company to him in satisfaction of his debt due from the bankrupt this did not prevent the transaction from being void under the statute of Bankruptcy *Ex parte Trustees* (1923) 2 Ch D 1.

The use of the word preference implies an act of free will, and since an act done under pressure cannot be said to be an act of free will it is material in determining whether a transaction is a fraudulent transfer or not to see what was the mind of the person making the transfer. If a transaction is a fraudulent transfer it is not a preference. If a creditor was preferred, it must further be shown that the transfer was made with the view of giving him preference over other creditors. It is not necessary that it should be the dominant view, it is enough if it is a substantial or intellectual view. It is not necessary that it should be the sole view.

a secondary view the transaction cannot be treated as a fraudulent preference. In each case what the Court has to find is whether the insolvent has preferred the creditor with the dominant view of giving him preference over the other creditors. If the dominant view in making the transfer was to protect himself from legal proceedings the transaction would not be a fraudulent preference, *Ramaswami Iyengar v Chinnathambi* 1932 A I R (M) 459. In 1922 an insolvent became involved. From January to June 1923 he tried to arrive at a settlement with his creditors but failed. Some of the creditors obtained decrees against him and attached his properties. On the 15th July, 1923 he paid Rs 7125 to a creditor to whom he owed Rs 14000 and got the balance written off. In October, 1923 he was adjudged insolvent. The Receiver in insolvency applied to annul the payment on the ground that it was fraudulent and void under sec 54. It was held that the payment to the creditor by the debtor was made voluntarily on the part of the insolvent without any outside pressure with a view to give the particular creditor preference over his other creditors and the Receiver was entitled to have it annulled as fraudulent and void. *Gandabhai Gulabchand v Balkrishna* 32 Bom L R 294 127 I C 190 (1930) A I R (Bom) 217.

A mere transfer of property or payment made to one creditor rather than another by an insolvent on the eve of insolvency while it is in essence a preference of one creditor over another, is not in the eye of law made with a view to giving that creditor a preference over other creditors unless the dominant intention of the insolvent in making the preference was to prefer that particular creditor over the other creditors. Official Liquidator v. Official Liquidator 327 119.

A preference given in return for a money payment which was made for the benefit of the insolvent personally and which would not possibly be for the benefit of his business and therefore for his creditors would result in preference being given to the man who made it which could only be described as fraudulent. *A K R M M C T Chettyar Firm v Maung Ba Chut* 128 I C 589 1930 A I R (R) 315.

Motive for preference

The mere making of a preferential payment by a debtor to his creditor is not a fraudulent preference. The dominant intention of the debtor in making it must be considered. If the debtor's real intention is to prefer the creditor the payment is a fraudulent preference. If the transfer is made with a view to repairing a past wrong or to avoid evil consequences to the debtor himself the payment is not a fraudulent preference. *N P R M P Adakammi*

Achi v. The Official Assignee, 11 Rang 489. In order to hold that a transfer by a debtor in favour of a creditor constituted a fraudulent preference within the meaning of sec 54 the Court must be satisfied that the dominant or substantial motive of the debtor in making the transfer was to prefer the particular creditor and not to secure some particular advantage for himself. A debtor approaches one of his creditors for a fresh loan which he required for business purposes. The creditor refused to advance the loan unless his previous loan was also secured. The debtor then agreed to grant him a mortgage of certain property to secure the previous debt and the fresh advance. It was held that the mortgage did not constitute a fraudulent preference within the meaning of sec 54, *Daulat Ram v. Deoki Nandan*, 70 Ind Cas 861 1924 AIR (L) 686. To the same effect is the judgment in *Rama Nanda Pal v. Pankaj Kumar Ghosh*, 1 LR (1938) 2 C 275, in which it has been held that if a debtor transfer a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor. But where prior to adjudication as insolvent, the insolvent took a fresh advance from one of his creditors and executed a mortgage of his immovable property in his favour to secure the sum previously due to him together with the fresh advance, and two fictitious amounts also formed part of the consideration, so that the total amount of the mortgage money be nearly equal to the value of the property, and the other creditors may not be able to recover their debts if the equity of redemption, it was one in which the insolvent dealt with his immovable property with a view to giving preference to one of his creditors over the others, and the mortgage must be annulled under sec 54 of the Act. *Abdul Sattar v. Onkar Nath*, 1936 ALJ 698 1936 AWR 585 163 IC 831 1936 AIR (All) 489.

Section 54 does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor the dominant factor in deciding the fate of the transaction. Where the debtor, unable to meet his liabilities and in need of further accommodation approaches the creditor and asks him to make a loan, intending thereby to benefit himself and the creditor it was held that the transaction was not effected with a view to giving the creditor a preference over other creditors. *M. I. Ramsarup v. Dula Ram*, 92 IC 296 (1926) AIR (L). The leading case on the point is *Ex parte Taylor, In Re C* (1888) 18 QBD 295. The general principles of law which govern transfers made in favour of one creditor have been explained by

C J in *Labhu Ram v Purand Chand* 130 PR 1919, *Umrao Singh v Punjab National Bank* 3 LLJ 44 followed in *Puran Chand v Puran Chand* 1923 AIR (L) 652. As regards the question of fraudulent preference the real question is what was the dominant motive of the transfer or was it to give a preference to the creditor over the rest. *Nagarathana Mudaliar v Chidambaram Chettiar*, (1928) MWN 617 1928 AIR (M) 860 following *The Official Assignee of Madras v T B Mehata & Sons* 42 Mad 510. It is the dominant intention of a debtor that is the determining factor in considering whether there has been undue preference within s 54. If a debtor transfers a valuable property on the eve of insolvency to a creditor of his the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists as a part of the same bargain, on the payment of the existing debt the debtor consenting to it cannot be said to have voluntarily given preference to the creditor. *Ramananda Paul v Pankaj Kumar Ghosh* 11 LR (1938) 2 C 275, 1938 AIR (C) 417.

In proceedings under sec 54 what the Court has to determine is 'was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character'. This is a question of fact. If the Court after enquiry finds that the insolvent's dominant motive in making the transfer was to prefer the particular creditor over others then the transaction amounts to a fraudulent preference, *Kasi Iyer v Official Receiver Tanjore* 1929 AIR (M) 821. *Manohar Lal v Khan Zaman* 1935 AIR (Lah) 167. Intent to defeat or delay the creditors or having a view to give preference to a creditor are mental acts and not acts of fraud or concealment.

ties or transfers properties in favour of some of the creditors having made no provision for the payment of debts due to others perhaps a Court may come to the conclusion that the transfers were made with intent to defeat or delay the creditors or with a view to give preference to a particular creditor. *Baynath Rameshwar Lal v Anand Prashad Kumar* 17 PLT 807 168 IC 154 1937 AIR (P) 134.

The mere fact that the transfers have resulted in an undue preference in favour of one creditor over the other creditors is not necessarily an indication of the intention of the insolvent to give such preference, and the real test of this in each case is the dominant motive of the insolvent. It is his intention that is to be looked into when deciding whether the transfer by him should or should not be annulled. The intention of the transferee is immaterial. If a transfer is made under pressure of a threat of suit to recover the money due to the creditor the transfer cannot ordinarily be annulled.

annulled under the section *Rooria Mal v The Official Receiver* Kar
nal 33 P L R 464 1932 A I R (L) 381

Preference for benefit to oneself

When making a transfer in favour of a creditor the debtor in fact was not really intending to prefer the creditor or to confer any benefit on him but the dominant motive or object which influenced the debtor was the desire to secure a benefit for himself the transaction cannot be treated as having been a fraudulent preference within the scope of sec 54 of the Provincial Insolvency Act V of 1920 *Bhagwan Das v Chutan Lal* 19 A L J 240 62 Ind Cas 732 Where the debtor unable to meet his liabilities and in need of further accommodation approaches the creditor and asks him to make a loan intending thereby to benefit himself and not the creditor it was held that the transaction was not effected with a view to giving the creditor a preference over other creditors *Moti Mal v Daulat Ram* 92 I C 296 (1926) A I R (L) 231

Every transfer made by a person who is unable to pay his debts does not *ipso facto* become void in the absence of an intention to give preference to the transferee over other creditors The pressure brought about by a creditor for the payment of the debt due to him militates against the fraudulent intention such as is contemplated by section 54 There may be circumstances which by themselves may raise a strong presumption of an intention to give preference over other creditors But where a genuine attempt is made by the debtor to postpone the sale of the property at the instance of his creditor and the transfer is in pursuance of that attempt and an advantage is gained by him e.g. stoppage of interest and payment of the amount claimed by instalments then the presumption in favour of the intention to give preference to creditor does not arise *Firm Mela Ram Dip Chand v Ghulam Dastgir* 114 I C 709 1929 A I R (L) 159

Where the insolvents' dominant motive in executing certain mortgages was to save themselves and their business in the hope that their business would recover for the mutual benefit of themselves and their creditors it was held that there was no fraudulent preference within the meaning of sec 54 *District Official Receiver Tinnevely v Nallaperumal Pillai* 1929 M W N 327 119 I C 708 1929 A I R (M) 471 In *Official Receiver Trichinopoly v Muhammad Mieris Sahib* (1937) 2 M L J 378 46 M L W 439 1937 M W N 1090 1937 A I R (M) 872 an insolvent by a document purported to sell some of his property to respondent and making it a part of the consideration for the sale that the transferee should pay one of the debts due from the insolvent to respondent no The said transaction was impeached as being a fraudulent preference of one of the creditors. On evidence it was found that the transaction was not the result of the desire or intention

the part of the insolvent to prefer respondent no 2 but the result of the pressure from respondent no 2 and also a desire on the part of the insolvent to secure a benefit to himself. It was held that the insolvent entered into the transaction mainly with a view to secure some advantage to himself real or fancied—it could not be impeached as amounting to a fraudulent preference and it did not matter that the advantage was not obtained by the insolvent by payment in cash directly by the preferred creditor and that the insolvent did not succeed in getting the extra advantage. In *Ramananda Pal v Pankaj Kumar Ghosh* I L R (1938) 2 C 275 1938 A I R (C) 417 one of the creditors of the insolvent entered into a transaction of mortgage with his debtor the object of which was to raise money to carry on business of the debtor or at any rate to pay off some of the creditors of the business. The consideration for the mortgage was not the satisfaction of his own past debt merely but a substantial advance in addition to it. It was held that no dishonesty could be imputed to the mortgagee even if it happened that it

reacheably amongst all the to the exclusion of others

the purview of s 54 there was no duty cast upon a creditor to protect the interest of other creditors and it could not be said that one creditor was defrauded by payment to another

Preference pursuant to contract

In *Ex parte Keir* and *In re Crauford* (1874) 9 Ch A 752 a debtor who on the 5th November 1872 committed an act of bankruptcy and was adjudicated thereon the 28th and was owed £4 000 to his mother's estate being pressed by the executrix for payment promised to send £2 350 on account of the debt to the estate. On 4th November that is the day previous to the act of bankruptcy he sent bills for £4 000 of which £2 350 was appropriated towards the debt due to the mother's estate and the remainder to an account between the insolvent and the executrix. On these facts the Court of Appeal held that there was no fraudulent preference because the remittance on the 4th November was made in pursuance of a previous promise. This was followed in *Ex parte Hodgkin* and *In re Softley* (1875) 20 Eq 746 (755) in which a bank to whom a ship builder owed money for advances made towards the building of a ship and to whom the ship builder offered security which was refused by the bank which said that they did not want the security at the moment but that circumstances might arise which would induce them to call upon him to perfect the offer which he made did afterwards accept as security the ship then in an unfinished condition at the time when he was in insolvent circumstances and it was not doubted that the bank was aware of the fact. On this Sir James Bacon C J said that the bank was not precluded from insisting on the performance of that promise on which they had acted for several months since it was made.

Ashutosh Ghosh, 19

v Ashutosh Ghose,

authorities for the

doctrine. In the former report the proposition under discussion was stated that the presumption of fraudulent intention would be repelled if it were apparent that the debtor acted in fulfilment of a prior agreement. In the latter report this proposition was further considered and it was held that a previous oral agreement to mortgage sufficient property would take a mortgage given later on, out of the operation of sec 37 (corresponding to the present sec 54). It is undoubtedly the law that if security is given to a creditor by the debtor in insolvent circumstances not as an act of preference but in pursuance of a previous contract to do so the security cannot be attacked on the ground of fraudulent preference. The presumption of fraudulent intention would be repelled if it was apparent that this debtor acted in fulfilment of a prior agreement, *Narayana Ayyar v Official Receiver, South Malabar*, 1933 M W N 1049 1934 A I R (M) 294

Preference under pressure.

A transaction cannot be avoided as fraudulent preference when the transaction is proved to be the result of pressure brought to bear on the debtor, i.e., pressure which must have operated on the mind of the debtor as the dominant influence affecting him, and where the preference would not have been made but for the importunity of the creditor and the desire of the debtor to prefer. But where the debtor was acting in the ordinary course of business, as by meeting bills as they fell due or even before they fell due (*Re Clay, Ex parte The Trustee*, 3 Mans 31) or where the debtor was acting in the fulfilment of a prior agreement, (*Nripendranath v Ashutosh*, 19 C W N 157 *supra*) or where the transaction was in performance of a special contract, (*Bills v Smith* (1863) 34 L J Q B 68) such transactions cannot be avoided as fraudulent preferences. Where two days before a person was adjudicated insolvent and his property had vested in the Official Assignee, such person had not spontaneously but in consequence of being pressed, assigned to a particular creditor certain properties, it was held by Stuart, C J., that such assignment was not voluntary and was therefore not fraudulent and void, *Sheopershad v Miller* 2 All 475. See also *Miller v Sheopershad*, 6 All 84 (PC). Where the proper inference to draw from the facts was that the dominant motive actuating the debtor was that, in making the transfer to his creditor, he (the debtor) was only doing what he felt himself bound or compelled to do and where it must have appeared to him that the alternative handing over was a prosecution for criminal breach of trust, the act is not of fraudulent preference within the statute, *Sime Darby & Ltd v Official Assignee*, 47 C L J 339; *Sholapur Spinning & Weaving Co Ltd v Pandharinath*, 30 Bom LR 893 (1928) A I R. (B)

An act done by the insolvent not as a free agent but under pressure or as purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of others. What the Court has to ascertain is, what was the dominant intention in the mind of the insolvent at the time the act was done, and that it is for the creditors to establish that the principal object of the transaction was intended to be fraudulent preference, *M A Roeborn v Tollkoffer*, 2 Rang 193. A transfer made by a debtor in difficulties in favour of one of his creditors under pressure of a threat by the latter that he will institute insolvency proceedings against the debtor unless the transfer—

Mansookhlal v Nagardass,

Revenue, Tanjore, (1929) A I

to pay his creditors and had stopped considerable portion of his business. He was all the while making genuine effort to set right his financial position without admitting defeat. In such circumstances his bankers who had a legitimate grievance against him exerted severe pressure on him, whereupon the insolvent executed a registered security bond within three months prior to the date of being adjudicated insolvent. It was held that the security bond was not executed with a view to giving the bankers a preference over other creditors within the meaning of sec 54.

In order to come within the statute it must be shown that the act of the debtor was a voluntary one. In other words the term 'preference' or 'preferring a creditor' has always been interpreted as meaning a purely voluntary act on the part of the debtors which condition could not exist where there was anything in the nature of pressure or that which would lead the debtor to think that he was compelled to do what he had done, *Firm Hardayan Dass & Johar Mall v Jagannath Marwari*, 15 P L T 461 1934 A I R (Pat) 526. A threat to file a suit for recovery of the debt amounts to pressure, *Sundar Singh Sachar v The Official Receiver of Ravalpindi*, 34 P L R 436. Where apart from the fact that an adjudication order was subsequently made there was no other evidence to show that the debtor was unable to pay his debts at the time of the transfers and where it was obvious that the transfers were made under pressure, viz, to avoid a sale in execution of a decree after properties had been attached, the Court refused to set aside the transfers on the ground that they were protected under sec 57 of the Presidency Towns Insolvency Act. *Re Hirulal Mondil Ex parte Sm Lilabati Dassee*, 40 C W N 1031.

What is not pressure.

Although in some cases, a writ may be a pressure, there are cases where the writs are of no importance to the debtor and no

terror, and in such cases the threat, or a writ or the issuing of a writ ought not to be called a pressure so as to validate a transfer by a debtor in insolvent circumstances *Arunachellam Chettiar v Official Receiver Tanjore*, 22 M L W 134 1925 M W N 561 49 M L J 562 91 I C 522 (1925) A I R (M) 1089 The mere payment of a debt by a debtor in imminent expectation of bankruptcy is not by itself sufficient to prove the intention to give preference The word preference involves and imports a free choice and it is, therefore necessary to prove at least that the debtor's act was voluntary and not due to extraneous influence, such as pressure or threat from creditors *Ram Chand v Parmanand*, 110 I C 824 Sir George Jessel Master of the Rolls, observed in *Ex parte Hall*, L R (1882) 19 Ch D 580 Can that delivery of the bills to Brown be said to have been in consequence of bona fide pressure on the part of the appellant? It is plain that it was voluntary act of the bankrupt It would be absurd to call it pressure A man says to his creditor 'I am about to be come bankrupt or I shall stop payment in a week The creditor said 'Pay me my debt or I will sue you for it Can that be called bona fide pressure by the creditor? It would be absurd so to call it"

A constant demand for payment of debts is not pressure, *Madhoram v Official Assignee*, 27 C W N 611 Where the creditor demanded a substantial payment or a return of goods, otherwise he would 'make it hot' for the debtor and the debtor agreed and during the next few days returned goods of a value more than three times the amount then due and within three months the debtor became bankrupt, it was held, on the evidence that the return of the goods was not caused by any real pressure on the part of the creditor but was the voluntary act of the debtor and therefore the transaction was a fraudulent preference In *Re Rimsay Ex parte Diacon*, (1913) 2 K B 80 The effect of a demand by a creditor, with or without a threat of legal proceedings on the mind of the debtor will depend in each case on the circumstances Where, both the creditor and the debtor are aware that the latter's business is collapsing the pressure exercised by the creditor cannot be said to be real Where a firm was unable to pay its debts as they became due, and the agent of the firm transferred certain property and outstanding of the firm to certain creditors who knew the position of the firm and who had done business with the firm through the agent, it was held that the transaction amounted to a fraudulent preference *N P R M P Adakammil Achi v The Official Assignee*, 11 Rang 459 A mere threat to sue which, if at all is the only pressure will not be such as to change the nature of the debtor's act from a voluntary to an involuntary one especially when the debtor is in expectation of such suits being filed by almost all the creditors It is not, therefore, to secure freedom from being su for the debts that the mortgage is created In such a case

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Brown be said to have been in error on the part of the appellant? It is plain that it was voluntary act of the bankrupt. It would be absurd to call it pressure. A man says to his creditor 'I am about to become bankrupt or I shall stop payment in a week. The creditor said 'Pay me my debt or I will sue you for it. Can that be called bona fide pressure by the creditor? It would be absurd to call it'.

A constant demand for payment of debts is not pressure, *Masram v. Official Assignee* 27 CWN 611. Where the creditor demanded a substantial payment or a return of goods otherwise he would make it hot for the debtor and the debtor agreed and during the next few days returned goods of a value more than five times the amount then due and within three months the debtor became bankrupt. It was held, on the evidence that the return of the goods was not caused by any real pressure on the part of the creditor but was the voluntary act of the debtor and therefore the transaction was a fraudulent preference. *In Re Rumsay Express Diakon* (1913) 2 KB 80. The effect of a demand by a creditor with or without a threat of legal proceedings on the mind of a debtor will depend in each case on the circumstances. Where, however, the creditor and the debtor are aware that the latter's business is collapsing the pressure exercised by the creditor cannot be said to be real. Where a firm was unable to pay its debts as they became due and the agent of the firm transferred certain property and outstanding of the firm to certain creditors who knew the position of the firm and who had done business with the firm through the agent it was held that the transaction amounted to a fraudulent preference. *N. P. R. M. P. Adakammachi v. The Official Assignee*, 11 Rang 489. A mere threat to sue which at all is the effect of pressure will not be such as to change the nature of the debt from a voluntary to an involuntary one, especially when the debtor is in expectation of such suits being filed by all his creditors. It is not, therefore, to secure freedom from suits for the debts that the mortgage is created. In *Gu-*

debtor is in a position to tell the creditor that he will not give a mortgage in order to give security for the debts due to the creditor unless a further loan is advanced. The creditor is not in a position to dictate to the debtor that a mortgage must be executed as a security for the debts due to him. In such circumstances the dominant or substantial motive of the debtor was to give preference to one creditor over the rest and the transfer cannot be said to be made simply to protect himself from legal proceedings. *A L S P L Subraman an Chettiar v Subbaraya Goundan* 1934 M W N 801

In determining whether a transfer by the debtor is executed under pressure from the creditor the effect of the creditor's demand in the mind of the debtor has to be considered and it does not necessarily follow that because the creditor makes the demand that his debt should be paid the transfer is executed under pressure from the creditor. In *Gopal Balkrishna v Bajirao* ILR (1937) N 78 167 IC 833 1937 AIR (N) 117 an insolvent in the period of one week got rid of all his attachable property and executed a certain sale deed in favour of a creditor A upon his promising that he would pay the debt due to the creditor B. The insolvent obtained no advantage from these sales. B had pressed the insolvent for the payment of his debt but was not aware until a few days later that the sale deed had been executed and that A had promised to pay off the debt due to himself. It was held that it was impossible to say on this evidence that there was anything for the insolvent to protect himself from B. B had pressed him for the debt and a suit by B would have no terrors for him. The insolvent obtained no advantage to himself. This being so the actual execution of the sale deed was not made at the instigation of B and therefore it could not be said that the sale was made because of the pressure from B. The insolvent's intention clearly was to prefer the two creditors A & B and the mere fact that B had pressed for his debt did not make the sale deed one executed under pressure.

Suffer a judicial proceeding

When a debtor suffered judgment by default in an action by his father in law shortly before filing his petition but said that he did so because he did not think that the creditor would proceed to extremities and issue execution it was held that the trustee had not made out a case of fraudulent preference. *Ex parte Lancaster* (1883) 25 Ch D 311. A decree obtained against the judgment debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusion between the parties when the judgment debtor has nothing in the world to bless himself with and does not care whether he has decrees for an unlimited amount against him or not. *Mir Sha v Rahim Bux* 1923 AIR (All) 33

Transfer within three months.

Under the English law the limitation as to three months was first introduced in the Act of 1869, but the notion that preference to be fraudulent must be a preference on the eve of bankruptcy was not then new. Lord Ellenborough in *De Tastet v Carroll*, 1 Stark, 88, says "Formerly the act of bankruptcy drew the line of separation between that property which might be disposed of by the bankrupt and that which vested in the assignees. But it occurred to those who presided in the Courts, that it was unjust to permit a party, on the eve of bankruptcy, to make a voluntary disposition of his property in favour of a particular creditor, leaving the mere husk to the rest, and, therefore, that a transfer made at such a period, and under such circumstances as evidently showed that it was made in contemplation of bankruptcy and in order to favour a particular creditor, should be void."

Before the right to make an application under section 37 (now sec 54) accrues two conditions precedent have to be fulfilled, firstly, the application for insolvency must be made within three months of

secondly, the debtor must be

Marwar Bank, 52 I C 188

Aiyar, 49 I C 283, Sadasiva

ditor was intended by the

Indian Legislature to be more leniently dealt with than a voluntary, colourable or fraudulent donee, and hence the former could escape section 37 if his preference took place beyond the short period of three months before the date of the petition. The transfers being more than three months before the date of the petition upon which the insolvent was adjudged as such, cannot be questioned under section 54 (1), *Sohan Lal v Sheo Nath*, 26 A L J 941 111 I C 136 1928 A I R (A) 676. Where a consent decree was passed against the insolvent more than three months prior to the date of the presentation of the petition, the execution proceedings on such decree initiated within three months of the presentation of the petition cannot be challenged under sec 54, *Chaintai v Dolaram*, 25 S L R 371 1932 A I R. (S) 3

Computation of the period of three months.

In some cases it has been held that the date of the commencement of the period of three months mentioned in sec 54 is the date on which the transfer sought to be set aside becomes effective in law, namely, in the case of transfer such as a mortgage or sale, the date of the registration of the deed and not the date of execution, *U Ba Sein v Maung San*, 12 Rang 263 1934 A I R (Rang) 216. Where the act of insolvency of a debtor is the execution of a sale deed, the period of three months for presenting a petition for adjudication by a creditor commences from the registration of the deed and not the date of its execution, *Muthiah Chettiar*

v. *Official Receiver Tinnetelley* 1933 M W N 312 37 L W 130 64 MLJ 382 141 I C 101 1933 AIR (Mad) 185 *Sariathada Isuarayya v Kurubasubbanna* 40 L W 413 1934 M W N 784 67 MLJ 380 1934 AIR (M) 637 In later cases e.g. in *Rama Nanda Pal v Pankaj Kumar Ghosh* 1 LR (1938) 2 C 275 42 C W N 554 1938 AIR (C) 417 it has been held dissenting from the above cases that when a transfer of property can only be effected by a registered deed the date of such transfer within the meaning of sec 54 of the Provincial Insolvency Act is the date of the execution of the deed and not the date of registration. Similarly it has been held in *U On Maung v Maung Shue Hpaung* 1937 R LR 375 1937 AIR (R) 446 FB overruling *U Ba Sem v Maung San* 12 R 263 that the requirement of registration of a document is an evidentiary requirement an unregistered transfer is inchoate and is ineffective until registered. But it nevertheless exists and when registered operates from the date of its execution. The requirement of registration is a requirement of form only the Registration Act looks not to the reality of the agreement between the parties but to the form in which the agreement is expressed once the form has been supplied the reality of the transaction receives acknowledgment. Hence the period of three months referred to in sec 54 begins to run from the date of execution of the transfer provided it has been registered within the specified time.

Where the act of insolvency alleged is an execution sale of certain properties of the debtor a creditor's petition for adjudication of the latter as insolvent must be made within three months from the sale and not from the confirmation thereof *Kanai Lal Nandy v Timkar De* 37 C W N 535 57 CLJ 148 145 I C 429 1933 AIR (Cal) 564

Limitation for annulment of preferences

Sec 54 nowhere lays down that the transfer can be annulled only at a particular stage. It must be done after the Court has passed an order of adjudication otherwise the Court would have no jurisdiction to annul the transfer. Where the lower Court passed the order of adjudication basing it on the finding that the transfer in question was void as a fraudulent transfer and incorporated the two orders in the same judgment but recorded the order of annulment in the sentence preceeding the order relating to adjudication it was held that it was merely a clerical error and there was nothing to make the order void *Harnam Singh v Gopal Lal Des Raj* 109 I C 370. An application for setting aside a transfer of property under sec 54 may be made at any time during the pendency of the insolvency proceedings and there is no period of limitation provided for such an application. *Hemraj Champalal v Ramkrishna Ram* (1917) 2 P L J 101 Art 181 of Sch 1 of the Limitation Act has no application to such proceedings. Where the Court chooses

to take action itself under this section or is moved by the Receiver or by a creditor it is not bound by any period of limitation, *Daryai Singh v Kanai Lal* 75 Ind C 15 99 following *Pirthi Nath v Basheshar Nath* 69 Ind C 15 403

Who can apply for annulment.

Vide section 54A and notes thereunder

Issues to be proved.

The Privy Council in the case of *Mushahar Sahu v Lala Hakim Lal*, 43 Cal 521 (P C) has held that "as a matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving other creditors unpaid." In an application under sec 54 of the Provincial Insolvency Act it is not sufficient to prove that the transfer had the effect of giving preference to a creditor it must be proved further that it was the view or the intention to give that creditor a preference, *Boliseti Momayya v Kolla Kotayya*, 63 Ind Cas 916 In case of fraudulent preference it is not necessary for the Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully. In cases of fraudulent preference the Receiver is only to make out the intention of insolvent. Even if the creditor takes a *bona fide* sale from the insolvent in discharge of a debt due to him that does not make the transaction a valid transaction if the intention or the view of the insolvent was to prefer one creditor to others, *Baliseti Momayya v Official Receiver, Guntur*, 1926 M W N 124 23 M L W 10 92 I C 726 (1926) A I R (M) 338. Although the predominating motive of the insolvent is the guiding factor in the case under sec 54 in entering into a transaction sought to be impugned, the mere fact that the effect of the transaction is preference of the creditor who gives further accommodation to a debtor does not amount to a proof of an intention to give undue preference to a creditor. The intention must be clearly proved *Bansi Lal v Official Receiver*, 12 L.L.J 316. Under the present section of the Insolvency Act actual fraud need not be proved as under sec 53 of the T P Act. It is *only necessary to show that a transfer has been made with a view to show preference to one creditor to whom a debt may be due over another creditor*, *Balmokand v Ayya Sing*, 18 P W R 1912 26 P L R 1912 13 Ind Cas 68

If a man is insolvent, and disposes of a portion of his property in favour of a *bona fide* creditor, although upon the eve of bankruptcy and although this fact be known or believed by both parties, it may be a perfectly valid and legal transaction. To be invalid, there must be a disposition on the part of the insol

favour that particular creditor, and this is generally shown by the fact that the first step or proposal towards the disposal of the property in favour of the creditor proceeds from the insolvent debtor. But if the creditor, although he knows that the debtor is insolvent presses and insists upon having a security for his debt and the debtor yield to that pressure and give the security, although it may be well known to both at the sametime, that the effect will be to give that particular creditor an advantage over the other creditors of the insolvent, the transaction is perfectly good and valid. *K P A P Chettuar Firm v U Maung Maung*, 1934 AIR (Rang) 208

As the solution of the question involves an enquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence. *Sime Darby & Co v The Official Assignee*, 47 CLJ 339. Fraud being always secret in its working it is seldom possible for a party to adduce direct evidence in proof of it. It is open to the Court to infer fraudulent intention from circumstantial evidence. *Ajodhia Parsad v Sita Ram* 8 O W N 1125 134 IC 1013 1931 AIR (O) 403. It is an error to take each fact which militated against the bona fide of the transaction separated from the rest of the facts and to proceed to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. *Seth Ghunsham das v Umaprashad* 23 C W N 817 (PC)

Procedure for annulment of fraudulent preferences

No doubt according to s 5 Provincial Insolvency Act, the provisions of the Civil PC are applicable subject to the provisions of the Provincial Insolvency Act. But the Insolvency Act provides for setting aside alienations under secs 53 and 54 on different grounds. Hence the dismissal of an application under sec 53 does not bar the subsequent applications under s 54 under the Civil PC, sec 11 Expl 4 particularly when the Official Receiver is not proved to be aware of the grounds of his second application at the time when his first application was presented. *Mangal Das v Official Receiver* 39 P L R 914 1937 AIR (L) 668

Onus to avoid preference.

It is important to state what a trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent a debtor from preferring one creditor to another and the Statute of Elizabeth (13 Eli. C 5) leaves the common law unchanged. The principle now known as fraudulent preference was first formulated in sec 92 of

the Bankruptcy Act, 1869 This section, but slightly altered, was reproduced by the Act of 1883, and its successor formed sec 44 of the present Act The conditions which section 44 requires are plain First, that the payment is made by a person unable to pay his debts as they become due from his own money, secondly, that it in fact prefers one creditor over others, thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made It has been decided many times that the mere fact that the payment does prefer one creditor over others does not make it void against the trustee in bankruptcy

As Mellish, LJ said in *Ex parte Topham*, LR 8 Ch App 614, quoting from the judgment of Bacon, VC in *Ex parte Blackburn*, (1871) LR 12 Eq 358, 'but then sec 92 of the Act of 1869 adds another qualification or condition which is the very life and essence of the enactment, the payment so made must, in order to be void, be made in favour of any creditor, with a view to giving such creditor preference over other creditors' so that unless it can be made clearly apparent and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor to other creditors, the payment cannot be impeached although it can be obviously in favour of a creditor Lord Esher in *Neuprance & Garard's Trustee v Hunting*, (1897) 2 QB 19 has said 'The question is, whether in fact he had intention to prefer certain creditors It has been argued that the debtor must be taken to have intended the natural consequences of his act I don't think that is true for his purpose I think, one must find out what he really did intend'

In *Ex parte Lancaster*, 22 Ch D 695, Cotton, LJ has definitely stated 'the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor' 'Dominant or substantial' not necessarily the "sole" view is that which has, since *Ex parte Hill*, (1883) 23 Ch D 695, been interpreted to be the proper meaning of the word See per Brown, LJ in 23 Ch D 704 Evidence of kinship would *prima facie* discharge the onus upon the trustee as in *Laurie*, 5 Manson 48 16 LJ QB 431 and *Ex parte Topham*, (1873) 8 Ch 614 There are other facts which do likewise, and if the onus is discharged, no doubt the debtor must displace the *prima facie* evidence of a dominant intention to prefer given by the trustee This can be done by proving that the payment was made under pressure, or for one or other of the many reasons indicated by Phillimore, J in *Re Ramsey*, (1913) 2 KB 80 But the trustee must first discharge the onus that upon him Merely the fact of payment with its attendant of preference is not sufficient The Court cannot speculate surmise in order to supply the deficiency Without the matter must be left where it is, unexplained and

character given to, or purpose proved in relation to the mere payment, *In Re Cohen, Ex parte the trustee*, (1924) 2 Ch. D. 514

Where the act is impeached as fraudulent preference, the onus of proof lies on the Receiver, *Ex parte, Lancaster, Re Marsden*, (1883) 25 Ch. D. 311. And it has been held that the burden of proof lies on the Receiver even if the debtor had been insolvent at the time of the payment and knew himself to be so, *Re Laurie, Ex parte Green*, 6 Mans. 48. In *Sir William Henry Peat v Gresham Trust, Ltd.* (1934) A.C. 252 (262), it was contended that once given the withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. Lord Tomlin in delivering the judgment of the House of Lords observed "I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the Court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is no direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred. In my opinion there is nothing in the decision in *In Re. Cohen*, (1924) 2 Ch. 515 to justify the doctrine for which the appellant contends, and I do not think that such a doctrine could be reconciled with the opinion expressed in the case of *Sharp v Jackson*, (1899) A.C. 419." The law as to the burden of proof is stated clearly in Williams on Bankruptcy, 10th Ed., p. 303: "One balance of authority would seem to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor, other than the mere fact that he was insolvent," *Janki Ram v. Official Receiver, Coimbatore*, 78 Ind. Cas. 16, 1925 A.I.R. (M.) 329. Where a sale by the insolvent within three months of his insolvency is impugned as a fraudulent transfer within the meaning of sec. 37 (now 54), of the Provincial Insolvency Act, the burden is upon the Receiver or the creditors who impugn the transfer to make out positively that the transfer was made with a view to give preference. Unless

43 Cal. 640; 20 C.W.N. 420; 33 Ind. Cas. 548, *Kasi Iyer v. Official Receiver, Tanjore*, (1929) A.I.R. (M.) 821; *Sundar Singh Sachar v. The Official Receiver of Rawalpindi*, 34 P.L.R. 436; *P. S. Narayana Ayyer v. Official Receiver, South Malabar*, 39 L.W. 449; 1933 M.W.N. 1049; 1934 A.I.R. (M.) 294.

After it has been established that the assignments by the insolvent to a creditor were fraudulent and void, the onus lay upon the creditor to show that not only did the creditor give consideration for the assignment, but also that he acted in good faith. *Madho Ram v. The Official Receiver*, 611 The reason why the onus lay in the judgment of the Court of Appeal in *Ex parte Tate*, 35 L.T. 531 (1876). It is well settled that where the Official Receiver or the trustee in bankruptcy challenges the validity of a payment made by the insolvent to his creditors under sec 54 of the Provincial Insolvency Act or under the corresponding section of the English Bankruptcy Act, 1914 the onus in the first instance cast upon the Official Receiver or the trustee in bankruptcy of proving that the dominant or the substantial or effective though not necessarily the sole motive, the insolvent had in view, in making such payments, was to prefer the particular creditor. But the onus is shifted on to the bankrupt to prove the contrary when he makes such payments on the eve of his bankruptcy. There is in such a case no need for any evidence that that view was expressed in so many words by the bankrupt. Where the reason of such payment remains unexplained, it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established and to act on it, *Official Receiver v. Keulmul Ajumul* 93 IC 372 (1926) AIR (S) 123. The payment made to a creditor very shortly before the filing of an application for insolvency showed that undue preference was intended, *Panmall Jesraj v. J Macleod*, 60 CLJ 253 1934 AIR (Cal) 190.

In determining the question whether a transfer is to be deemed fraudulent and void as against the Official Assignee in Bankruptcy, the onus is on the assignee—he has to show that the case is within the Statute. When the dominant motive actuating the debtor was that in making the transfer, he was only doing what he felt himself bound or compelled to do the transfer is not void as against the Official Assignee, *Sime Darby & Co Ltd v. Official Assignee of the Estate of the Paung Sing* 30 Bom LR 290 54 MLJ 337 107 IC 233 1928 AIR (PC) 77 47 CLJ 339. In application under sec 54 of the Provincial Insolvency Act, the onus is in the first instance on the Official Receiver to prove that the dominant or the substantial or effective though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But the onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of properties as the case may be, in discharge of an old debt and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained it is competent to the Court to hold that a *prima facie* case of fraudulent preference has been established and to act on it. *Neeh Chettyar Firm v. R K* 31 AIR (R) 136, *Kashu Nath* 31 A

character given to or purpose proved in relation to the mere payment, *In Re Cohen, Ex parte the trustee*, (1924) 2 Ch D 514

Where the act is impeached as fraudulent preference, the onus of proof lies on the Receiver, *Ex parte Lancaster, Re Marsden*, (1883) 25 Ch D 311. And it has been held that the burden of proof lies on the Receiver even if the debtor had been insolvent at the time of the payment and knew himself to be so *Re Laurie Ex parte Green* 6 Mans 48. In *Sir William Henry Peat v Gresham Trust Ltd* (1934) A C 252 (262) it was contended that once given the withdrawal and the consequences of the withdrawal then in the absence of any other explanation the intent to prefer must be inferred because a man is presumed to intend the natural consequences of his act. Lord Tomlin in delivering the judgment of the House of Lords observed "I do not accept this contention. In my opinion in these cases

id the transaction to establish
hat the real intention was to

when the Court upon a re

view of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of

inference, but where there is no direct evidence and there is room

for more than one explanation it is not enough to say there being

no direct evidence the intent to prefer must be inferred. In my

opinion there is nothing in the decision in *In Re Cohen*, (1924) 2 Ch

515 to justify the doctrine for which the appellant contends and

I do not think that such a doctrine could be reconciled with the

opinion expressed in the case of *Sharp v Jackson*, (1899) A C 419.

The law as to the burden of proof is stated clearly in *Williams on*

Bankruptcy 10th Ed, p 303. One balance of authority would

seem to be in favour of holding that the trustee must give some

evidence of a view to prefer on the part of the debtor other than

the mere fact that he was insolvent, *Janki Ram v. Official Receiver*

Coimbatore, 78 Ind Cas 16 1925 AIR (M) 329. Where a sale

by the insolvent within three months of his insolvency is impugned

as a fraudulent transfer within the meaning of sec 37 (now 54)

of the Provincial Insolvency Act the burden is upon the Receiver

or the creditors who impugn the transfer to make out positively

that the transfer was made with a view to give preference. Unless

such an intention is made out the mere fact that the transfer would

have such an effect is not sufficient to bring the case within the scope

of the insolvency law, *Bappu Rediar v Official Assignee Tinnevely*

(1919) M W 1. *... c, M id*

ras v. Mehta *Asutosh*

43 Cal 640 *v. Ofu*

cial Receiver, *Sachar*

v. The Official Receiver of Rawalpindi 34 PLR 436 P S Narayan

Ayyer v Official Receiver, South Malabar, 39 L W 449 1933 M W N

1049 1934 AIR (M) 294

After it has been established that the assignments by the insolvent to a creditor were fraudulent and void, the onus lay upon the creditor to show that not only did the creditor give consideration for the assignments but also that he acted in good faith, *Madho Ram v. Official Assignee*, 27 CWN 611. The reason why the onus lay upon creditor may be found in the judgment of the Court of Appeal in *Ex parte Tate*, 35 LT 531 (1876). It is well settled that where the Official Receiver or the trustee in bankruptcy challenges the validity of a payment made by the insolvent to his creditors under sec 54 of the Provincial Insolvency Act or under the corresponding section of the English Bankruptcy Act, 1914, the onus in the first instance cast upon the Official Receiver or the trustee in bankruptcy of proving that the dominant or the substantial or effective, though not necessarily the sole motive, the insolvent had in view, in making such payments, was to prefer the particular creditor. But the onus is shifted on to the bankrupt to prove the contrary when he makes such payments on the eve of his bankruptcy. There is in such a case no need for any evidence that that view was expressed in so many words by the bankrupt. Where the reason of such payment remains unexplained, it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established and to act on it, *Official Receiver v. Kewalmul Ajumul*, 93 IC 372 (1926) AIR (S) 123. The payment made to a creditor very shortly before the filing of an application for insolvency showed that undue preference was intended, *Panmall Jesraj v. J Macleod*, 60 CLJ 253 1934 AIR (Cal) 190.

In determining the question whether a transfer is to be deemed fraudulent and void as against the Official Assignee in Bankruptcy, the onus is on the assignee—he has to show that the case is within the Statute. When the dominant motive actuating the debtor was

AIR (PC) 77 47 CLJ 339. In application under sec 54 of the Provincial Insolvency Act, the onus is in the first instance, on the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive which the insolvent had in view was to prefer a particular creditor. But the onus is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of properties, as the case may be, in discharge of an old debt, and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained, it is competent to the Court to hold

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(All) 142, *Dina Nath v. Labhu Ram*, 33 P L R 255 1932 A I R (L) 321 Transfer for a grossly inadequate consideration leads to an inference of fraudulent preference and an attempt to defeat and delay creditors, *Krishan Lal v. Mr Mirzan Bibi*, 35 P L R 74 1934 A I R (Lah) 271 The execution of a mortgage for a sum more than double of what is really due to a near relative points both to the dishonest intention of the alienor to give undue preference to his creditor and to the *mala fides* of the alienee who obviously reserves the extra consideration for the concealed benefit of the insolvent, *Radhe Kishan Tirath Ram v. Fateh Muhammad* 35 P L R 171 1933 A L R (L) 856

Receiver's report is no evidence.

In *Basann Bai v. Nanhu Mal* 23 A L J 792 89 I C 357 (1926) A I R (A) 29, an application was made by a creditor stating that the houses which had ostensibly been sold by the insolvent were part of his assets and should be taken over by the Receiver. This application was sent to the Receiver with directions to take proceedings after an enquiry. The Receiver submitted a report stating that the transfers were fictitious and did not appear to have been made in good faith or for valuable consideration. The District Judge annulled the sales under sec 53 without taking any further evidence relying solely upon the report of the Receiver. The learned Judge had not before him the statement on oath of the Receiver or of the creditor or even of any of the witnesses mentioned in the Receiver's report. He had, however, the report of the Receiver which he treated as part of the evidence in the case. The High Court, in setting aside the order of the District Judge in appeal, held "the report of the Official Receiver in connection with an enquiry under sec 53 or 54 is not by itself legal evidence. It is to be noted that wherever it was intended by the legislature that the report of an Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter. We may draw attention to sections 38 and 42 of the Provincial Insolvency Act. No such provision, however, is to be found in secs 53 and 54. We must, therefore, hold that the report of the Receiver is not *per se* legal evidence on which a finding can be based."

Proof of fraudulent preference.

In determining whether a transfer is a fraudulent preference the proof of other transfers is relevant. In *In re Ramsay* (1913) 2 K B 80, it was held that evidence of other acts of preference committed by the debtor shortly before and shortly after the particular act of preference is admissible. Mr Justice Phillimore said "I think that where one has to look into the mind of the bankrupt any act of his at the time or about the time, any matter in *pari materia* may be looked into to see what was passing in his

mind *Chidambaram Chettiar v. Davani Ache* 1935 MWN 1159 In proceedings under s 54 what the Court has to determine is was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character The burden of proving that the transaction comes within the scope of s 54 and is bad as a fraudulent preference lies heavily on the receiver *Manohar Lal v. Khan Zaman*, 1935 AIR (L) 167 Where a transfer of property was made by an insolvent to one of his creditors it is not sufficient for the receiver to prove that the result of the transfer was the preference of some creditors over others The burden of proof lies upon him to show that the insolvent made the transfer with a view to give one creditor, the transferee preference over other creditors *Gopal Balkrishna Shingore v. Bayras Banaji Kunbi*, 1LR 1937 N 78 167 IC 833 1937 AIR (N) 117 "Intent to defeat or delay the creditors or having a view to give preference to a creditor" are mental acts and can only be determined if one looks into the surrounding circumstances If a man who is in serious pecuniary difficulties his debts surpassing his assets, transfers a considerable portion of his properties or transfers properties in favour of some of his creditors having made no provision for the payment of debts due to others a Court may come to the conclusion that the transfers were made with intent 'to defeat or delay the creditors or with a view to give preference to a particular creditor' *Bajjnath Rameshwar Lal v. Atal Prasad Kumar*, 17 PLT 807 168 IC 140 1937 AIR (P) 134

Decision under section 54 is *res judicata*

The doctrine of *res judicata* is applicable to proceedings in insolvency Were it otherwise it would be impossible for any one from an insolvent had been not transfer or preference to enjoy its proceeds with any sense of security Hence when an application by the Receiver under section 54 is dismissed on merits once one of the creditors cannot again apply for setting aside the transfer, *Rangappa v. Rangappa* 56 Mad 395 63 MLJ 778 1933 AIR (M) 9

Power of Court to award mesne profits on annulment of transfers under s 54

If a transfer is annulled under s 54, the position is not so clear as under s 53 Under that section a transfer that amounts to a fraudulent preference shall be deemed fraudulent and void as against the receiver and shall be annulled by the Court This section of the Act of 1914 (45 Geo V C of 1883 and s 92 of the word "void" is used through it has been held t

the meaning is voidable. In *re Brall*, (1893) 2 Q B 381, Halsbury 2 Ed v 2, para 495. In *Masippa Pellai v Raman Chettuar*, 42 M 322 it was held that the word 'void' in s 36 Provincial Insolvency Act of 1907 which corresponds to s 53 of the present Act means 'voidable' and the section has been amended and the word 'voidable' substituted for the word 'void'. In s 54 however the word 'void' continues to be used but it has been held in *Hemraj Champa Lal v Ramkrishnan Ram* 38 IC 369 that the word "void" in s 37 of the Provincial Insolvency Act of 1907 meant "voidable," and in spite of that decision the section has remained unamended in the Act of 1920. It is clear from sub-section (2) of s 54 that a transfer that may be deemed void under the section is not necessarily void *ab initio*, and it is void only as against the receiver which remains valid as between the parties to the transaction. From this it appears to follow that such a transfer is not void *ab initio* but is merely voidable and the transfer is valid until set aside and therefore the transferee could not be held to be in unlawful possession and is not liable for mesne profits. *Balkrishna v Digambardas*, 31 NLR (Sup) 178 161 IC 689 1936 AIR (N) 139.

Effect of annulment of preferences.

After annulment (i.e. annulment of preference) the property vests in the Receiver. Where an alienation by the insolvent is annulled under secs 36 and 37 (now secs 53 and 54), the alienee may prove as an unsecured creditor for his just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor, *Devi Dial v Sundar Das*, 51 Ind Cas 720 65 PR 1919. When a payment made by the insolvent is avoided on the ground that it is a fraudulent preference, the creditor must pay back the moneys to the official assignee or the receiver. In *Nanack v Official Receiver*, 143 IC 628 1933 AIR (S) 85, an insolvent made entries in his books of account to the effect that certain creditors were paid in full, and that they had received satisfaction in cash. The entries were held to be fraudulent preferences. It was contended by the creditors that the transactions were in fact *hailas* and that they had not received anything from the insolvent's debtors and there was nothing to repay. It was held that as the entries were made with the consent of the creditors, they were bound by the statements contained therein and were bound to repay the amounts to the Receiver.

Sub sec (2), Bonafide transferee from a preferred creditor

The House of Lords in *Butcher v Stead*, LR 7 HL 839 decided that 'the words 'purchaser, payee, or incumbrancer in good faith and for valuable consideration' referred to creditors of the bankrupt who were ignorant that they were being preferred. But the Bankruptcy Act of 1883 altered the law and sub-section (2) of the present section now confines the saving clause to persons making

title in good faith and for valuable consideration through or under a creditor and creditors themselves no longer come within the exception. The Court has jurisdiction to annul alienations by the insolvent's transferee where the transfer is merely a colourable transaction and the transferee only a *benamdar*. The second transferee is a necessary party. *Jagannath v. Narain* 52 IC 761

Appeal

Under sec. 75 (2) and Sch. I an appeal lies from a decision that a transfer of property is a preference in favour of a creditor under section 54. Order of a District Court refusing to annul a transaction as fraudulent preference is appealable only by leave. *Puran Chand v. Ram Chandra Gupta* 33 PLR 65 1931 AIR (L) 651. A creditor is entitled to file an appeal from an order passed on an application by the official receiver for setting aside an alienation under sec. 54. *Naidir v. Ramji Lal* 47 All 849 23 ALJ 503 88 IC 944 1920 AIR (All) 549. *Radhe Kishan Tirath Ram v. Fateh Muhammad* 35 PLR 171 1933 AIR (L) 856. Annulment of a transfer or refusal to annul a transfer is not a decision of a question falling under section 4 and as the distinction between decisions under sec. 4 and orders under sections 53 and 54 is clearly recognised in Sch. I no second appeal lies against an order passed under sec. 54. *Pandu Rang v. Nand Lal* 125 IC 680 1930 AIR (N) 272. No second appeal lies from an order under section 54 setting aside a transfer but a revision under proviso to sec. 75 is competent. *Dinanath v. Labhu Ram* 33 PLR 250 1932 AIR (L) under secs 53 MLJ 298 38

54A A petition for the annulment of any transfer under

By whom petition for annulment may be made section 53 or of any transfer payment obligation or judicial proceeding under section 54 may be made by the receiver or with the leave of the Court by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition

Review

The section has been newly added by sec. 3 of the Provincial Insolvency (Amendment) Act XXXIX of 1926. The object of adding this new section is to remove the doubts created by the divergence of judicial opinion as to the competency of a creditor to move the Court to set aside an encumbrance under sec. 53 or a fraudulent preference under sec. 54.

Court's duty to annul

The language of section 53 makes it incumbent on

to annul every transfer of property made by an insolvent if the transferor is adjudged insolvent within two years from the date of the transfer provided it comes to a finding that such transfer was not made in good faith and for valuable consideration. The section contemplates that action under it will be taken by the receiver but it does not mean that even where the receiver refuses or neglects to act no one else can set the proceedings under this section in motion *Daryal Singh v Kunj Lal* 75 Ind Cas 995, *Prithi Nath v Basheshwar Nath* 69 Ind 403. In a list of debts filed by an insolvent one B was shown as a mortgagee of certain properties K who was one of the creditors challenged the mortgagee. The Judge rejected his application and referred him to Civil Court. It was held that the Judge was bound to enquire into the validity of the mortgage in insolvency proceedings, *Khusali Ram v Bholarmal* 37 All 252 28 Ind Cas 57.

It is the duty of the Insolvency Court to be astute to look after the insolvency proceedings so as to ascertain whether anything can be saved for the creditors. But when a receiver is appointed and he is a gentleman of legal training it is better to leave him to take the initiatory steps to get voidable or fraudulent transfers annulled, *Kunj Beharee v Madhu Sodan* 50 Ind Cas 117. If no receiver is appointed in an insolvency case the Insolvency Court can itself move under sec 53 on the matter being brought to its notice by a creditor, *Seth Sheo Lal v Girdhari Lal*, 78 Ind Cas 140 1924 A I R (Nag) 361. A transfer by the insolvent within two years of insolvency is voidable against the receiver so he is the proper person to impeach the fraudulent transfer by the insolvent and proceedings to annul a transfer under sec 53 of the Provincial Insolvency Act should be taken in the name of the receiver but if the receiver refuses to interfere then a creditor can proceed with the matter with the leave of the Court. Until, however, the receiver has refused or declined to act no one else can do so. But if no Receiver is appointed, the matter is otherwise. In that case the Insolvency Court can itself move the matter being brought to its notice by any of the creditors, *Bansilal Agarwal v Rangalal Agarwal* 1923 A I R (Nag) 97.

Application for annulment.

There must be a foundation laid for an order under sec 54 by a petition from the receiver as prescribed by sec 54A of the Act. It is open to the creditor to petition under sec 54 and was fully gone into without any objection on the part of the creditor, it was held that there was no necessity to quash the proceeding and start afresh by a proper application. *Panmall Jesraj v Macleod* 60 C L J 253, 1934 A I R (Cal) 190. Under the Presidency Towns Insolvency Act proceedings under sec 55 may be

brought by a notice of motion in proper form under the insolvency rules. A notice of motion should be supported by an affidavit. The Official Assignee need not be relegated to a separate suit, *Umesh Chunder Seal v G M Falkner*, 36 C W N 337

Receiver to apply for annulment

When an *ad interim* receiver has been appointed in insolvency proceedings the receiver appointed after adjudication does not stand in the shoes of the interim receiver. He stands on a very much higher footing. The property of the judgment debtor vests in him, he holds it for the benefit of the whole body of creditors, and he has special rights and special duties imposed upon him by statute. Amongst the rights conferred upon him is the right to make an application under sec 36 (now sec 53), and this statutory right which has been conferred upon him cannot be taken away by an order in a proceeding to which he was not a party. An order as to the validity of a transaction to which the debtor and the creditors were alone impleaded as parties while the debtor's estate was in the custody of the *ad interim* receiver does not operate as *res judicata* as against the receiver appointed after adjudication and does not debar him from making an application under sec 36 (now sec 53) *Ramsaran Mander v Shiva Purshad*, 58 Ind Cas 783

The proper person to make an application for avoidance of the transfer is the receiver in whom the insolvent's property has vested. But when the application was made and prosecuted in the lower Court by the creditors, the receiver not having been joined as a party and the order proposed to be made did not in any way affect the position of the receiver, the appeal was heard and disposed of in the receiver's absence, *Lalfi Sahay v Abdul Gani*, 15 C W N 253 12 C L J 452. It was for the receiver to take action under sec 53 and not for the Court to do so on a petition for adjudication by a creditor, *Appi Reddi v Chinna Appi Reddi* 41 M L J 606 1921 M W N 816 14 L W 639. The proper person to move in the matter of getting the transfer annulled is the receiver, *Iswar Das v Ladha Ram* 62 Ind Cas 624. It is the receiver and no one else who is empowered to take action for the cancellation of the sale deeds under sec 53, *Ram Sundar v Ram Chant*, 51 Cal 663 1924 A I R (C) 827 79 Ind Cas 326. It is the official receiver at whose instance an enquiry into the fictitious nature of the transaction should be made and it is the official receiver who should be the principal party representing the whole body of creditors. *Basanti Bai v Nanh Mal*, 89 I C 357 23 A L J 792 (1926) A I R (A) 29

Section 54 confers a preferential right on the Official Receiver to apply for annulment of a transfer made by the insolvent with a view to give a creditor a preference over his other creditors. He is entitled on behalf of the general body of creditors to challenge the transaction although the insolvent in his own right co

have done so *In re Nathuram Mantri*, 34 Bom L R 1166 The receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule did not preclude the Court from entertaining an application by receiver to annul the transfer under sec 36 (now sec 53) *Khadir Shah v Official Receiver Tinnevely* 41 Mad 30 Where an Official Receiver applies to set aside a mortgage bond executed by an insolvent under sec 53, or in the alternative under sec 54 if the mortgagee is proved to be a creditor, and the mortgagee does not prove to be a creditor, it is competent to proceed with the application under sec 53, *Apothorai Odayar v Official Receiver, Tanjore* 99 I C 683

When can a creditor apply for annulment.

The proper procedure is for a Receiver to make an application for the avoidance of the transfer or at least to be a party to it. Where however the Receiver fails to move in the matter it is competent to a creditor to make the application *Nikka Mal v Marwar Bank Ltd* 52 Ind Cas 188 There is no rule that the Official Receiver alone and nobody else can move the District Court to annul an alienation by the insolvent under secs 53 and 54 of Act V of 1920 A creditor can at any time during the pendency of the insolvency proceedings move the Court to take action under secs 53 and 54, if the Official Receiver has refused to move in the matter on the request of the creditor *Hemraj Champi Lal v Ramkrishna Ram* (1917) 2 Pat L J, 101, followed in *Appai Reddi v Appai Reddi* 45 Mad 189 Where the Official Receiver declines to take action a creditor can apply to the Court to allow him to sue in the Official Receiver's name in order to recover the insolvent's property or to set aside a voluntary transfer or to avoid a fraudulent preference for the benefit of the creditors and the requirements of law are satisfied by making the Official Receiver a party to an application made by a creditor to take action under sections 53 and 54 of the Act *Anantha Narayana Ayyar v Sankara Narayan Ayyar*, 47 Mad 673 70 Ind Cas 395 1924 A I R (M) 345 The restrictions placed by sec 54A on the powers of a creditor to move the Court to take action under sec 53 apply only where a receiver has been appointed, and that therefore where the Court is summarily administering the estate any creditor may move the Court for the annulment of a transfer made by the insolvent, *Mt Bechni v Sheikh Sadique*, 9 Pat 839 129 I C 129 1931 A I R (Pat) 14 Sec 54A does not abrogate sec 58 and must be read subject to the provisions of that section The words 'voidable against receiver' in sec 53 must therefore in view of sec 58 be read as voidable against the receiver or the Court as the case may be and a creditor is entitled to move the Court to take action under sec 53 where a receiver has not been appointed *Sitaram v Musst Nathibai*, 1933 A I R

(Nag) 26> Where no receiver has been appointed a creditor is competent to move the Insolvency Court to annul a transaction under sec 37 (now sec 34) of the Act *Gopal Rao v Hirulal* 83 Ind Cas 246 1925 A I R (Nag) 225

Locus standi of creditor to apply for annulment without leave

The practice of the Calcutta High Court is that in adjudication creditor who has proved his debt and who satisfies the Court that the Official Assignee has refused to make an application for setting aside an alleged fraudulent transfer may with the leave of the Court himself make it *R Surymull Mangalchand* 26 C W N 803 Where no leave of the Court has been obtained the person so applying has no locus standi to make the application *Re Hiralal Mandal Ex parte Sm Lilabati Dassee* 40 C W N 1031

A transfer of his property effected by an insolvent is not necessarily void as against all persons Where neither the Receiver nor the Insolvency Court challenges such a transfer a prior gratuitous transferee from insolvent has no locus standi to challenge the transfer *Ramcharan Lall v Basdeo Sahai* 102 I C 92 Where a Court holds that a creditor has no locus standi to present an application for annulling a transaction under sec 53 having violated the provisions of sec 54A the Court has no jurisdiction to give a decision on the application on the merits and the decision if given is *ultra vires* *U Tha Hlaing v Mahomed Ishaq* 128 I C 592 1930 A I R (R) 332

Security for costs

The condition precedent for granting leave to a creditor to proceed under secs 53 and 54 is that he must furnish sufficient security for costs in case of his failure to set aside the encumbrances and fraudulent preferences The Official Receiver is bound to take action under the Act or prefer an appeal against an order of the District Judge if the creditor indemnifies the Official Receiver against costs in the event of failure in such proceedings *Anantha Narayana Ayyar v Sankara Narayan Ayyar* 47 Mad 673

Appeal by a creditor

An appeal from an order refusing to annul a transfer under secs 53 and 54 does not lie as of right and can only be allowed either by leave of the District Judge or the High Court under sec 75 (3) and leave to appeal from such an order should not be given to the creditor unless the District Judge or the High Court is satisfied that the Receiver had been requested and had refused to appeal *Purnachand v Ramchander* 33 Punj L R 65 132 539 (1931) A I R (L) 651

55 Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences nothing in this Act shall invalidate in the case of an insolvency—

Protection of *bona fide* transactions

- (a) any payment by the insolvent to any of his creditors ,
- (b) any payment or delivery to the insolvent
- (c) any transfer by the insolvent for valuable consideration , or
- (d) any contract or dealing by or with the insolvent for valuable consideration

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor

Review

This is section 38 of Act III of 1907 with the addition of the clause and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor in the proviso This section corresponds to sec 57 of the Presidency Towns Insolvency Act and to sec 45 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926

Retrospective effect of the section

It is a well settled rule of interpretation of statutes that in the absence of a provision to the contrary a new law ought not to be construed so as to interfere with vested rights Hence where a mortgage had been effected six months before the Act V of 1920 came into force and according to the law then in force the mortgage was valid notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending for it was effected for valuable considerations and was protected by the proviso to sec 38 Act III of 1907 the mortgagee therefore had acquired a valuable right and this right could not be lost by the subsequent change in the law made by the enactment of Act V of 1920 and repeal of Act III of 1907

Protected transactions.

Under s 55 the only transactions which are protected are (1) payments by the insolvent to any of his creditors, (2) payment or delivery to the insolvent (3) transfers by the insolvent for valuable consideration (4) or contracts or dealings by or with the insolvent for valuable consideration provided (1) that such transactions take place before the date of the order of adjudication and (2) that the persons with whom such transactions take place have not at the time notice of the presentation of any insolvency petition by or against the debtor. *Lindley, L J* has said in *In re O'Shea's Settlement* *Courage v O'Shea* (1895) 1 Ch D 325, "Contract dealing or transaction with the bankrupt is by him. The words 'do not point to the bankrupt is merely passive'". It is the filing of a suit and the obtaining of a decree even though by consent of the judgment-debtor cannot be held to be a contract, dealing or transaction done by the judgment debtor. This case was followed in *Wild v Southwood*, (1897) 1 QBD 317, where a charging order under s 23 of the Partnership Act, 1890, upon a judgment debtor's interest in a partnership, being a proceeding *in invitum*, was held not to be a 'transaction' protected by s 49 of the Bankruptcy Act. So in *Achuta Ramayya Garu v Official Receiver, East Godavari*, 11 LR 58 M 1032 1935 MWN 716 1935 AIR (M) 817, a suit for specific performance of agreement to mortgage was filed against the insolvent the day after the presentation of the insolvency petition and obtained a decree, the insolvent withdrawing his defence, before the date of adjudication, it was held that this was not a transaction which was protected by s 55, and that by reason of the doctrine of relation back, which vested the property of the insolvent in the Official Receiver from the date of the presentation of the insolvency petition, which was antecedent to the date of the filing of the suit and the decree, it was void as against the official receiver. 'Transaction' in s 55 means a transaction in which the insolvent does something and not a proceeding in which the insolvent is merely passive. In section 55 there are two conditions which must be complied with before the party who relies on the protection of the section can claim the benefit of the section. The conditions are to be found in the proviso. The first condition is, that the transaction must take place before the date of the order of adjudication, and the second condition is that the person with whom the transaction takes place had not at the time notice of the presentation of an insolvency petition by or against the debtor. Section 55 of the Act protects all transactions, unless they are in themselves acts of insolvency or fraudulent preferences, entered into with the debtor by third persons for valuable consideration and *bona fide*, namely, *bona fide* in the sense that the person with

whom such transaction takes place had not at the time notice of the presentation of any insolvency petition by or against the debtor," *Bhuguan Das & Co v Chutan Lal*, 43 All. 427 19 A L J 240 62 Ind Crs 732

Cl. (a) ; Payment by insolvent to creditor.

According to s 55 (a) the payment of money by the debtor to his creditor between the commencement of insolvency proceedings and date of the order of adjudication is only protected if the person who received the money has no notice of the presentation of an insolvency petition by or against the debtor. But if the money is received by the creditor with notice of the presentation of the insolvency petition, it is not protected and the creditor may be compelled to return it to the receiver. By the order of adjudication the property of the insolvent vests in the Court or the receiver and under s 28 (7) of the Provincial Insolvency Act, the order relates back to the date of the filing of the insolvency petition. Where therefore, during the pendency of an application for insolvency and before the order of adjudication the debtor pays to a creditor a certain sum in satisfaction of a debt the receipt of payment by the creditor is in violation of the provisions of s 55 (a) and the money received by him continues to belong to the estate of the insolvent which is vested in the receiver and the provisions of s 56 (3) read with s 4 give jurisdiction to the Insolvency Court to pass an order against the creditor to refund the amount which appertains in the eye of the law to the estate of the insolvent. *Jinuar Gangasa Chaure v W B Damle* 31 N L R. (Sup) 121 161 I C 441 1936 A I R (N) 28

Cl. (b) , Payment to insolvent.

Even though the debt vested in the Receiver, the payments in
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 question
 of the effect of the insolvency on any execution, nor there being any question of the avoidance of any transfer or preference, the payments being so far as the defendants are concerned valid, the defendants are discharged from the debt and cannot be made to pay over again to the Receiver. Sec 55 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to the debtors. The effect of the application of sec 55 is that a debt vested in the Receiver may be discharged by the payment made under circumstances specified in that section to the insolvent. *Onkarsa v Bridchand*, 1923 A I R (Nag) 290. The transaction dealt with in these provisions are those relating solely to the insolvent's property. Thus money advanced to a bankrupt for that purpose of paying pressing creditors, and impressed with a trust for the purpose, cannot be

recovered from a creditor to whom it has been paid, *Re Rogers, Ex parte Holland*, (1891) 8 Morr 243

Cl. (c) , Protection of *bona fide* transactions.

The true interpretation of sec 55, cl (c) is that insolvency itself will not invalidate the transfer except in cases provided for by the Act itself but the avoidance of transfers under the general law or under sec 53 of the Transfer of Property Act is not affected by the section *Sree Sree Radhakrishna Thakur v The Official Receiver*, 59 Cal 1135 56 CLJ 446 36 CWN 492 139 IC 323 1932 AIR (Cal) 642 Transaction which would be void under sec 54 as between the creditor and the Receiver can be upheld by any person making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent preference on the part of the bankrupt, *Butcher v Stead*, (1875) LR 7 HL 839 In that case Lord Hatherley observed "I think that Legislature intended to say that if you the debtor for the purpose of evading the operation of the Bankruptcy laws and in order to give fraudulent preference make this payment or this charge, it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him, and receives payment simply for valuable consideration and without notice of any intention on your part to favour one creditor above another"

Although the words "in good faith" do not occur in the section (sec 45 Bankruptcy Act) they must be deemed to be inserted, because in all former Acts (Acts of 1849 and 1869) those words have been inserted and it has been since held that the omission was not intended to make any difference, and that the person who takes the conveyance of a debtor's property cannot claim the benefit of the section if he had notice of anything wrong or anything that really put him upon enquiry, *In re Slobodinsky, Exp Moore*, (1903) 2 KB 517 A creditor who takes a transfer of the whole of the property of his debtor in payment of a past debt with notice that there are other creditors cannot be said to be acting in good faith, *In re Jukes*, (1902) 2 KB 58 A creditor who enters into a transaction with his debtor with the knowledge that the debtor had committed an act of bankruptcy at the time the transaction was entered into was not entitled to claim the benefit of the section, *The Mercantile Bank of India v Official Assignee*, 39 Mad 250 If money is raised by an insolvent by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying the creditors, if the mortgagee acts *bona fide*, the transaction would be valid against the Official Receiver, *Janaki Ram v The Official Receiver, Coimbatore*, 78 IC 16

Cl. (d) ; Protection of contract for valuable consideration.

Where a security on land has been given in pursuance of a *bona fide* verbal agreement to do so, the absence of a men

agreement will not prevent effect being given to such verbal agreement so as to render the security valid against the trustee although it would be otherwise void as an act of bankruptcy. By a parol agreement between a lender and D the former agreed to lend D £2 000 in consideration of the latter's promise to assign certain interests. About a year later in pursuance of this agreement D assigned those interests to the lender and became bankrupt immediately afterwards. At the time of the assignment no memorandum of the above agreement was in existence but it was recited in the assignment. It was held that the assignment did not constitute a fraudulent preference or a fraudulent conveyance under the Bankruptcy Act and was valid as against the trustee in bankruptcy. *In Re Davies* (1921) 3 K B 268. *In re Holland* (1920) 2 Ch 360 distinguished.

Pleading of *bona fide* transfer without notice

A person who had executed a mortgage of his immovable property as security for due payment of rent due to Government committed default in payment thereof. He was adjudged an insolvent and subsequent to adjudication the Government sold the property without notice to the receiver who applied to have it set aside. It was held that if the Government wished to rely upon the protection given by s 55 Provincial Insolvency Act to *bona fide* transactions prior to the date of the order of adjudication, it was the duty of the Crown to have pleaded the protection of that section and further the burden was upon the Crown to show that at the time of the transaction in question it had no notice of the presentation of an insolvency petition. *Secretary of State v S C Niyogi* 158 IC 361 1935 AIR (R) 273.

Onus to prove *bona fides* of transferee

In *Exp Schulte* (9 Ch 409) and in *Exp Cartwright* (44 LT 883) it was held that the onus of proving want of notice is upon the person who relies upon such want of notice though the cases were decided under sec 95 of the Act of 1869 corresponding to section 45 of the Bankruptcy Act 1914 still the principle of law remains the same as under the old Act. Under the proviso to sec 55 a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section a mortgagee must show that both these conditions co exist but where it is found that he had notice of the fact that the petition of insolvency was pending at the time when the mortgage in his favour was executed he cannot avail himself of the protection given by the proviso to sec 55. *Firm Mela Mal Shib Dyal v Thakar Das Sud* 1934 AIR (Lah) 819. The burden is not discharged by relying on statements of the insolvent

that the payments were made to him without the debtors having notice of the insolvency petition *Dharandas v. Hubam* (and 158 IC 628 1932 AIR (S) 62

Transactions before the date of the order of adjudication are protected.

The order of adjudication relates back and takes effect under sec 16 (6) [now sec 25 (7)] for the purpose of binding the insolvent and his creditors from the date of the presentation of the petition of insolvency but it takes effect retrospectively only to the extent laid down in the Act. The question therefore, is to what extent the Act permits the retrospective operation of the order to bind the rights of the creditors. It is a principle of interpretation of a statute should be construed so as to give a meaning to a word. If the date of the order of adjudication referred to in section 34 and 38 (now secs 51 and 55) be deemed to mean the date of the presentation of the petition of insolvency, sections 34 and 37 (now 53 and 54) there is no law under which a creditor can claim the benefit of realisations or payments made, in whole or otherwise before the application for adjudication was made. *Achambit Lal v. Chhanga Mal* 32 Ind Cas 429 A.C. 101. After the order of adjudication is not binding. In the matter of *Jhauar*, 40 Cal 78 18 Ind Cts 908, *Raghunath Das v. D. S. Khetri* 42 Cal 72 (P.C.), 20 CLJ 555 16 Bom LR 24 Ind Cas 304. It should be noted that sec 55 contains provisions of sec 16 (now 28), and by virtue of the provisions of sec 55 a debt vested in the Receiver may be discharged by payment without notice made to the insolvent after the application for being adjudged insolvent and before the order of adjudication. *Onkarsa v. Baidichand* (1923) AIR (N. 1)

Transfer after adjudication

In *In re Badham, Exp. Palmer*, (1893) 10 Morr tended that the transaction which would have had preference if it had been carried out before the date of the bankruptcy was not fraudulent preference carried out after the commencement of the bankruptcy relying on the transaction having had no effect at the time of the bankruptcy. Vaughan Williams, J. did not observe 'I am not bound to give the benefit of the policy of the Indian Act to any transaction which is fraudulent or contrary to the policy of the bankruptcy law. It is, in fact, a fraud to make a payment contrary to the provisions of the Act and to do so with intent to give the benefit of the Act to such transaction.'

Sec 55 protects anybody who before the date of the order of adjudication deals with the insolvent for valuable consideration but that protection has always been held to be unavailable to a transferee where the circumstances show that the transfer which he has taken is in itself an offence against the bankruptcy law that is to say a man cannot claim the protection of a *bona fide* transfer for value where he is himself engaged in an act which is an act of bankruptcy *Sheonath Singh v Munshi Ram* 42 All 433 Under the Bankruptcy Act and the Presidency Towns Insolvency Act inspite of an order of adjudication being passed against an insolvent providing for the vesting of his future property in the Official Assignee the insolvent is free to dispose of any property that he might acquire after being declared insolvent and all persons dealing with him *bona fide* and for a consideration are discharged from making further payment to the Official Assignee provided the transaction took place before the Official Assignee intervened and claimed the property on behalf of the insolvent estate *Chotte Lal v Kedar Nath* 84 Ind Cas 289

The bankrupt has not the ordinary right of a *cestui que trust* to intervene until the surplus has been ascertained to exist and all the creditors interests and cost have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration and management of the trustee during the bankruptcy in due course of the execution of his duty he can demand the surplus—a right which he can dispose by will or deed or otherwise during the pendency of his first bankruptcy even before the surplus is ascertained although such disposition will of course be ineffectual unless in the event there is proved to be a surplus upon which it can operate. Moreover his assignee cannot interfere with the administration of his estate by virtue of such assignment. It would be an assignment of contingent interest which would give no right to the assignee to intervene until it was ascertained whether or not there was a surplus *Ram Bahudra v T V Npunji* (1924) AIR (B) 49 A husband transferred his share in the family dwelling house to his wife without consideration on the 11th Nov 1911. On the 27th February 1912 he was adjudicated insolvent and his wife on the 12th October 1912 transferred the property which had been so conveyed to her to the appellant. It was held that even assuming that the appellant had purchased the property for valuable consideration and without notice of the adjudication of the insolvent the transfer to the appellant subsequent to the adjudication was void inasmuch as the transfer to the wife by the husband prior to his insolvency was found to be fictitious or *benami* and the consequence was that the property had vested in the Official Assignee prior to the transfer to the appellant. *In re Gobardhan Seal an insolvent* 20 CWN 554

Realisation of Property

56. (1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent and such property shall thereupon vest in such receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

- (a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property, and
- (b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof :

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the balance due from him thereon as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him

(5) The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20

Review.

This is section 18 of Act III of 1907, and is based upon Or, X

r 1, CPC, 1908. The section corresponds to sec 77 of the Presidency Towns Insolvency Act. It deals with the appointment of a Receiver to the estate of the insolvent for the realisation of his estate after the order of adjudication as opposed to the appointment of an interim Receiver under sec 20. *Lyon Lord & Co v Virbhandas Ratanchand* 76 Ind Cas 380 (1924) A I R (Sind) 69.

Object of appointment of Receiver.

In every system of law for the realisation and distribution of a bankrupt's property there is an official be he called an assignee or trustee or by any other name and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens. This is one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. *Sheobaran Singh v Kulsum un nissa* 49 All 367 (PC) 31 CWN 853. There is a wide difference between the position and powers of the Insolvency Court before and after adjudication. Before adjudication the debtor continues in possession of the property and is subject to the provisions of the Act entitled to deal with it like any other owner. Therefore in order to prevent alienations and waste the Insolvency Court is empowered under sec 21 (2) to order attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor," provided the conditions laid down in the Proviso obtain. But these powers of attachment are limited to the position before adjudication and they are not as wide as powers of attachment conferred upon the Civil Court under the Civil Procedure Code. After adjudication the position changes entirely. Under sec 28 (2) the whole of the insolvent's property immediately vests in the Court or the receiver and when there is no receiver, the Court is invested with all the rights and is authorised to exercise all the powers conferred on a receiver by the Act under section 58. One of these rights is the right to actual physical possession of the insolvent's property by the Receiver and in order to enforce that right the Court is empowered under s 56 (3) to remove any person who is in possession or custody of the insolvent's property from such possession or custody subject to the Proviso of that section. *Mt Jasodabai v Firm Shrikishan Radhakishan* 1938 N L J 384 1939 A I R (N) 10.

Sub-section (1), Order for appointment of Receiver on adjudication essential

Sec 18 (2) [now sec 56 (1)] contemplates on every adjudication of insolvency, an order by the Court appointing Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under sec 19 (now 57). Hence a sale of the estate by the Official Receiver without such an order

does not give the vendee any title *Muthusami Samar v Samoo Kandiar* 43 Mad 869 39 MLJ 438 which was distinguished in *Silba Aiyar v T S Ramaswami* 40 MLJ 209 62 Ind Cas 346 where a District Judge to whom an insolvency application was presented transferred it to the Official Receiver for adjudication and for the administration of the estate. In due course the Official Receiver passed an order of adjudication but there was no order by the District Judge appointing the Official Receiver as Receiver in the particular insolvency or vesting the property of the insolvent in him. The Official Receiver however assigned some of the properties of the insolvent to a third person. It was held that the order of the District Judge in effect amounted to an appointment of the Official Receiver for sale of the property of the insolvent under sec 20 (e) [now sec 59 (e)] and sec 23 (now sec 58) and that the transferee from the Receiver had a valid title. In delivering the judgment their Lordships observed: "This Court has had an occasion before in the case of *Muthusami Samar v Samoo Kandiar* to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver and we note with regret that that omission has not been rectified in the Amendment Act which has been passed." *For Rules of appointment of Receiver vide Rules infra*

Appointment of Receiver at any time after adjudication

The mere fact that seven years had passed was not sufficient reason for refusing to appoint a Receiver *Haramohun v Mohandas* 39 CLJ 433 1924 A I R (Cal) 849

Persons incompetent to be appointed receiver

Ordinarily it is objectionable to appoint a pleader who represents a party in the proceedings as Receiver by allowing him to throw up his brief in the middle of a case but there may be special circumstances which would justify such appointment *Laxman Prasad v Gound Prasad* 1938 A I R (N) 230

Vesting in the Receiver

All movable and immovable property the insolvent held or was possessed of in his own right at the time of the admission of the application vests in the Receiver under section 28 (2). Under the English law a person being adjudged a bankrupt all his properties personal and real vest in the trustee under sec 53 of the Bankruptcy Act 1914. The real properties which vest in the trustee in bankruptcy may be properties situated in England or elsewhere (sec 167). The law on this point has been widened by the Act of 1914 for previous to it property which vested in the trustee was property within the dominion of His Majesty and before that it was property which was situated in Great Britain

In *Prince Victor N Narayan v Kumar Bhairabendra*, 34 CWN 53 it was held that the petitioner being adjudged in England his property in India vests in the trustee in bankruptcy. On the other hand the adjudication of a debtor as an insolvent under the provisions of the Provincial Insolvency Act has the effect of vesting his property wherever situate in British India but has not the effect of vesting his property outside British India, *Yokohama Specie Bank Ltd v S Curlander* 43 CLJ 436 vide also *The Official Receiver v Janki Bai* 114 IC 112 (1929) AIR (S) 135 As to what is and what is not the property of the insolvent for the purposes of vesting vide Notes under sec 28

An order of adjudication as insolvent made by a foreign Court does not operate in British India *vi statuti* but only under the rule of private International law Under that law, no adjudication order is recognised as having the effect of vesting in the Receiver any immovables in another country With regard to movables, after the date of a foreign adjudication order, it must be recognised as effective, but subject to the condition that it cannot interfere with any process at the instance of a creditor already pending even though such process is incomplete, provided that at that date the insolvent's freedom of disposal was so affected by the process that he could not have assigned the subject matter of the process to the Receiver The British cantonment in Secunderabad is still a part of the Nizam's dominions and in relation to the Courts of British India orders of the Secunderabad District Court are orders of a Foreign Court, *Gummidelli Ananta padmanabhaswami v The Official Receiver of Secunderabad* 56 Mad 405 (PC) 37 CWN 553 (PC) reversing *Official Receiver v Lakshminarayan* 54 Mad 727 61 MLJ 774 33 LW 562 1931 MWN 444 132 IC 297 1931 AIR (Mad) 474

The adjudication of a debtor as insolvent in Penang under the Bankruptcy Ordinance in the Straits Settlements does not vest in the Official Assignee of Penang *vi statuti* the insolvent's immovable property in the Madras Presidency *Aiyaswamy Chetty v Official Assignee, Madras* 57 Mad 616 1934 MWN 81 67 MLJ 59 39 LW 541

Vesting relates back.

The effect of an order of adjudication (2) and (6) of sec 16 of Act III of 1907 while no vesting of the property takes place until an order of adjudication is made and it is the order of adjudication which vests the property taken place at the date of the presentation of the petition or, in other words the commencement of the insolvency, *Sheonath Singh v Munsi Ram*, 42 All 433 18

A L J 449 55 I C 941 The property of the insolvent by virtue of the adjudication vests in the Receiver on the date of the petition, *Tulsi Ram v Mahomed Arif*, 109 I C 373 (1928) A I R (L) 738 It should be noted that where an insolvency Court has not made an order vesting the property of the insolvent in the Receiver, it is not the Receiver but the Court in whom such property vests But when before an order vesting the property in the Receiver has been made, the Receiver purports to sell the property and the Court subsequently makes an order vesting the property in the Receiver, the vendee's title to the property becomes complete either on the principle of ratification or under sec 43 of the T P Act, *Narasimulu v Basava Sankaram*, 85 Ind Cas 439 (1925) A I R (M) 249

Status of the Receiver appointed.

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy and the whole of the property of the insolvent is vested in him, and he is the owner of the property until he is discharged He is an officer of the Court and does not represent either the debtor or the creditor, *Amrit Lal v Narain Chandra*, 30 C L J 515 The Receiver is an officer of the Court and the possession of the Receiver is the possession of the Court, *Hunsewar v Rakhal*, 18 C W N 366 The Receiver is an officer of the Court It is not correct to say that his position is merely that of a representative of the insolvent The title of the Receiver is in many respects higher than that of the insolvent There are cases in which the Receiver is not merely the insolvent but also the owner of the property, *Sita Ram*, 134 I C 1013 8 O W N

The admission of proof of a debt and payment of a part thereof by the Official Assignee during the insolvency of a debtor does not operate to extend the period of limitation against him as the Official Assignee is not an agent of the debtor within the meaning of sec 19 Explanation II of the Indian Limitation Act, *Curnimbhai Abdulhussain v Ahemedalli Lukmanji*, 35 Bom L R 12 143 I C 698 1933 A I R (B) 91 The principle to be derived from the cases, viz, *Kashi Prasad v Miller*, 1 L R 7 All 752, *C E Grey v Hazari Lal*, 30 All, 486, *Sardarmal v Aramajal Sabhapathy*, 21 B 205, *The Official Assignee of Madras v Aiyu Dikshithar*, 48 M L J 530, and *Mohitosh Dutta v Rai Satis Chandra Choudhury Bahadur*, 35 C W N 971, appears to be that the question whether an Official Assignee or Receiver is a "representative" depends on the true character of the proceedings If his application is to stay an execution sale of property or to release property from an attachment on the ground that the property in question has become vested in him, the authorities above cited show that he is not to be regarded as acting in a representative capacity Sec 47 CPC has then no application, because the Official Receiver is exercising his right as Receiver to recover property which is vested in him and is not pursuing a claim as a representative of a party to the suit in which

the decree was made *The Official Receiver of Kistna v The Imperial Bank of India* 1 L R 58 M 403 69 M L J 558 41 M L W 28 1935 M W N 23 154 I C 1059 1935 A I R (M) 151 The Receiver in bankruptcy in whom the property of the insolvent vests is in the position for all practical purposes of a trustee on behalf of the creditors *Rama Vilas Nidhi Ltd v Pera Natchen* 1 L R 59 M 770 1936 M W N 79 43 L W 483 70 M L J 90 161 I C 723 1936 A I R (M) 161

Duties and powers of the Receiver

A Receiver is an officer of the Court and he must comply with orders given by the Court exactly as they are given. In *Paut Paban Daw v Dinesh Chandra* 66 C L J 70 it has been laid down that when a properly constituted Court makes an order that order must be complied with. It becomes all the more lamentable when a person who is an officer of the Court disregards the order. Vide section 59 and notes thereunder.

No leave necessary for suits against the Receiver in insolvency

There is no statutory authority for the proposition that a person who is suing a Receiver appointed under the Provincial Insolvency Act has to obtain the permission of the Insolvency Court. In *Amritlal v Narain Chandra* 30 C L J 515 it was held the rule that a suit should not be instituted against a Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver is mentioned in the Provincial Insolvency Act, who is really what is known in the old English law as an assignee in bankruptcy. This view has also been followed in *Sant Prasad Singh v Shew Dutt Sing* 2 Patna 724 where it has been held that it is not necessary to obtain the leave of the Court to proceed against a Receiver appointed under the provisions of the Provincial Insolvency Act. Sulaiman J. in delivering the judgment in *Mr Maharana Kunwar v E V David* (1924) A I R (All) 40 observed: "There is no statutory provision under which leave is necessary to file a suit against Official Receiver. On the other hand whatever provision there is in the Act relating to the grant of such leave is confined to creditors. A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not rest in him nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody. After leave he represents the real beneficiary. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under sec 28 (2) the insolvent's estate rests in him. He alone, and no one else represents the

estate He therefore is the proper party to be impleaded in the action No leave is accordingly necessary for suing him

Notice to Receiver before suit

A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of sec 2 (17) of the C P C and before an action can be brought against him notice must be served upon him in conformity with the requirements of sec 80 of the Code *Anna Lateshi De Silva v Gound Bala vint Parashere* 22 Bom LR 987 58 Ind Crs 411 *Rura v Official Receiver Amritsar* 125 IC 625 1930 AIR (L) 708 A suit brought against an Official Receiver for a declaration that certain property in his hands could not be sold by him in the course of insolvency is not competent without a notice under sec 80 CPC and it is immaterial whether the property has been sold by the Official Receiver or is merely threatened to be sold *Bhogachand Dagadusa v Secretary of State* 51 Bom 725 (PC) *Duli Chand v Kahan Singh* 12 Lah 260 The official duties of a Receiver in insolvency fall within the purview of sec 2 (17) of the CP Code and outside the Insolvency Court which appointed him he is entitled to the protection afforded by sec 80 CPC No suit can therefore be instituted against him in respect of any act done by him in his capacity as such public officer without a previous notice of the kind prescribed by sec 80 CP Code

A sanction granted by the Insolvency Court to file a suit cannot be taken as tantamount to a notice to a Receiver within the meaning of sec 80 CP Code *Maharana Kunuar v E V David* 77 IC 57 1924 AIR (All) 40 Where a suit is instituted without previous notice having been given to a Receiver and he does not take the plea of want of notice but raises it at a later stage he does not waive his right to raise such a plea and the suit must be dismissed for want of such a notice *Mirardal v E B David* 84 Ind Crs 739 22 ALJ 1116

Where no notice to Receiver is necessary

Sec 80 of the CPC would not apply to a suit against the Official Receiver where the suit was really a suit to establish and realise a charge over property and the Official Receiver was impleaded not on account of any special action taken by him in respect of the property concerned but merely because he was for the time being in charge of it *Skippers & Co Ltd v David* 48 All 821 The language of sec 424 (of CPC 1882) is clear and requires no notice unless the suit is brought against the public officer in respect of an act done by him purporting to be in discharge of his duty *Anantharaman v Ramasami* 11 Mad 317 It cannot be said because the Insolvency Act does not sanction what the C^o Assignee did his act cannot be regarded as purporting to be

by him in his official capacity. If the act of the officer is one which was ostensibly done by him in the performance of his duties, the act will be deemed as purporting to be done by him in his official capacity, even though he has acted mala fide and a suit against the Official Assignee for damages for trespass and wrongful seizure of goods will not lie except after due notice under sec 50 CPC. *Wilson Official Assignee Manager v. Nanknull* 59 MLJ 521 31 LW 339 124 LC 144 1937 ALR (M) 452. In the case of a suit against a public officer it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice is enjoined. Mere omission to pay an interest or principal could not be an act purporting to be done by the manager in his official capacity. *Ravi Mohan Das v. Jugal Mohan Ghosh*, 38 C W N 517 (PC).

Sub-sec. (2), cl. (a), Receiver to furnish security

Although under sec 56(2) (a) the Court has a discretion to appoint a Receiver without security as under the Code of Civil Procedure, the Privy Council in *Mt Brij Indar Kuar v. Thakur Jai Indar Bahadur Singh*, 36 C W N 882 (PC) has observed that the appointment of Receiver without security should be done only in the most exceptional circumstances and omission to take security was, in that case, considered a grave detection of duty on the part of the Court.

Receiver's liability to render accounts

The Receiver is bound to keep accounts in the manner laid down by the Rules framed under sec 79 *infra*. If on an examination of accounts by the Receiver with respect to the Receiver's commission charged certain mistakes and over-charges are pointed out, it is open to the Court to re-open the accounts and make the Receiver refund what he has taken without justification. *E. V. David v. The Judge, Small Cause Court, Calcutta* 1931 ALJ 670 133 IC 607 1931 AIR (All) 723.

Sub section (2), cl. (b), Receiver's remuneration on equity of redemption

If the property that vests in the Receiver is subject to a mortgage or encumbrances, it is only the equity of redemption that vests in the Receiver, and by sale of the property free from encumbrances with the consent of the mortgagee or encumbrancer he pays off the mortgagee or encumbrancer, he is not entitled to any remuneration for so doing. *Prasanna v. Sridhar* 12 Bom 272, *Sheoraj v. Re Official Assignee's Commission*, 36 Cal 990 where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If

the Receiver sells a property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase money. *Gorinda v Abdul Kadir* 1923 AIR (Nag) 150, *R M M Chettyar Firm v U Hla Bu* 5 R 623 1928 AIR (R) 23 106 IC 200. A Receiver cannot claim his commission on the gross sale proceeds of the property sold by him free of a mortgage, but only on the balance, if any, after satisfying the mortgage debt, *K P S P P L Firm v C A P C Firm*, 7 Rang 126 117 IC 582 1929 AIR (R) 168, *My Po Yeik v Pauer*, 1934 AIR (Rang) 112.

In any other case regulated by rules The Court is to determine the Receiver's commission, *Prakas v E E Adlam* 30 Cal 696. A Receiver is entitled to a lien for the amount of his commission on all charges, *Mahadeb v the Official Assignee* to are funds in his hands realised and available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists, *Official Assignee v Ramalinga*, 8 Mad 79. Rule 16 of Chap 23 of the Manual of Circulats issued by the Bombay High Court directs that the remuneration of Receivers, other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the Receiver at the rate of five per cent on the whole amount realised, *B S Jorapur v Venkatesh Balwant Joshi* 27 Bom LR 1116 90 IC 656 (1925) AIR (B) 472.

Though in *In re Official Receiver* 1930 ALJ 1497 130 IC 695 1931 AIR (All) 94 it was held that the expression 'gross assets' in the U P Government Notification No 607 VII-247, dated May 20, 1925 (subsequently No 359 VII-277, dated 11-3 1930) means the entire amount realised by the Official Receiver irrespective of whether the whole was distributable or not among the creditors in *E V David v Judge, Small Cause Court, Caunpore*, 1931 ALJ 670 133 IC 607 1931 AIR (All) 723, it was held that but for the Notification and its interpretation in *In re Official Receiver*, supra the proper course would be to treat the equity of redemption alone as forming the assets of the insolvent. But the above view was not accepted as correct in *In the matter of the Official Receiver* 1932 ALJ 152 140 IC 111 1932 AIR (All) 260, where it was held "The word 'assets' has been defined in Murray's dictionary as 'effects' of an insolvent debtor or is applicable to the payment of his debts. The definition implies the interest of the mortgagee is not to be taken into considering what are the assets of an insolvent debtor. This

be so because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. The word gross means the whole entire and total this word qualifying assets does not give the latter word any extended meaning beyond this that the entirety of the assets have to be taken into consideration.

The proceedings following in order of adjudication are not invalidated simply because the order of adjudication is set aside on appeal. A Receiver appointed under s 56 by the Court on an adjudication is entitled to be paid for the work done by him although the adjudication order be subsequently set aside. Where the Receiver is clearly appointed under s 56 the mere fact that the appointment is determined later on as a result of the adjudication order being set aside does not make the Receiver an *ad interim* Receiver appointed under s 20. Where an order under s 56 appointing a Receiver only fixes the rate at which remuneration is to be paid to the Receiver but does not specify the source from which the remuneration is to proceed or the particular time for payment such an order must be considered in the light of s 56 (1) (b) read with the rules framed under s 79 (2) (a) and mentioned on p 52 of the Judicial Commissioner's Circular No 16 Part 2 and the money is to be paid out of the assets of the estate and is not payable until there has been either realisation or distribution. If the realisation or distribution of the assets cannot take place on account of the order of adjudication having been set aside in appeal and the order as it stands becomes inexecutable a *quantum meruit* is all that the Receiver can claim. Ordinarily he is entitled to 5 per cent of the assets realised and the money is payable out of the estate of the debtor. *Laxmanprasad v Govind Prasad* 177 IC 650 1938 NLJ 40 1938 AIR (N) 230.

Receiver's remuneration when he himself conducts proceedings
Where a legal practitioner is appointed receiver of the estate of an insolvent and he applies under section 54 for annulment of a mortgage executed by the insolvent and the receiver himself conducts the case he is not entitled to any legal practitioner's fees for conducting the case. In *Abdul Sattar v Onkarnath* 1936 ALJ 698 1936 AWR 585 163 IC 831 1936 AIR (All) 489 the Subordinate Judge directed Rs 56 40 legal fees be taxed as costs even though the receiver did not pay this sum to any legal practitioner. The order was based on the view that the receiver had to discharge not only the duties of a receiver but also those of a legal practitioner. The High Court in appeal held we do not think that a legal practitioner's fees can be taxed as ordered by the learned Subordinate Judge. According to the rules only such sum can be taxed as legal practitioner's fees as has been actually

paid and certified by the legal practitioner to whom it has been paid."

Sub-section (3) : Court's power to remove a person in possession.

Two inferences seem to be deducible from sec 56 (3) first, that the Court, before it takes action under this sub-section in the way of realisation of property must have appointed a Receiver and that means a Receiver in insolvency and not a Receiver *ad interim* before adjudication secondly the power to remove the property from the possession of any person is reserved to the Court. Sec 4 read with sec 5 intends that the Court in such matters of forcible realisation of property is to act with the judicial caution of a Civil Court. Under sec 4 decision of a dispute between the debtor and the debtor's estate on the one hand, and the claimant against it on the other is to be final and binding and under sec 5 the Court in regard to the proceedings under the Act is to have the same powers and to follow the same procedure as it has and follows in the exercise of Original Civil jurisdiction. An enquiry by the so-called Receiver would not after adjudication be an enquiry of a person having authority under the Act and he has no power to make any decision as is mentioned in sec 65 nor would a Receiver in insolvency have power under sec 56 to remove property from the possession of any other than the insolvent *Gokulthan Dis v. Jagat Narain*, 94 I C 506 (1926) AIR (Patna) 291

The Receiver can take possession of the property of those that have been declared insolvent and not of those who have not been declared insolvent *Sannasi v. Asitosh* 42 Cal 225 *Palaniappa v. Official Receiver, Trichinopoly* 4 LW 51 20 MLT 334 35 Ind Cas 610 32 MLJ 84 A Receiver appointed by the Court is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry *Nilmony v. Durgacharan* 22 C.W.N 704 47 Ind Cas 377 The power conferred by this section is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of the question of title as between the insolvent and third parties *Maddipati v. Gandurappa*, 24 MLJ 106 1918 MW N 479 47 Ind Cas 308 This section clearly applies to the case of a Receiver applying for the removal of an obstruction from the possession of the property claimed to be the property of the insolvent. It is also clear for the purpose of determining the right of the Receiver as the obstructor, to the possession of the property, the Court can make an enquiry under this section. Sub-sec (3) of sec 56 is not limited to the case of an application by the Receiver. The words of the sub-section are general and there is no reason to restrict the operation of the section to the case of an application by the Receiver himself.

be so because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. The word 'gross' means the 'whole', 'entire' and 'total', this word qualifying 'assets' does not give the latter word any extended meaning beyond this that the entirety of the assets have to be taken into consideration."

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Subordinate Judge directed Rs 56-4-0 legal fees, be taxed as costs even though the receiver did not pay this sum to any legal practitioner. The order was based on the view that the receiver had to discharge not only the duties of a receiver, but also those of a legal practitioner. The High Court in appeal held "we do not think that a legal practitioner's fees can be taxed as ordered by the learned Subordinate Judge. According to the rules, only such sum can be taxed as legal practitioner's fees as has been actually

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be so because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. The word 'gross' means the whole entire and total. This word qualifying 'assets' does not give the latter word any extended meaning beyond this that the entirety of the assets have to be taken into consideration.

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for refusing to give to the words of sub-sec. (3) of section 56 their natural meaning and for restricting the scope of the sub-section, *Ramaswami Chettier v. Ramaswami Anger*, 45 Mad 434 42 M.L.J. 185 : 1922 M.W.N. 110

The Court, on an objection being made by person who are no parties to the suit claiming the properties to be theirs and in their possession is bound by clause (2) of r. 1, Or. XL, C.P.C., to come to a decision on these allegations before it can make an order to take possession of the property. The objection cannot be disposed of on the ground of discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others. It is not the duty of the Receiver of a property to enquire into the claims of title made by third parties and the Court has no power under the Code to delegate an enquiry on the point to the Receiver, *Hamida Rahaman v. Jamila Khanum*, 34 C.L.J. 123. Where after the appointment of a Receiver for the estate of an insolvent had been made by District Court some of the properties were sold in auction by a District Munsiff's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication, it was held it was competent to the Receiver to make an application to the District Court for annulment of the sale and for delivery of possession of the properties from the purchasers under sec. 18 (3) [now sec. 56 (3)] of the Act, *The Official Receiver, Tinnevely v Sanagaralinga Mudaliar*, 44 Mad 524.

The Court dealing with the insolvency has jurisdiction to declare a sale in execution of a money decree by a Civil Court invalid and order delivery of possession of property to the Receiver and the Receiver is not bound to institute a suit for the purpose, *Kochu Mahomed Asan Tharagon v. Sankaralinga Mudaliar*, 40 M.L.J. 219 : 62 Ind. Cas 495. A Court exercising powers under the Provincial Insolvency Act has jurisdiction to enquire whether the property in possession of a third party and alleged by the Receiver to be the property of the insolvent is really so or not and if it finds that it is the property of the insolvent it can order its delivery to the Receiver, *Bansidhar v. Kharagpur*, 37 All. 65, See also *Muhummad v. Muniram*, 54 P.R. 1917 : 41 I.C. 802, *Kundan Lal v. Sadi Ram*, 55 P.R. 1917 : 41 I.C. 809, *Dambar Singh v. Munuar*, 15 A.L.J. 877; *Basodi v. Lal Muhummad*, 13 N.L.R. 210, *Jagrup Sahoo v. Ramanand*, 39 All. 633 : 15 A.L.J. 738.

It should be noted that a mere assertion of a paramount title will not compel the Court to withhold its hands. Where a person who is a stranger to the suit seeks to retain possession as against the Receiver it is proper for and perhaps absolutely incumbent upon the Court to make an order for an enquiry, because, whatever may be the least expensive course, consistent with satisfactory enquiry, ought to be adopted in order that the Court shall not

by its dominant power hold the property on which the parties to the suit have no claim and hold it on inspite of real owners, if the Court can find out who the real owners are, it should do so and in the least expensive manner. In determining whether the Court should remove from possession or custody of property under attachment, any person who is not a party to the litigation the test to be applied is whether the parties to the suit or some or one of them has a present right so to remove him, *Roulard Hudson v J P Morgan* 13 CWN 654 9 CLJ 563. As soon as the Court finds on enquiry that the Receiver has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person. If the Insolvency Court, owing to a mistaken view of the law does not pass such an order, the person aggrieved may appeal and the Appellate Court should pass the order and appeal should not be dismissed merely because the insolvent delays in asking to be put in possession, *Nagoba v A V Zinzarde*, 1929 AIR (N) 338.

Proviso to sub-sec. (3), Restriction on Court's power of removal.

The restriction on the Court's right to disturb possession under the proviso to sec 18 (3) [now sec 56 (3)] has reference to cases where owing to the act of the insolvent the property is under a lease for a particular period or is under a usufructuary mortgage or the like, *Kochu Mahomed Asan Tharagon v Sankaralinga* supra. When there is a dispute as to title of the insolvent sec 56 cannot be invoked. In order that the section may be resorted to the insolvent must have an immediate right to remove from possession. Where the person in possession claims adversely to the insolvent or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under sec 56. The power of the Court under the Provincial Insolvency Act, sec 56, is not higher than the power of the High Court under sec 58 of the Presidency Towns Insolvency Act. It is open to the Court on a proper application being made under sec 4 of the Act to try the issue whether the insolvent is entitled to the property or not. Where an order is passed under sec 56 (3) it does not determine the rights of the parties though the Judge may incidentally determine the title of the parties. The power given by sec 4 of the Insolvency Act is subject to the provisions of the Act one of which is the proviso to sec 56 (3) which is in the way of the Court removing any person from the possession of the property whom the insolvent has not the present right to remove, *Chittamal v Ponnuswami Nicker*, 1926 MWN 121 and 170 50 MLJ 180 23 MLW 94 92 IC 573 (1926) AIR (M) 363. As has been observed in *Mt Jasadabai v Firm Shrikishan Radhakishan*, 1938 N.L.J. 384 1939 AIR (N) 10, that a Court has no power under s summarily to direct a third person to deliver up possession.

property of which he is in possession if he sets up a title however flimsy to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under s 4. But before that can be done a proper application has to be presented by the receiver when there is one or by some one of the creditors or other person interested in preserving the insolvent's estate as the Court authorises to act when there is none. But the person who proceeds is either the Court or the receiver and not a creditor. Even when a creditor is authorised to act he is acting as an agent of the Court and has no right or title to the property itself not even a right to possession. If he succeeds the property passes to the Court and not to the creditor who conducted the proceedings. In such cases if the third party is not present or does not object when the receiver or such creditor takes possession and he is therefore obliged to institute proceedings against the Receiver or the creditor acting for the Court for recovering back the possession of such property the whole body of creditors need not be joined in such proceedings. Before the question of title is decided either by a decree in a separate suit or by an order under sec 4 a person in possession cannot be dispossessed from the property which to all appearance he claims to be his own. *Duarka Prasad v Sunder* 1935 A.L.J. 484 1935 A.W.R. 497

Appointment of Receiver in a mortgage suit

When in a mortgage suit a Receiver has been appointed of the mortgaged properties the appointment is not superseded by subsequent proceedings in insolvency against the mortgagor and such Receiver cannot be directed to surrender possession to the Receiver in insolvency appointed on adjudication of the mortgagor as an insolvent in such proceedings. The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication the equity of redemption only vesting in the Receiver in insolvency. Furthermore the Insolvency Court has no power under the law to remove from the possession or custody of property any person whom the insolvent has not the present right so to remove. The conjoint effect of sec 28 (6) and sec 56 (3) is that the Receiver appointed for the benefit of the mortgagee and at his instance cannot be removed by the Insolvency Court the Receiver being a person in possession whom the insolvent judgment debtor in whose favour an order of adjudication was subsequently passed by the Insolvency Court has not the present right to remove. *Nrisinha Kumar Sinha v Deb Prasanna Mukherjee* 39 C.W.N. 384. The considerations which apply in a suit between the mortgagor and the mortgagee as regards the appointment of a receiver differ considerably from the considerations which arise where the interests affected are not of the mortgagor only but also of the mortgagor's creditors. The appointment

of a receiver in the mortgagee's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Hence the appointment of a receiver in a mortgage suit subsequent to the appointment of receiver in insolvency is not proper. *Gocharan Singha v Ramballabh*, 17 P L T 671 163 I C 811 1936 A I R (P) 357

Obstruction to Receiver is contempt of Court.

Any interference with a Receiver amounts to a contempt of Court. In *Re Mead*, L R 20 Eq 282, and sec 48 (6), Bankruptcy Act, 1914. A Receiver appointed under the provision of the Provincial Insolvency Act is a Public Officer within the meaning of sec 2 (17) of the Civil Procedure Code, *Anna Laticia De Silva v E V David*, 1924 A I R (All) 40. Obstructing a Receiver in taking possession of the property of a person against whom insolvency proceedings are pending under the order of the Court is contempt of Court. The Receiver should not be resisted and the person claiming that property as his by purchase may move the Court against the action of the Receiver, *E D Sassoon & Co v Musaji Ismailji Lottia* 9 Ind Cas 485. Any treasurer or other officer or any banker, attorney agent of the bankrupt may pay to the trustee all money and securities in his possession or power as such officer, banker or agent, which he is not entitled by law to retain as against the bankrupt or the trustee. If he does not, he is guilty of contempt of Court. See sec 48 (6) of the Bankruptcy Act, 1914. When a Receiver is appointed of property and the property is forcibly taken possession of by any person, not only the person interested in the property but also the Receiver may proceed against such person for contempt. There is nothing to prevent the Receiver from himself applying for a rule for contempt, *Grey v Ugramohan* 28 Cal 790.

A Receiver is an officer of the Court and the Court will therefore see that he performs his functions and will protect the agent appointed under its orders, *Dmonath v Hogg*, 2 Hay, 395. Being such officer his possession is simply the possession of the Court and to such an extent is the case that any attempt to disturb that possession without the leave of the Court is a contempt of Court, *Wilkinson v Gangadhar*, 6 B L R 486. The mere appointment of a Receiver operates as an injunction against the parties their agents and persons claiming under them restraining them from interfering with the possession of the Receiver except by permission of the Court, *Mohammed Zohuruddeen v Md Nuruddin*, 21 Cal 85. The Court will not permit anyone without its sanction and authority to intercept or prevent payment to the Receiver of any property which he has been appointed to receive though it may not be actually in his hands.

Committal by the High Court for contempt

The form in which the Court usually enforces its orders in the matter of Receivers is in extreme or aggravated cases by committal to prison or ordinarily by ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct. The High Courts in India being superior Courts of Record possess the power of enforcing obedience to their orders by attachment for contempt *Hassanbhai v. Couasji* 7 Bom 1 *Nannahoo v. Narottamdas* 7 Bom 5. The power of the High Court to imprison for contempt is irrespective of the Indian Codes *Surendranath Banerjee v. Chief Justice of Bengal* 10 Cal 78 (PC) *Martin v. Lawrence* 4 Cal 655. The High Court however had no jurisdiction to punish as an offence in a summary proceeding conduct in relation to a proceeding in the mofussil Courts as such jurisdiction was not inherited from any of the three abolished Courts—the Supreme Court the Sudder Dewany and the Sudder Nizamat Adalats and is not vested in the High Courts by the Charter Act of 1861 or the Letters Patent under that Act and as such conduct is not contempt of the High Court and the High Court's power of superintending over the mofussil Courts does not imply any power of protecting those Courts from improper interference *Governor of Bengal v. Motilal Ghosh* 41 Cal 173 18 CLJ 452 17 CWN 1253 *Dusseendra Krishna v. Surendra Nath* 32 CWN 525.

But under section 2 of the Contempt of Courts Act XII of 1926 the High Courts have now been empowered to exercise the same jurisdiction powers and authority in accordance with the same procedure and practice in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves. Under clause (3) of section 2 of the said Act XII of 1926 High Courts have no power to take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code. The punishment for contempt of Court is simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. But the accused may be discharged or the punishment remitted on apology being made to the satisfaction of the Court (section 2 Act XII of 1926).

Power of District Court to commit for contempt

In a case from Madras the District Judge *suo motu* and without any application from the parties issued notice to the defendants to show cause why they should not be committed and afterwards without any application by the plaintiffs although they took part in the enquiry which led to the commitment made an order committing the defendants to prison for three months for contempt. In making this order he purported to act as a Court of Record. It was held

that District Court is not a Court of Record and as such has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience is conferred by the Code of Civil Procedure but the powers conferred by Or XXXIX r 2 (3) are only exercisable when the Court is set in motion by a party who deems himself aggrieved. *Kochappa v Sachi Devi* 26 Mad 494

Sub sec. (4) ; Power of the Insolvency Court over Receiver.

As to the powers of the Civil Courts to punish Receivers for acts of disobedience vide C P C Or XL r 4 Under sec 56 (4) of the Provincial Insolvency Act, V of 1920, the Insolvency Court is specially authorised to attach and sell the property of a Receiver or interim Receiver appointed under sec 20, when they fail to submit their accounts at such periods and in such form as the Court directs or fail to pay the balance due from them "A Receiver in bankruptcy is a trustee for the creditors and consequently, if he has withheld sums which properly belong to the creditors then his conduct can be and should be inquired into by the Court at any time and there is no question of limitation, *Mg Po Yeik v Power*, 1934 AIR (Rang) 112 When a Receiver has been appointed he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officers, *Hanseswar v Rakhal*, 18 C W N 366 The Court has power to dismiss the Receiver appointed by it. The power of appointment carries with it the power of dismissal, *Ramchandra v Rakhal*, 17 C W N 1045 The Receiver is an Officer of the Court and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person, *Nagoba v Zingarde*, 1929 AIR (N) 338 Where a Receiver entered into secret agreements with the parties without the agreements being brought to the notice of the Court and where the effect of the agreements was to restrict and control his power as Receiver, it was held that the parties concerned in making the agreements were guilty of gross contempt of Court for which they were each and all liable to committal, *Manicklal v Sarat kumari* 22 Cal 648 The purchase by the Receiver in insolvency of property belonging to the insolvent's estate is irregular, and the Court ought not to sanction such a purchase *Ram Kamal v Ba' of Bengal*, 5 C W N 91

Receiver when liable for costs and damages.

If the Official Assignee brings an unsuccessful motion, careful he may have been, the order that the Court

generally would be that he is to pay the respondent's costs and he will have the right of indemnity given him by the previous order of the Court or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for cost should not be directed to the assets in the hands of the Official Assignee when the respondent is not in any way in default for which he may be partially mulcted in costs. *Re Suresh Chander Gooyee* 23 CWN 431. Certain creditors moved the Court to direct the Receiver to take possession of a brick kiln which was alleged by them to belong to the insolvent but which really belonged to the plaintiff. The Court made the order and the Receiver took possession. The plaintiff filed objections which were allowed and possession was restored to him. The creditors applied for review making the same allegation and prayer as before and the Court again passed an order in their favour in compliance with which the Receiver again seized the property. Ultimately the order was set aside on appeal and possession restored to the plaintiff. In a suit by the plaintiff against the said creditors for damages caused by the seizure the defendants raised the plea that they were not legally liable for damages and the proper person to be sued was the Receiver. It was held following *Abdul Rahim v Sital Prasad* 41 All 658 that the defendants were legally liable for the damages. *Binda Prasad v Ram Chandra* 19 ALJ 277.

Remedy of creditors when loss is occasioned by wilful default of Receiver

In *Punnayyah v Viranna* ILR 45 M 425 it has been held that a person who had been impleaded as a minor defendant represented by a guardian *ad litem* in a suit in which a decree was passed *ex parte* against him can institute a suit to set aside the decree on the ground of gross negligence apart from fraud or collusion of the guardian *ad litem* in not defending the suit properly on his behalf. The decision was followed in *Moolaswami v Tatayya* 51 MLJ 389. In that case it was observed: "I do not think that any good ground has been shown for distinguishing a case of gross negligence on the part of the guardian of the minor from that of fraud or collusion. In the case of trustees there is no doubt that fraud or collusion on the part of a trustee would be a good ground for a suit on behalf of the *cestui que trust* and there seems to be no good reason why the negligence of the trustee should not be on the same footing—Vide *Lewin on Trusts* 13th Edition page 982 where the author quotes Sir J Jekyll. The forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the *cestui que trust* since at that rate it would be in the power of the trustees either by doing or delaying to do their duty to affect the right of other persons which can never be maintained. The Receiver in bankruptcy in whom

the property of the insolvent vests in the position for all practical purposes of a trustee on behalf of the creditors and if he negligently allows property to be usurped by others which ought to and might have been available for payment to creditors any of the creditors is at liberty to file a suit for the recovery of that property. In *Hamir Vilas Nidhi Ltd v Para Vicken* 1 L R 59 M 770 1936 M W N 79 70 M L J 90 43 L W 483 161 I C 723 1936 A I R (M) 161 the sons of an insolvent a Hindu sued for partition of the family property. Neither of them was born or even conceived on the date on which the property of their father vested in the Official Receiver. The Official Receiver was impleaded as a defendant in that suit but he did not appear at the hearing with the result that the sons got a decree for partition which was obviously unsustainable on the merits. The Official Receiver filed an application for setting aside the *ex parte* decree but it was dismissed as having been filed out of time. Thereupon one of the creditors of the insolvent filed with the leave of the Court on behalf of all the creditors of the insolvent a suit for a declaration that the decree in the partition suit was not binding upon the creditors. The Courts below found that the Official Receiver had been guilty of gross negligence but held that nevertheless the suit was not maintainable. It was held by the High Court in second appeal that the suit was maintainable.

Sub section (5), Interim Receiver and Receiver after adjudication

There is apparently no provision under which the Court can make a vesting order before adjudication but the interim Receiver has very much the same rights and liabilities as a Receiver for sec
be to interim Receivers *Subra*
W N 216 (1978) A I R (M)
for the protection of the estate
42 Cal 289 as opposed to the

Receiver who is appointed after adjudication for the purpose of the realisation of the estate *Amrita Lal v Narain Chandra* 30 C L J 515. Where an *ad interim* Receiver has been appointed in insolvency proceedings the Receiver appointed after adjudication does not stand in shoes of the interim Receiver. He stands on a very much higher footing. The property of the judgment debtor vests in him; he holds it for the benefit of the whole body of creditors and he has special rights conferred and duties imposed upon him by statute. *Ramsaran Mani Lal v Shri Prasad* 58 Ind Cas 783. There seems to be a conflict of opinion as to whether the Receiver referred to in section 52 contemplates an interim Receiver or a Receiver after adjudication. In *Lyon Lord & Co v Virbandas* 76 I C 380 1924 A I R (S) 69 it has been held that the Receiver referred to in section 52 is Receiver appointed under paragraph (1) of section 56 after the passing of order of adjudication. On the contrary it has been held in S

Odayar v Subramania Aiyar 55 Mad 316 62 M L J 68 1932 A I R (M) 95, *Mohitosh Dutta v Rai Satis Chandra Choudhuri Bahadur*, 35 C W N 971, *Madho Ram v Raj Kishan*, 1932 A I R (L) 471, *Mahendra Kumar Baisya Saha v Dinesh Chandra Roy Choudhury*, 60 Cal 696 37 C W N 381 57 C L J 381, *Firm Ghanshyam Das Hanuman Prasad v Jainaram Verman* 1934 All L R 389 1934 A L R (All) 444, *Bishan Singh v Gurmukh Ram*, 34 P L R 41, *Madho Ram Bud Singh v Receiver of Firm Radhakishen & Sons*, 14 Lah 63, that section 52 contemplates a Receiver before adjudication

Appeal.

An order authorizing a Receiver appointed by Court to remove any person in possession of property (24) of the C P C, 1882 [Or 43, r 1] *Hudson v J P Morgan*, 13 C W N authorizing a Receiver appointed by the insolvency Court to remove any person in possession of any property of the insolvent passed by a Court subordinate to the District Court is appealable to the District Court under section 75 (1) and when the order is made by the District Court, an appeal lies to the High Court under section 75 (3) by leave of the District Court or of the High Court

No appeal lies from an order refusing to direct a Receiver of mortgaged properties appointed in a mortgage suit, to surrender possession to a Receiver in insolvency of the mortgagor's estate, subsequently appointed, *Nrisinha Kumar Sinha v Deb Prosanna Mukherjee*, 39 C W N 384

57. (1) The Local Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers under this Act within such local limits as it may prescribe

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs

(3) Any sum payable under clause (b) of sub section (2) of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the Local Government may direct

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the Local Government may fix in his behalf, and no remuneration

whatever beyond that so fixed shall be received by the Official Receiver as such

Review

This is section 19 of Act III of 1907 and corresponds to sec 81 of the Presidency Towns Insolvency Act

Appointment of Official Receivers

This section leaves the appointment of an Official Receiver entirely in the hands of the Local Government. There will be difficulty in many cases in getting suitable persons to act as Receivers. It may be advisable in some cases and in some circumstances to have Officials to act as Receivers in order that Insolvency matters may be thoroughly investigated so power has been given to the Local Government to appoint Official Receivers—*Viceregal Council Proceedings to Act III of 1907*

Sub sec (2), Vesting in Official Receivers

The mere fact that a person is adjudicated insolvent does not *ipso facto* vest the property of the insolvent in the Official Receiver who may have been appointed by the Local Government under sec 19 (now sec 57) of the Act. Before such vesting can take place there must be an order by the Court appointing a Receiver of the estate of the insolvent. In the absence of such an order a sale by an Official Receiver does not convey a good title to the purchaser *Vythilinga Padaichi v Ponnuswami* 41 M L J 78 62 Ind Cas 396. The insolvent's estate does not vest in the Official Receiver under sec 18 (now sec 56) or any other provision and will not so vest unless an order vesting in him is passed by the Court *Muthuswami Swamiar v Samoo Kandiar* 43 Mad 869 1920 M W N 537 39 M L J 438

Vesting must be by express order

The Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order of the District Judge. Where when the insolvency petition was filed by the insolvent in the District Court the District Judge made an endorsement on that petition that it was transferred to the Official Receiver for disposal it was held that the wording of the order itself does not convey the idea of any vesting at all. Where the sales were made by a person who was not authorised to sell and were thus invalid it was held that it is impossible to hold that the limitation under sec 68 will apply as sec 68 presupposes that the decision is by a Receiver properly appointed *Sankara Rao v Turlapati Ramakrishna an* (1924) A I R (M) 461 46 M L J 184

Status of Official Receivers

Besides having the same powers of Receivers the Court can

delegate to the Official Receiver certain powers exercisable by the Court, *Vide* sec. 80, *supra*. The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his decision can appeal to the Court from those decisions, *Beardsel & Co v Abdul Gunni*, 37 Mad. 107.

Liability of the Secretary of State for acts done by the Official Receiver.

Under sec. 56 the Court may appoint any person as a Receiver. There is nothing in this section which indicates that the Government or the Court have any liability for the acts of the Receiver. On the contrary it is laid down in sec. 56 (4) that where a Receiver appointed under this section occasions loss to the property by his wilful default or gross negligence, the Court may direct that his property be attached and sold and may apply the proceeds to make good any balance found due from him for any loss so occasioned by him, that is, that a Receiver can be made personally liable for his negligence as regards the property entrusted to him. It is obvious from the section that the liability of a Receiver as regards his actions towards other persons would be personal and that he would not involve the Court or the Government in any liability as regards other persons. Sec. 57 states that the Local Government may appoint certain persons as Official Receivers and that such persons shall be Receivers for all cases of insolvency unless the Court for special reasons otherwise directs. It is also provided in sub-section (3) & (4) that sums payable in respect of the services of Official Receiver shall be credited to a fund but not beyond a fixed rate. In sec. 59 it is provided for both classes of Receivers that they may by leave of the Court carry on business of the insolvent so far as may be necessary for the beneficial winding up of the same. There is moreover nothing to show that the person in the position of an Official Receiver has any authority whatever to bind the State by his contracts. All that he can do by making a contract is in the first place to render the property of the insolvent liable for the performance of the contract, if the Receiver has obtained the sanction of the Insolvency Court to the making of the contract, and if he has not obtained that sanction, then he is personally liable on the contract. Under no circumstances there is any liability imposed on the Secretary of State in Council by an Official Receiver making a contract, *Ram Shanker v. The Secretary of State for India in Council*, 1932 A.L.J. 842. *Secretary of State for India in Council, v Chand Mal*, 1936 A.L.J. 79. 1936 A.W.R. 34 : 160 L.C. 1025 : 1936 A.I.R. (All) 89.

Difference between a Receiver and an Official Receiver.

An Official Receiver appointed under sec. 57 exercises such

judicial or quasi judicial powers as may be conferred upon him by Rules framed by the High Court under sec 80. But in the case of an ordinary Receiver his duties and powers are defined by sec. 59 and they are executive in their character and not judicial, *Nilmoni v Durgacharan*, 22 C W N. 704

Appointment of special Receiver.

Where an appellant was adjudicated an insolvent after the appeal had been instituted, and a third party (other than the Official Receiver) was appointed as a Special Receiver for the purpose of conducting the appeal in the place of the insolvent, it was held that the appointment was within the power of the Court and the appeal had not abated. S 56 of the Provincial Insolvency Act does not operate to prohibit the Court appointing an additional Receiver for a special purpose. *Gopu Chinn Jogayya v Manapalli Bapanayya*, (1939) 1 M L J 88

Sub-secs. (3) & (4) ; Official Receiver's remuneration.

Where the Official Receiver, on the application of the mortgagee sold certain properties, which were subject to mortgage, it was held that he was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate. In *Re. Official Assignee's Commission*, 36 Cal 990. Vide also notes under sec 56, sub-sec (2), cl (b), heading "Receiver's remuneration"

Court's power over Official Receivers.

A Court under the Provincial Insolvency Act has power to review its orders and can remove for sufficient reason the Official Receiver already appointed by it to administer an insolvent estate, and appoint a Special Receiver, *The Official Receiver, Tanjore v. Nataraja Sastrigal*, 46 Mad 405 44 M L J 251. In *Rambadia Chetty v Ramaswami Chetty*, 44 M L J 284 it was observed "In view of the above ruling Rule 12 of the Madras High Court is ultra vires. The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some mala fides on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. Reliance is placed in the case of *Ex parte Lloyd Re Peters*, (1882) 46 L.T. 64, where the Master of the Rolls observed "The Court would not interfere unless the trustee did that which was so utterly unreasonable and absurd that no reasonable man would so act". The same objection was taken in *Thirunenkatachanniar v. Thangia Ammal*, 39 Mad 479, and overruled. It was there observed "it (*Ex parte Lloyd, Re Peters*) is not an authority for the proposition that where proper reasons are given by Court for holding the action of a Receiver was irregular and has prejudiced the ge-

interest of the creditors, it should not set aside the order passed by the Receiver. We adopt these observations in dealing with the present case where the Receiver's act was certainly irregular and prejudicial to the creditors in accepting a lower bid at the second sale."

58 Where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act

Review.

This is section 23 of Act III of 1907

Vesting in Court.

Section 28 (2) provides that 'on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver'. The alternative in the section applicable to vesting in the Court is inserted to provide for the case of a Receiver not being appointed at the same time as the adjudication of an insolvency and to foreclose an argument that the vesting is suspended until the actual appointment of a Receiver, *Kalachand v Jagannath* 31 CWN 741 (PC) 44 CLJ 544 (1927) AIR (PC) 108 101 IC 442. Where after an order of adjudication a District Court has not made an order vesting the property of the insolvent in the Receiver it is not the Receiver but the Court in whom such property vests *Narasimulu v Basava Sankaram* (1955) AIR (M) 249. It is in the discretion of the Court either to take upon itself the administration of the insolvent's property or to administer it by appointing a Receiver. And the Court has power to appoint a Receiver either at the time of the order of adjudication or at any time afterwards *Haramohan v Mohandas*, 39 CLJ 433 (1924) AIR (Cal) 849. In cases of summary administration under sec 74 and also in cases in which there are very little assets of the insolvent to be taken charge of and realised the Court may not appoint a Receiver as mentioned in sec 56. Where there is no Receiver the property of the insolvent vests in the Court, *Gobind Das v Karam Singh* 40 All 197 16 A.L.J. 32 *Gowinda v Gopal*, 9 N.L.R. 18.

Powers of the Court when no Receiver appointed

Where no Receiver is appointed the property of the insolvent vests in the Court and the Court may exercise all the powers of a Receiver, e.g. it can itself sell goods alleged to have been sold to the insolvent and can release a claim by a stranger that they belonged to him. Where there is no Receiver, the Court may make an order of a transfer under sec 53 at the instance of a creditor

Bansilal v. Rangalal, 71 IC 418 (1923) AIR (N) 97 Sec 54A does not abrogate sec 58 and must be read subject to the provisions of the section. The words "voidable against the receiver" in sec. 53 must, therefore, in view of sec 58, be read as voidable against the receiver or the Court as the case may be and a creditor is entitled to move the Court to take action under sec 53 where a receiver has not been appointed *Sitaram v. Musst Nathibai*, 1933 AIR (Nag) 365. When the insolvent's estate is vested in the Court it can sell the estate through an agent appointed by it and such sale by the agent will be valid when subsequently ratified by the Court, *Sankaranarain Pillai v. Rajamani* 47 Mad 462 46 MLJ 413 83 IC 196 (1924) AIR (M) 550. Where a Court acts under sec 23 (now sec 58), it exercises the function of a Court and does not act in the character of a Receiver. Where a Court acting under the provisions of the Provincial Insolvency Act, re-sells the property of an insolvent owing to the failure of the auction purchaser to complete the deposit of the purchase money and at the re-sale the price realised falls short of the price for which it was originally knocked down, the Court has power to call on the defaulting auction purchaser to pay the amount of the difference and to recover such amount under Or XXI, r 71 C P C, *Manak Chand v Ibrahim*, 17 NLR 49 62 Ind Cas 307.

59. Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may—

- (a) sell all or any part of the property of the insolvent,
- (b) give receipts for any money received by him, and may, be leave of the Court, do all or any of the following things, namely —
- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same,
- (d) institute defend or continue any suit or other legal proceedings relating to the property of the insolvent,
- (e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court,
- (f) accept as the consideration for the sale of

property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit ,

- (j) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts ,
- (h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon , and
- (i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold .

Review.

This is section 20 of Act III of 1907, and is based upon sec 68 of the Presidency Towns Insolvency Act (III of 1909) and sections 55 and 56 of the Bankruptcy Act 1914, as amended by the Bankruptcy (Amendment) Act, 1926 The Provincial Insolvency Act, V of 1920 expressly enumerates certain matters in regard to which the Receiver can act of his own authority, and certain other matters of which he cannot dispose without the sanction of the Court A Receiver may, of his own authority, do any of the following (i) sell all or any part of the insolvent's property , (ii) give receipts for money Under section 55 of the Bankruptcy Act, 1914 he may also of his own authority , (iii) in any other bankruptcy prove for and draw a dividend in respect of any debt due to his bankrupt , (ii) exercise any powers vested in him, and execute any instrument necessary for carrying into effect of the provisions of the Act , (i) deal with any property to which the bankrupt is beneficially entitled as tenants in tail in the same manner as the bankrupt might have dealt with it

His power to do these things is subject nevertheless to the general provisions of the Act and, in particular to the general provisions subjecting him to the control of the Court

Duties of the Receiver

The duties of the Receiver relate not only to the administration of the estate of the debtor but also to the conduct of the debtor .
 The first duty of the Receiver is to investigate the estate of the debtor his duty is to investigate it and there is reason to believe that he has the Insolvency Act or any act of bad

faith which would justify the Court in refusing or qualifying an order of discharge. As to the debtor's estate it is his plain duty to take control of all the property of the insolvent for the purpose of realisation and distribution amongst the creditors and in general to obtain all information from the bankrupt about his affairs. As soon as possible he must take over all books deeds documents and all other property of the bankrupt capable of manual delivery for the purpose of acquiring and retaining possession of the insolvent's property and for the purpose of realising it. It is the primary duty of the trustee to administer the bankrupt's affairs in such a way as to realise the maximum possible sum for the unsecured creditors. To this end he must as far as possible get in all the assets of the bankrupt and it is generally his duty to set aside transactions that are not binding upon him. It is also his duty to resist claims upon the bankrupt's estate to which there is any answer. —*Ringuood*

Powers of the Receiver are not judicial

The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his orders have a right of appeal to the Court. *W A Beardsel & Co v Nilagiri* 11 M L T 391. A Receiver is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry. A glance at the list of the duties and powers of a Receiver given in sec 59 will show that judicial functions are wholly foreign to his position in relation to the insolvent's estate. The duties and powers of a Receiver as defined in the section are executive in their character and not judicial. *Nilmoni v Durga Charan* 22 C W N 704.

In *Sant Prasad Singh v Sheo Dut Singh* 2 Pat 704 Musst Anup Koer on behalf of her minor sons filed a petition claiming that three fourths of the property should be exonerated from the liability. The District Judge thereupon called upon the Receiver to report on the objections filed by Musst Anup Koer. The Receiver took evidence and came to the conclusion that her contention was right. The District Judge without considering the matter at all accepted the report of the Receiver exonerated the share of the minor children from sale. It was held that it is always desirable that a contention of this nature should be decided by the Court and not by an officer that may be appointed by the Court. The question raised on behalf of the minors was a question of paramount title and therefore a question raising a very important matter between the insolvent and the general body of creditors. It was necessary that the District Judge should have himself disposed of the matter. The power conferred by this section is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of the question of title as between the insolvent and third parties. *Maddipati v Gan*

rappu, 24 M L J 106 1918 M W N 479 47 Ind Cr 308 The Receiver can take possession of the property of those that have been declared insolvent and not of those who have not been declared insolvent *Saraswati v Asutosh* 42 Cal 225, *Palaniappa v Official Receiver Trichinopoly* 4 L W 51 20 M L T 334 35 Ind Cas 610 32 M L J 84 The Receiver has power to transfer, conveyance and sale subject to the nature of the property

Powers of the Receiver exercisable without leave of Court :

Clause (a) ; Power to sell

This clause is based on sec 50 (1) of the Bankruptcy Act, 1914 which runs as follows Subject to the provisions of this Act, the trustee may do all or any of the following things —(2) Sell all or any part of the property of the bankrupt (including the good will of the business if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels Under the Presidency Towns Insolvency Act the only two powers that the Official Assignee has got in acting of his own motion are (1) to sell the property and (2) to give receipts, the other powers that were conferred upon him by sec 68 require the sanction of the Court *C Grey v Lamond Walker & Co*, 17 C W N 578 The Official Receiver has full power to deal with the property that is vested in him in his official capacity though his acts are subject to the control of the Insolvency Court *Shakar Khan v Sarmukh Singh* 33 P L R 332 1932 A I R (L) 320 The question of selling the property of the insolvent is within the discretion of the Receiver, *Arman Sardar v Saikhira Jt Stock Co Ltd* 18 C L J 564

The Official Assignee has full power to sell the property and effects of the insolvent and it is his duty to sell the same with all convenient speed *Woonualla & Co v N C Machol* 30 Bom 515 8 Bom L R 470 The purchaser of property belonging to the insolvent cannot impugn the sale on the ground that the Receiver who sold the property entered into an arrangement with the purchaser for deferred payment of the purchase money without leave of the Court *Shu Wa v Sultan*, 15 Ind Crs 368 Whether the occupancy holdings are saleable or not without the consent of the riyat was concluded by the decision of a Special Bench in the case of *Chandra Binod v Sheikh Ali Baksh*, 24 C W N 818 (F B), in which it was held that apart from custom or local usage the transfer for value of an occupancy holding in whole or in part, is operative against the riyat whether it is made voluntarily or involuntarily, but such transfer is not effective against his landlord without his consent But under sec 26B of the Bengal Tenancy Act IV of 1928 such transfers have now become effective against the landlord even though made without his consent In a sale held by the Official Receiver of the insolvent's property the

purchase by the Receiver of the insolvent's property is irregular and the purchase is liable to be set aside. *Ram Kamlal v Bank of Bengal* 5 CWN 91. In *Nilkantha Narayan Tevar v Debendra Nath Ray* 15 P 363 17 PLT 39 161 IC 167 1936 AIR (P) 115 it was held that the Provincial Insolvency Act does not empower a receiver to sell anything more than the property of the insolvent which vests in the receiver by reason of the insolvency. The power of a Hindu father to sell the joint family property including the interest of the son is not property of the insolvent which by reason of s 28 of the Act vests in the receiver and which by reason of s 59 he is empowered to sell for distributing among creditors. The receiver is not therefore empowered to sell the joint family property including the interest of the son which does not vest in him by reason of the adjudication. But in the Full Bench case of *Bishua Nath Sanyal v Official Receiver* 16 Pat 60 18 PLT 1 167 IC 765 1937 AIR (P) 185 FB it has been held that where a Hindu father is adjudicated insolvent the interest of his son or sons in the joint family property does not vest in the Court or the Receiver but the Court or the Receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes. To the same effect is the judgment of their Lordships of the Judicial Committee in *Sat Narain v Sri Krishna Das* 63 IA 384 17 L 644 40 CWN 1382 64 CLJ 80 38 Bom LR 1129 1936 O WN 681 17 Pat LT 717 71 MLJ 812 164 IC 6 1936 AIR (PC) 277 where it has been held that an order of adjudication of the father of a joint Hindu family as insolvent does not, no doubt, vest in the Official Assignee the son's interest in the family property. But under s 52 (2) (b) of the Presidency Towns Insolvency Act the capacity to exercise the insolvent's power to sell the joint family properties for his antecedent debts so far as they have not been incurred for immoral or illegal purposes vests in the Official Assignee. Accordingly in a suit by the sons for partition of the joint family properties they will not be entitled to a decree in respect of the properties already sold by the Official Assignee.

Sales by the Receiver not governed by C.P.C.

Sales by the Court are cases in which the Court makes a title to the purchaser and the Court confirms the sale and issues a sale certificate. The second class is where a Court authorises a trustee Receiver or other person holding property to sell the property and the sale is made out of Court. The Court while authorising or directing the sale does not make any title to the purchaser and in such a sale the Court does not grant a sale certificate nor does it confirm the sale. *G H C Ariff v Fauma Begum* 16 CWN 394. The Insolvency Court does not provide that sales by a Receiver in insolvency shall be conducted by him in accordance

provisions of Order XXI of the Code of Civil Procedure *Cheda Lal v Lachman Prasad* 39 All 267, *Guntapalli v Marlapati* 41 Mad 440 42 IC 525, *Ram Chand v Shah Mohra Shah* 11 LLJ 698 119 IC 427 1927 AIR (L) 622 Sales by a receiver in whom the property of the insolvent is vested are really sales by the owner and may be held either by auction or by private treaty *Entazuddin v Ram Krishna*, 24 CWN 1072 A sale by the Receiver is not a transfer by operation of law or in execution of a decree and therefore does not attract the advantages or infirmities attending Court sales, *Basava Sankaram v Anjaneyulu* 50 Mad 135 (F B)

A sale by a Receiver not being a Court sale an application under Or 21, r 90, CPC does not lie to set aside the sale *Ayanashi v Muthukaruppan* 34 MLJ 319 1918 MWN 345 7 LW 406 44 IC 885 The provisions of the CP Code do not apply to sales of an insolvent's property by the Receiver under sec. 59 of the Provincial Insolvency Act *Mulchand v Murarilal* 36 All 8 11 ALJ 979 21 Ind Cas 762, *Husami v Md Zamur Abed* 74 Ind Cas 802 The rules laid down in the Code of Civil Procedure regulating sales are not applicable to sales by the Official Receiver in insolvency proceedings Therefore a sale by the Official Receiver is not invalid simply because it was held by the said officer in his office and not at the spot, *Shakar Khan v Sarmukh Singh* 33 PLR 332 1932 AIR (L) 320 Fraudulent misrepresentation by one of

sale The principle of *Goundan v P L V V* 1926) AIR (M) 1080 take a good title unless only as they have got *Foljamba* 11 Ves 343

The sale of the property of an insolvent by the receiver is not a sale in execution of an order of the Court within the meaning of s 3 sub s (5) (a), Punjab Pre-emption Act of 1913 and is therefore subject to the right of pre-emption *Gurbaksh Singh v Sardar Singh* 1935 AIR (L) 268 A sale by an Official Receiver of the property of an insolvent is not a sale in execution of an order of a Civil Court and therefore the provisions of law contained in sub s (1) of s 4 of the Punjab Debtor's Protection Act are not applicable The "Court" though it includes an Insolvency Court does not include a Receiver in Insolvency *Lal Khan v Official Receiver, Jerozapore* 1 LR 18 L 721 1937 AIR (L) 446

Objections to sale held by the Receiver

Where the mortgaged property of the insolvent is sold by the official receiver without reference to the rights of the mortgagee the mortgagee may or may not have a right to protest against the sale, but this does not give the insolvent a right to protest against the sale, *Asa Nand v Jugal Kishore*, 1933 AIR (Lah) 1008 There is

no provision in the Insolvency Act which requires or empowers the Official Receiver to attach the property as a necessary preliminary to sale as in the execution of decrees under the Code of Civil Procedure. The Official Receiver may sell the insolvent's property as any other private individual having disposing power over certain property vested in him can sell. He may advertise for sale of the property in any manner he likes and can sell it to the highest bidder. The sale is not in any sense in continuation of attachment. It is a distinct act of the receiver which can be objected to by the insolvent before the Insolvency Court by an application under sec 68. *Sardar v Natin Chandra* 1937 A L J 129 167 I C 940 1937 A I R (All) 226

Sale by Receiver is subject to equities

The Receiver is appointed by the Court but the power of sale is conferred upon him by statute and not by the Court. The Act does not make the sale of the property of an insolvent by the Receiver a sale in execution of an order of the Court. Their Lordships of the Privy Council have held in *Sheobaran Singh v Kulsum un Nisa* 49 All 367 that the official assignee took the property of the bankrupt exactly as it stood when in possession of the insolvent with all its advantages and burdens and their Lordships held that a sale by an official assignee was not a sale by Court. In *Gurbakhsh Singh v Sardar Singh* 16 L 173 a full Bench of the Lahore High Court has held that the act of an Official Receiver in selling the property of an insolvent is not an act in execution of the order of a Court and is therefore subject to the right of pre-emption.

Court's power to interfere with sales by the Receiver

The Court has no jurisdiction to set aside a sale held or made by the Receiver in the absence of proof of fraud or collusion or material irregularity in conducting the sale or misconduct in his part causing injury to the estate. The sale may of course be set aside if the receiver acts beyond his authority or in excess of the powers conferred upon him. Within a month after the sale of their property by the Receiver appointed under the Provincial Insolvency Act V of 1920 insolvents tendered money to pay their creditors in full and a certain sum being 5 per cent on the purchase money to be paid to the purchaser as a compensation for the cancellation of the sale and further prayed for the annulment of the order of adjudication. It was held that a Receiver's sale was not a proceeding under the Act which

in bankrupt sales by the Receiver
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8 AIR (R) 60 The

Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in cases in which the action of the Receiver was irregular and has pre-

the general interest of the creditors, *Rambadia Chetty v Ramaswami Chetty*, 44 M L J 284

Court's power to deliver possession.

Section 5, *supra* makes provision *inter alia* for effect being given to the orders and decrees made by the Insolvency Court. In *Ramaswami Chettiar v. Ramaswami Aiyangar*, 45 Mad 434, a question arose as to whether a purchaser from the Receiver has the right to apply to the Court for being put in possession of the property purchased by him. The District Judge disallowed the application on the ground that the Court cannot issue a delivery warrant on the application of a stranger to the proceedings. It was held that the execution of any order made by the Court will be regulated by the terms of section 5. For instance, if an order for a warrant of possession is made in favour of the Receiver or of a purchaser from him the method of executing the warrant under section 5 will be the same as that prescribed for the executing of a warrant issued by the Court in the exercise of original civil jurisdiction. The purchaser can, therefore, under the provisions of the Provincial Insolvency Act, 1920, apply to the Insolvency Court for a warrant of possession.

Clause (b) ; Receiver's power to give receipts for money.

Section 59(b) of the Provincial Insolvency Act, 1920, which runs as follows:—
 "The Receiver may give receipts for money received from all persons who are liable to contribute to the assets of the bankrupt."

Power of the Receiver exercisable with leave of Court.

"As Rankin, J. pointed out in a case referred to in *Laduram Nathmull v Nandalal Karim*, 47 Cal 555 31 C L J 150 55 I C 747, the Official Receiver is the person in whom is vested the property of the bankrupt, by law the provisions regarding leave of the Court as under the English Act are administrative provisions only, *Lee v Sangster*, (1857) 2 C B (n s) 1, *Leeming v Murray*, (1879) 13 Ch D 123 and *In re Branson Ex parte Trustee*, (1914) 2 K B 701. The same principle is applicable to liquidators of companies, *Cycle Makers' Co operative Supply Co v Sinns*, (1903) 1 K B 477. The provisions of sec 179 of the Companies Act, are similar to those of sec. 151 of the English Act and to sec 59 of the Provincial Insolvency Act, and it has been held in *Cycle Makers' Co operative Supply Co v Sinns*, *supra* that a liquidator may for his own protection take the sanction of the Court but when he took the risk, the compromise was binding until set aside by the Court, *Rup Ram v Fazal Din*, 1 L 237, where it was held by Shadi Lal, J., that leave is a 'domestic' matter and that a Court in dealing with the suit is not affected by it," *Lalchand Gobindram v Tejchand Jagannath*, (1929) A I R (S) 41

Under section 56 of the Bankruptcy Act, the trustee may, with

the permission of the Committee of Inspection, do all or any of the following things : (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ; (2) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt , (3) employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the Committee of Inspection , (4) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulation as to security and otherwise as the Committee thinks fit , (5) mortgage or pledge any part of the property of the bankrupt for the purpose of raising the money for the payment of his debts , (6) refer any dispute to arbitration, compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums payable at such times and generally on such terms as may be agreed upon , (7) make such compromise or other arrangements as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy , (8) make such compromise or other arrangements as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person , (9) divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold

The permission given for the purposes of this section shall not be a general permission to do all or any of the abovementioned things, but shall only be a permission to do the particular things for which permission is sought in the specified case or cases. It is the duty of the Receiver to obey strictly the directions of his appointment and not to act on his own responsibility, and then come in Court to sanction what he has done, *Trenchard v Same*, (1918) L R 1 Ch. D 423. In all matters of importance the Receiver should apply for and obtain the direction of the Court, *Balaji v. Ramchandra*, 19 Bom 660. It is quite obvious that the only two powers that the Official Assignee has got in acting of his own motion are, (1) to sell the property, and (2) to give receipts, the other powers that were conferred upon him by sec 68 (Presidency Towns Insolvency Act) require the sanction of the Court. It is to be noticed that the sanction contemplated by sec 57 of the Bankruptcy Act (1883) is not general sanction but only a permission to do a thing or things, *C Grey v Lamond Walker & Co*, 17 C.W.N 578.

Clause (c) ; Receiver's power to carry on the business.

Ordinarily the business of the insolvent might be carried

the Receiver, not with a view to profit, but only in so far as may be necessary for the beneficial winding up of the same *Exp Emmanuel*, (1881) 17 Ch D 35. The principle is well settled that the Courts are generally averse to assuming the management of a business, except as incidental to the object of the proceedings and for the purpose of closing it up and dividing the assets, *In re Manchester & Milford Ry Co.*, (1880) 14 Ch D 645. What the priest did for - 'be described as business within 59 (c)] and the exercise of his alled a trade under sec 40 (now 21 Ind Cas 909. The Official Assignee was not entitled to carry on the business of the insolvent for beneficial winding up without sanction of Court, *C Grey & Lamond Walker & Co.*, 17 CWN 578.

Clause (d) ; Receiver's power to institute suits relating to "property of the insolvent"

The Court in the exercise of its insolvency jurisdiction has no summary powers of realising debts due to the insolvent. The powers of the Court for this purpose are the same as those of the Receiver (sec 23, now 58) and the powers of the Receiver are defined in sec 20 (now 59). The power to order an alleged debtor of the insolvent to deposit the amount of the debt in Court or to pay up is not one of those powers. The Court has no power to enquire into and judicially determine the existence of the amount of the debt. It is in this respect merely managing the estate of the insolvent. It has power to enquire into claims against the estate not into claims by or on behalf of the estate *Gobinda v Gopal* 9 NLR 182.

The right to claim damages for injury to the bankrupt's credit and reputation, does not pass to the trustee in bankruptcy but imptent to maintain an action *v United Counties Bank Ltd.*, *Drake*, 2 HLC 579, Earle, J observed, "the right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversion, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law." A right of action in respect of a tort or a breach of contract resulting in injuries wholly to the estate of the bankrupt passes to the trustee for his creditors. *Santon v Collier*, 23 LJQB 116. The right of action for a breach of contract resulting to the personal labour of the bankrupt will vest in the trustee if there was such a breach as to vest a right of action in the bankrupt before bankruptcy, *Beekham v Drake*, supra.

Court institutes civil proceedings and is replaced by another subsequently it is necessary that the new Receiver should be made a party to these proceedings *Akula v Dhelli* 28 Mad 157. An interim Receiver cannot be made a party *In Re Hunt* 1 B H C R 251. A Receiver cannot entrust or delegate his duties to another *Balaji v Ramchantra* 19 Bom 660.

The word person in Order 33 C P C means a natural person that is a human being and does not include a judicial person such as a receiver. Therefore a receiver appointed under the Provincial Insolvency Act cannot be allowed to sue as a proper party where the receiver himself is possessed of sufficient funds to carry on the suit though the estate of which he is the receiver may not be sufficient for that purpose *S M Mura v Corporation of the Royal Exchange Assurance* 126 I C 650 1930 A I R (R) 250.

Leave for suit by the Receiver

The power of the Receiver to sue with or without the leave of the Court depends upon the terms of his appointment. If there is no authority given in his writ of appointment to sue that suit will be dismissed *Drabamoyee v Davies* 14 Cal 323. Where the order appointing him a Receiver gives him power to let and sell the immovable property to take and use all such lawful and equitable means and remedies for recovering realising and obtaining payments of the rents as shall be expedient it was held that under the terms of such an order the Receiver had power to sue to eject without obtaining permission of the Court *Haridas Kundu v J C McGregor* 18 Cal 477. The permission of the Insolvency Court required by sec 59 for institution of a suit by a Receiver need not be in writing. The mere fact that a Receiver appointed under the Act has not obtained the leave of the Court to institute a suit is not fatal to the suit brought by him as the obtaining of such leave is a matter between the Receiver and the Insolvency Court whose Officer he is and cannot be pleaded as a valid defence by a third person to that suit *Mahomed Galif v Abdul Rahim* 89 I C 419 (1926) A I R (N) 156. The obtaining of leave is a matter between the Receiver and the Court and the fact that the leave of the Insolvency Court has not been obtained is not valid defence which a Receiver *In Re Brar* Official Receiver *Coimbatore v D D Kan*

Limitation for suits by the Receiver

Insolvency is not a disability under the Limitation Act and the Official Assignee cannot have a longer time for bringing a suit than the insolvent himself *Singh v Mythili Ammal* 61 M L J 688 1932 A I R (M) 170.

Limitation for suits against the Receiver

The plaintiff paid the Official Receiver of an insolvent's estate a sum of money under a receipt signed by him as part of the purchase money of the estate of the insolvent which the receiver promised to transfer to the plaintiff subject to the approval of the Insolvency Court. The Insolvency Court did not sanction the sale to the plaintiff and the property was eventually sold in auction to another person. Subsequently the plaintiff brought a suit for return of the amount paid by him. It was held that Art 97 Limitation Act applied to such a suit and the suit having been brought more than three years after the date when the consideration failed it was barred by time *Lachman Kachhi v Secy of State* 1934 A L J 864

Power of Receiver to defend suits

A Receiver in insolvency is not affected by the doctrine of *lis pendens* and a party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit. A decree for sale obtained by an unpaid vendor against his insolvent vendee subsequent to the order of adjudication without making the Receiver party in the suit is a nullity so is the sale under the decree and the purchaser at such a sale acquires no title against the Assignee *Mokshagunam Subramania v S V Ramkrishna* 70 Ind Cas 357 In *Kalachand Banerjee v Jagannath Maruani* 54 IA 190 54 C 595 31 CWN 741 (PC) 52 MLJ 734 29 Bom LR 882 25 ALJ 621 45 CLJ 544 26 LW 263 101 IC 442 (1927) AIR (PC) 108 it was held that rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is of course plain but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by operation of law

In deciding what is the duty of the Official Assignee with regard to a contested action in which he is concerned as a trustee the Court must consider not merely whether he has a cause of action or right of defence or answer which would prevail at law or in equity as between ordinary litigants but also what in point of honesty the trustee ought to do in respect of the facts of the case. Where a certain company possessed a moral or equitable claim to a certain sum which represented money that had been entrusted by the company to the insolvent to be applied by him for a specific purpose as their agent and the insolvent has no beneficial interest in the sum except to the extent of his commission it was held that the Official Assignee is justified in refusing to intervene and claim the amount as against the company *Choung Taik v Ma Them Nu* 8 Rang 665 131 IC 504 1931 AIR (R) 74 In *_____* against the Official Receiver though he may not choose to

the same as a result of his investigation of the matters in question still he owes a duty to the Court to appear in the matter and explain to the Court the result of his investigation, 35 L W. 28 (notes)

Power of Receiver to continue suits.

Under Or 22, r 8 (1) of the CPC, 1908 the insolvency of a plaintiff in any suit which the Assignee or Receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such Assignee or Receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct. An Assignee in bankruptcy who applies to continue a suit filed by a person before his bankruptcy can be called upon to give security only for the costs incurred in the suit before the Assignee is brought on record and not for the entire costs of the suit till its termination," *Gulam Hussain v Pirally Abdulla*, 97 IC 797. "There is no authority for holding that the words 'relating to' must be taken to mean 'affecting' Section 59 does not authorize the Official Receiver to appeal against a decree against the insolvent in a suit for damages. But when the insolvent has filed a suit for return of the deposit money for breach of contract on the defendant's part the Official Receiver is entitled to continue the suit," *Dhuras J Subbarayar v J K Muniswami Iyer*, (1926) AIR (M) 1133. Where a plaintiff obtains leave to sue *in forma pauperis* and after the commencement of the suit is adjudged an insolvent, the Receiver in insolvency is entitled to continue the suit just as the insolvent could have done, *Mohammad Zaki v The Municipal Board, Mampur*, 47 IC 577. An undischarged insolvent brought a suit for a declaration that certain land mortgaged to a certain person had been redeemed. The receiver also was made a party to the suit, but the receiver stated that he had not taken possession of the land and it did not vest in him by virtue of s 28 (5) of the Act, being not attachable under s 60 CP Code. It was held that there was no bar to the insolvent himself bringing the suit in respect of the land which does not vest in the Receiver. *Sargand Gul v Swamidas*, 168 IC 377. 1937 AIR (Peshwar) 42.

When the insolvent can sue.

During the pendency of a suit for maintenance by a widowed daughter in law against her father in law, the latter was adjudged insolvent, and the Official Receiver was added as the 2nd defendant. But the 1st defendant was also allowed to continue the defence of the suit. A decree was passed against the 1st defendant personally and a declaration of charge on the entire family properties was also made. The 1st defendant (insolvent) appealed against the decree impleading the Official Receiver as a party respondent. It was objected that he had no *locus standi* to appeal

by reason of s 59 of the Act and O 22, r 8, C P C It was held (1) that the right of appeal could not be denied to the insolvent who was co nomine a party to the decree, (2) that the decree as it stood was a personal decree against the insolvent, though there was a declaration of a charge, and that it could not be said that the claim in the suit only related to the property of the insolvent within the meaning of s 59 of the Provincial Insolvency Act, and (3) O 22, r 8 and r 10, did not also bar the right of the insolvent to appeal, *Ramarayudu v Sitalakshamma*, 1937 M W N 1014 46 L W. 550 1937 A I R (M) 915

Appeal by the Receiver.

When the Official Receiver who was a party to the suit and whose statutory duty is to "institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent under sec 59 (d) of the Provincial Insolvency Act has not preferred the appeal it is not open to a creditor to ask the Appellate Court on general grounds to grant him leave to appeal The proceeding contemplated by sec 146, C P C would include an appeal and the expression "claiming under" in that section is wide enough to cover cases of devolution mentioned in Or 22, r 10 of the Code *The Indian Bank Ltd, Madras v Seth Bansiram Jashamal Firm* 39 L W 624 1934 A I R (M) 411

Disposal of suits ex parte Receiver.

Though the hearing of a suit or appeal in the absence of the Official Receiver may be technically justifiable is regrettable The Official Receiver is an official assisting the Court in the case and the Court should not treat him ex parte unless he clearly showed that he did not want to appear, 1932 M W N xxx (Notes)

Liability of Receiver for costs

In the absence of definite provision to the contrary a trustee is liable personally in a suit between himself and a stranger Consequently when a decree for a costs against a trustee does not show that the costs are to be realised out of the trust property the trustee is liable personally to pay the costs incurred by the defendants to the suit brought by him, *Har Kishan Das v Parshotam anand Gir*, 3 A W R 576 1934 A L J 225 151 I C 952 1934 A I R (All) 793

If the limit of expenditure sanctioned by the Committee is exceeded, or if the trustee has proceeded with an action or a defence to an action without first obtaining the required permission, he may in the first case lose his right to indemnity out of the estate for any expenses incurred by him in excess of the permitted limit and in the second case lose his right to any indemnity at all, *Re White, Ex parte Nicholas*, (1902) W N 114 Where during the pendency of a suit the plaintiff becomes an insolvent and the Official Assign

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If the limit of expenditure sanctioned by the Committee is exceeded or if the trustee has proceeded with an action or a defence to an action without first obtaining the required permission he may in the first case lose his right to indemnity out of the estate for any expenses incurred by him in excess of the permitted limit and in the second case lose his right to any indemnity at all, *Re White, Ex parte Nicholas*, (1902) W N 114 Where during the pendency of a suit the plaintiff becomes an insolvent and the Official Assign

continues the action knowing that it is wholly unsustainable, or where in the conduct of the action he is guilty of any conduct which a prudent man would not be a party to, it would be open to the Court to direct the Official Assignee to pay the costs of the action personally. But where there is a *bona fide* dispute and the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Official Assignee should not be made to pay the costs personally out of his pocket, *Abdul Rahman v Shaw Wallace & Co*, 92 I C 620. In an action started by the Receiver on behalf of the insolvent in the absence of an express order to the contrary the Receiver is personally liable for costs to the opposite party who succeeds in the action though the Receiver may have a right to be reimbursed out of the insolvent's estate, *Lachman Das v Lakshmi Narain* 54 All 444 1932 A L J 226 1932 A I R (All) 288. Where a decree dismissing the Official Receiver's appeal directed him to pay the costs of the respondents without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the then Receiver, though he has ceased to hold office at the time of execution, *Balakrishna Menon v Manakkal Uma* 52 Mad 263 114 I C 825 1929 A I R (M) 105. Where an order for costs is made against creditors and in favour of the insolvent and at the time there is a receiver appointed of the insolvent's property, on the death of the receiver, if no other receiver is appointed insolvent's estate vests in the insolvency Court, and the order for costs cannot be executed by the insolvent or on his death pending insolvency by his heir as agent under s 59 (c) without the leave of the Court on an application in that behalf. Mere leave to execute the order is not sufficient to entitle the heirs of the deceased insolvent to clothe them with title to execute the decree *Chhatrapat Singh v Kharag Singh*, 1936 A I R (C) 521.

Clause (e) ; Receiver's power to employ a pleader.

Under sec 56 (3) of the Bankruptcy Act, 1914, the trustee in a bankruptcy may, with the permission of the Committee of Inspection, employ a solicitor to take any proceedings or do any business which may be sanctioned by the Committee. When there is no trustee or Committee of Inspection and the Official Receiver becomes the trustee in bankruptcy the Board of Trade have the power to authorize the employment of a solicitor by the Official Receiver and in doing so to limit the amount of costs which may be incurred. When the amount of costs to be incurred has been limited either by the Committee of Inspection or the Board of Trade the taxing master in taxing the solicitor's bill of costs cannot allow as against the bankrupt's estate a larger sum than the amount thus limited. *In re Duncan, Ex p The Official Receiver*, (1892) 1 Q B 879. Where a legal practitioner is appointed receiver of the estate of an insolvent and he applies under s 54 for annulment of a mortgage

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Mortgage of the insolvent's property often becomes necessary in the absence of any funds immediately available in the hands of the Receiver to meet urgent demands against the estate of the insolvent, such as repairs government revenue arrears of rent, etc., and for the purpose of meeting these demands the Receiver is empowered to raise loan on the mortgage of the insolvent's property with the leave of the Court. A mortgage without the leave of the Court is void. Under sec 59 the Receiver is entitled to sell any part of the property of the insolvent and to give receipt for any money received by him without the permission of the Court. If, however, he wishes to mortgage or pledge any part of the property of the insolvent for the purposes of raising money and payment of the debts of the insolvent he must first obtain the leave of the Court. But when a Receiver not duly appointed effects under a written order of the Court a mortgage of a part of the property belonging to the insolvent which is subsequently verified by the Court, the mortgage is analogous to a judicial sale and is valid. As soon as the order of adjudication is passed the estate of the insolvent vests in Court and the person effecting the mortgage is merely acting as its agent." *Shahbuddin v Mt Umri*, 35 P L R 717 152 I C 638 1934 A I R (L) 867. "When immediate expenditure is required for the preservation of property, a Receiver may be authorised to borrow money for the purpose, and the amount will be charged upon the property in priority to all existing incumbrances" —Halsbury, Vol 24, page 397, para 752. The Co

continues the action knowing that it is wholly unsustainable, or where in the conduct of the action he is guilty of any conduct which a prudent man would not be a party to, it would be open to the Court to direct the Official Assignee to pay the costs of the action personally. But where there is a *bona fide* dispute and the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Official Assignee should not be made to pay the costs personally out of his pocket, *Abdul Rahman v Shaw Wallace & Co*, 92 I.C. 620. In an action started by the Receiver on behalf of the insolvent in the absence of an express order to the contrary the Receiver is personally liable for costs to the opposite party who succeeds in the action, though the Receiver may have a right to be reimbursed out of the insolvent's estate, *Lachman Das v Lakshmi Narain*, 54 All 444. 1932 A.L.J. 226 1932 A.I.R. (All) 288. Where a decree dismissing the Official Receiver's appeal directed him to pay the costs of the respondents, without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the then Receiver, though he has ceased to hold office at the time of execution, *Balakrishna Menon v Manakkal Uma*, 52 Mad 263 114 I.C. 825 1929 A.I.R. (M) 105. Where an order for costs is made against creditors and in favour of the insolvent, and at the time there is a receiver appointed of the insolvent's property, on the death of the receiver, if no other receiver is appointed, insolvent's estate vests in the insolvency Court, and the order for costs cannot be executed by the insolvent or on his death pending insolvency by his heir as agent under s. 59 (c) without the leave of the Court on an application in that behalf. Mere leave to execute the order is not sufficient to entitle the heirs of the deceased insolvent to clothe them with title to execute the decree *Chhatrapat Singh v Kharag Singh*, 1936 A.I.R. (C) 521.

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has power to grant to a Receiver such powers for the protection, preservation and improvement of the property as the owner himself has. In order to decide whether a power to raise money on the property itself may be necessary for its own preservation regard must be had to the fact that estates are liable to be sold if the rents and revenue due upon them are not paid. The power to take the estate out of the hands of the owners and to place it in the hands of a Receiver with power to do what is necessary for its protection must include a power to raise money to pay rent or revenue when it is necessary to do so. Therefore a suit brought to enforce a charge upon certain estates created by a Receiver who was authorized to raise money on security of the estate for the purpose of paying a putni and mourasi rents which had fallen due, was rightly decreed, *Pareshnath Mookerjee v Omerto Nauth Mitter*, 17 Cal 614.

Deeds by the Receiver not exempted from stamp-duty.

According to English law "every deed, conveyance, assignment, surrender, admission or other assurances relating solely to free-hold, leasehold, copyhold or customary property, or to any mortgage, charge or other encumbrance on, or any estate right or interest in, any real or personal property which is part of the estate of any bankrupt and which after the execution of the deed, conveyance, assignment, surrender, admission or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond or other instrument or writing, relating solely to the property of any bankrupt or to any

stamp duty
bankruptcy Act,
Towns Insol

venty Act, 111 of 1909, every transfer, mortgage, assignment, power of attorney, proxy paper, certificate, affidavit, bond or other proceedings, instrument or writing whatsoever before or under any order of the Court, and any copy thereof shall be exempt from payment of any stamp or other duty whatsoever. And no stamp duty or fee shall be chargeable for any application made by the Official Assignee to the Court under this Act or for the drawing and issuing of any order made by the Court on such application."

Insolvency Act
Act and
exemption

of such deeds, from the payment of stamp duty

Clause (h) ; Receiver's power to compromise.

"Incidental to the power to bring and defend an action is the power to compromise an action which has been begun, *Leeming v. Lady Murray*, (1879) 13 Ch D 123. The right is inherent in the

trustee, but in order to make any compromise of an action valid as between the trustee and his estate he must obtain the sanction of the Committee of Inspection to the compromise, [sec 56 (6), (8), Bankruptcy Act, 1914], or if the sanction is refused by the Committee or the trustee does not obtain the sanction of the Court, (1889) 6 Morr 277, *Re Ridgway Ex-pa* *Re Pilling, Ex parte Salaman*, (196) 2 p 135 In a redemption suit by a mortgagor the insolvent-mortgagee was made a party along with the Official Assignee. The matter was referred to arbitration by consent of parties other than the insolvent mortgagee who did not appear. It was held that the Court had no jurisdiction to make the order of reference without his consent. Consequently the award was invalid, *Laduram v Nandlal*, 47 Cal 555. A compromise (accepting a certain amount in full settlement of claim) effected by the Official Receiver without sanction of the Court is not valid. Sanction is taken by the Official Receiver for his own protection and the compromise is binding unless set aside. The provisions regarding sanction are administrative only, *Lal Chand Gobindaram v Tejbhandas Jagannath*, (1929) A I R (S) 41.

59A. (1) The Court, if specially empowered in this behalf by an order of the Local Government, or any officer of the Court so empowered by a like order, may on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent, or suspected to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any document in his custody or power relating to the insolvent or to his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any

brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner

Review.

This section has been newly added by section 4 of Act XXXIX of 1926 and corresponds to section 25 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and to section 36 (1) (2) (3) of the Presidency Towns Insolvency Act. By this section the Court may, at any time after the receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property and the Court may require any such person to produce any documents in his custody or powers relating to the debtor, his dealing or property. "The section empowers the Court, on the application of the Receiver or a creditor to summon any person who may be suspected of having any of the estate of the insolvent in his possession or who may be capable of giving information respecting the estate and effects of the insolvent or his acts, dealings or conduct. Such power of examination of third persons with a view to discovery of the insolvent's property, has been inherent in Insolvency and Bankruptcy Courts from their first establishment in England," *In re Alladinbhoy Hubibhoy*, 11 Bom 61

Genesis of the new section.

In *Quasim Ali v. Emp*, 43 All 407 19 ALJ 378 64 IC 37, Piggot and Walsh, JJ remarked "Unfortunately there seems to be no provision in the Provincial Insolvency Act as there is in the English Act enabling the Receiver to call the sons before him and to compel to answer questions on oath as to the disposition of their father's property." The Civil Justice Committee in their Report (page 232, para 15) observed "It has been pressed upon us that the private examination sec, 12, section 36 of the Presidency Towns Insolvency Act should be made applicable to the mofussil, not that there is not already ample power under the Provincial Act to examine the debtor, but in order that a Receiver may be able to examine a third party and thus to obtain, in a comparatively inexpensive manner, reliable information as to the debtor's conduct and affairs. The ordinary course in England and in Presidency towns is for the Receiver to obtain, under the section, evidence as to the dealings between the insolvent and the third party. He would, as a rule, be careful to utilize his power under the section before launching a motion to set aside a fraudulent preference or to recover property. In the like manner he would use the section, if necessary, to

enable him to deal with doubtful proofs of debt. In the absence of such powers it is only to be expected that the setting aside of past transactions, under special principles of insolvency law, will be regarded whether by creditor or by Receiver as a hazardous expenditure of time and money. The power of examining the third person is very valuable. It is discretionary on the part of the Court to grant the application for examination and it is discretionary in the Court to allow, or to disallow, any particular question.

We suggest that when the insolvency law is next amended powers analogous to those of section 36 of the Presidency Towns Insolvency Act might be given, subject to the option of the Local Government to bring them into force for particular Courts." To give effect to the above recommendation of the Civil Justice Committee sec 59A has been inserted with the following Objects and Reasons "that a provision analogous to that of section 36 of the Presidency Insolvency Act, 1909, should be inserted in the Act of 1920, by which the Courts should have power to examine a third party supposed to be indebted to the insolvent in order to elicit information, such power being given to courts by a special order of the Local Government and being capable of delegation to a Registrar, where such an officer is appointed at a head quarters station"—*Gazette of India* Part V, pp 136 137, dated 21st August 1926

Effect of the new section.

Section 59A has been taken verbatim from sec 36, cls 1-3, Presidency Towns Insolvency Act, III of 1909. The Legislature which saw the necessity to introduce sub secs 1-3 of sec 36 of Act III of 1909 has deliberately refrained from incorporating sub sec (5) which deals with the delivery of immovable property. The

(5) has been in pursuance of
mittee (p 232) in the following

the Presidency Towns Insolvency

Act gives the Court power, if on the examination of any person the Court is satisfied that he is indebted to the insolvent, to order him to pay, in like manner if the Court is satisfied that a person examined has in his possession any property belonging to the insolvent, the Court may order him to deliver it up. In any case we are not satisfied that for the purpose of the mofussil these particular powers could safely be, or need be, entrusted to the Courts. It would be quite enough that the Receiver should afterwards bring a motion before the Court using the evidence taken under section 36 against the third person."

It seems, therefore, to lend colour to the view that the Insolvency Court has no power (under sec 59A) to decide questions of title between the Receiver and third parties in possession of properties alleged to be those of the insolvent. The remedy of the

Receiver or of a purchaser from him seems to be in a regular suit. In *Narasingha v Virasghavulu* 41 Mad 440 6 L W 694 42 IC 525 (1917) M W N 857 certain property alleged to belong to the insolvent was sold by the Receiver. The purchaser was resisted in taking possession by a third party as holding the same in his own right. The District Judge held an enquiry and ordered delivery of possession to the purchaser. It was held that the District Judge had no jurisdiction to pass such an order.

The above case was decided under the old Insolvency Act III of 1907. After the passing of the New Act V of 1920 the point again came up for consideration in *Ramaswami Chettiar v Ramaswami Aiyanger* 45 Mad 434 42 M L J 185 (1922) AIR (M) 147 and it was held that sec 5 makes provision *inter alia* for effect being given to the orders and decrees passed by the Insolvency Court. A question arose as to whether a purchaser from the Receiver has the right to apply to the Court for being put in possession of the property purchased by him. The District Judge disallowed the application on the ground that the Court cannot issue a delivery warrant on the application of a stranger to the proceedings. It was held that the execution of any order made by the Court under sec 56 or sec 4 will be regulated by the terms of section 5. For instance if an order for a warrant of possession is made in favour of the Receiver or of a purchaser from him the method of executing the warrant under section 5 will be the same as that prescribed for the execution of a warrant issued by the Court in the exercise of original civil jurisdiction. The Legislature having invested the Insolvency Court with extensive powers under section 4 it would be anomalous to hold that the Courts are powerless to give effect to their judgments. The terms of sections 4, 5 and 56 do not suggest that any such limitation is intended. The auction purchaser can therefore under the provisions of the Insolvency Act of 1920 apply to the Insolvency Court for an warrant of possession. The same view has been held in *Bansidhar v Kharagju* 37 All 65 12 A L J 1273 26 IC 926 *Jagrup Sahu v Ramananda Sahu* 39 All 633 15 A L J 738 40 IC 373 *Muhammed Umar v Munsu Ram* 54 PR 1917 41 IC 802.

No decision has been arrived at on the question after the amendment of Act V of 1920 by Act XXXIX of 1926. But it is sufficiently clear that when the Official Assignee summons a person alleged to be indebted to the insolvent estate as a witness under sec 36 of the Presidency Towns Insolvency Act and that witness disputes his indebtedness to the insolvent the Insolvency Court has no jurisdiction to make the order for payment of the amount by him and the Official Assignee must only proceed by suit to recover the amount. *The Official Assignee Madras v Narasinha Mudaliar* 57 M L J 145.

Jurisdiction of Courts under the section.

All Courts exercising insolvency jurisdiction are not authorized to summon before them for examination according to section 59A. It is only the Courts that are specially authorized in this behalf by an order of the Local Government that can exercise this power. By notification Nos 6956 J and 6964 J, dated the 6th August, 1927, published in the Calcutta Gazette, Part I, dated 18th August, 1927, the District Courts of the following Districts in Bengal have been empowered to perform the functions referred to in section 59A (1) Twenty-four Pergannas, (2) Burdwan, (3) Midnapore, (4) Hooghly, and Additional District Judge's Court of Hooghly, (5) Dacca, (6) Rajshahi, (7) Dmajpur.

Jurisdiction to summon any person.

Sec 36 of the Presidency Towns Insolvency Act, 1909 (sec 59A of the Provincial Insolvency Act) confers a power which is general in its character. The Court can require a person to be examined whenever the circumstances are such as to bring the section into operation. The Court ought not to refuse or limit the order on the ground that the information to be obtained on the examination may result in litigation against the person examined. One of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not. The examination may be ordered when the circumstances bring the case within sec 36 (1). The examination may or may not result in some admission of liability on the part of the person examined. *Prima facie* the Court ought not to make an order under this section unless there is ground for thinking that the order is likely to be of some use, *In re Goolbai Petil, The Bank of India Ltd v Pherozshaw Pent*, 57 Bom 665 35 Bom L R 546 145 I C 648 1933 A I R (Bom) 309. Under section 36 (1) of the Presidency Towns Insolvency Act (sec 59A of the Provincial Insolvency Act) it has been held that the Court in a suitable case may summon before it any *pardanashin* lady witness who is known or suspected to have in her possession any property belonging to the insolvent. Section 132 (1) of the Code of Civil Procedure which does not apply to examination of witness under sec 36 (1) of the Presidency Towns Insolvency Act, empowers the Court to order any *parda nashin* lady witness to give evidence in Court provided she is not compelled to come forth into view or to become visible to the public gaze, *In re Bilas Ray Seraugee*, 56 C 865 33 C W N 681.

Jurisdiction when may be invoked.

The section does not contemplate a roving enquiry into the affairs of the insolvent, but where the Official Assignee only desires to enquire into a specific matter, namely, a debt which he is informed is due from the applicant to the insolvent, then the section

may be invoked *In the matter of Jagjwan Keshouji* 152 I C 878
1934 A I R (Sind) 158

Who can apply

The Court has power under section 59A on the application of (1) the Receiver or (2) any creditor who has proved his debt. When an application praying for an order for examination of witness under section 36 of the Indian Insolvency Act (sec 59A of this Act) has been made or supported by the Official Assignee himself it is the duty of the Court to grant the same readily. But when any person other than the Official Assignee asks for such examination the grounds of the application should be carefully considered and sifted by the Court which should satisfy itself that the examination of the proposed witness is likely to be of some benefit to the creditors or to the estate and has not been made merely with a view to harass and annoy persons to be examined. *In re Alladinbhoy Hubibhoy* 11 Bom 61. To entitle a creditor to make an application under the section he must be a creditor who has proved his debt that is he must be a bona fide creditor. *Ibid*. The Court had power to take action under section 36 of the Insolvent debtors Act as soon as there was an insolvent before the Court even prior to the date fixed for the hearing and there was no necessity for an application by anybody. *In re Chunilal Osual* 29 Cal 503. The phrase a creditor who has proved his debt in sec 36 of the Presidency Towns Insolvency Act (sec 59A of the Provincial Insolvency Act) does not mean that such a creditor is only a person whose proof of debt has been formally admitted by the Official Assignee as has been held in *In re Abdul Samad* 26 C W N 744 but includes a creditor who has given the required proof of his debts by delivering or sending through the post in a prepaid letter to Official Receiver an affidavit verifying the debt. *Sailendra Krishna Roy v Rashmohan Shaha* 33 C W N 709.

Nature of application to summon

So far as the general nature of the application is concerned applications of this nature should set out fully and in detail the no affidavit or trustee examination of s Insolvency swore that the matters stated were true to the best of his information and belief it was stated that the person whose examination was sought was capable of giving information regarding the dealing with the property of the insolvent. It was held that the verification was sufficient. *Re A F Seldana Exp Suklal Karnani* 32 C W N 679.

60. (1) In any local area in which a declaration has been made under section 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver, but, after the other property of the insolvent has been realised, the Court shall ascertain—

- (a) the amount required to satisfy the debts proved under this Act after deducting the moneys already received
- (b) the immovable property of the insolvent remaining unsold, and
- (c) the incumbrances (if any) existing thereon, and shall forward a statement to the Collector containing the particulars aforesaid, and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers, conferred on him by paragraphs 2 to 10 of the Third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property, and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order

Review

This is section 21 of Act III of 1907, and is intended to afford protection to the agriculturists as contemplated by sec 68 of the C P C 1908

Receiver's power to sell revenue paying property.

The Receiver has no power to sell immovable property of insolvent paying revenue to the Government or held or let

agricultural purposes in any local area in which a declaration has been made under section 68, C.P.C., 1908. Under section 68, CPC the local Government may, with the previous sanction of the Governor General in Council, declare by notification in the Local Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector.

"The first clause of sec 21 (now sec 60), is not applicable to the Punjab and the second clause of that section does not require that the Receiver or the Court should proceed through the Collector. The underlying principle of the law of insolvency is that an insolvent shall be freed from his indebtedness and shall obtain a discharge within a reasonable period, and the Court or a Receiver proceeding under the Insolvency Act, should proceed as far as possible on the same lines as a Court acting in execution of decrees. In execution of decrees against the land of indebted members of an agricultural tribe it has always been the practice that the debt should be liquidated by a farm terminable after a reasonable period, and the maximum period for which a farm has been permitted is twenty years. By the arrangement of such a farm or a mortgage, which is automatically redeemed by the profits, the debt is automatically extinguished. Ordinarily, different or harsher measures should not be taken against a person, who becomes an insolvent under the provisions of the law, *Manji v Giridhari Lal*, 2 Lah 78 61 Ind Cas 674. But this case does not lay down an absolute bar to the Insolvency Court permanently alienating the land of an insolvent or to its departing from the principles governing the execution of ordinary decrees if a fit case is made out for such an action," *Lachman Singh v Mahantram*, 29 P L R 606 (1929) A I R (L) 66.

Sec 16, Punjab Alienation of Land Act, overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in "enforcement of the order of adjudication." An act done by the Receiver in pursuance of the authority which he derives from the order of adjudication is nothing but an enforcement of the order of adjudication, and sale of the land belonging to a
 the provisions of sec
Jhanda Ram, 12 Lah
 owing the Full Bench
 510, a judgment debtor
 against whom were outstanding decrees of a Revenue Court for rent being adjudicated insolvent, the decree holder sought to execute his decrees and was met by an objection that the property against which execution was sought had been transferred by the

insolvent judgment-debtor to his wife and minor son. The decree-holder, thereupon, with the leave of the Insolvency Court brought a suit for a declaration that the transfers made by the insolvent were collusive and sham transactions and that the properties should be declared to have vested in the Receiver. It was held that inasmuch as the Provincial Insolvency Act did not apply to proceedings in the Revenue Courts the suit was misconceived and not maintainable.

Effect of sale by the Receiver.

When an immovable property belonging to an insolvent whose claim, however, to it was in dispute was sold by the Receiver for a low price, it was held that the sale was void either under sec. 60, Provincial Insolvency Act or under sec 6 of the T P Act, *Nazir Hossan v. Matin uz-zaman*, (1925) A I R (Oudh) 299

Rights of secured creditor unaffected.

Where during the pendency of the insolvency proceedings the Receiver and the secured creditors referred the matter to arbitration and the award directed the Receiver to bring the insolvent's property, which was ancestral and revenue-paying, to sale and realise the sale-proceeds through Court, it was held that the Insolvency Act has no provision to prevent secured creditor from acting according to the award, but the better way would be to obtain the insolvent's discharge under section 38 and deal with the property outside the jurisdiction of the Insolvency Court. The Receiver would then cease to be Receiver under Insolvency Act, but being a person vested by the arbitrator with authority to sell the property under the arbitration provisions, would be able to sell the property under the terms of the award, *Ram Devi v. Ganesh Lal*, 24 A L J 480 95 I C. 416 1926 A I R. (All.) 501

Sale by Receiver of property held or let for agricultural purposes.

Agricultural purposes must be for the purpose of cultivating soil. Where the main object of occupation is the dwelling house and where the cultivation of the soil, if any, was entirely subordinate thereto, it was held that the land was not used for agricultural purposes, *Kali Kissen v. Janki*, 8 W.R. 250. Cultivation of indigo is an agricultural purpose, but not manufacture of indigo cakes, *Surendra v. Hari Mohan*, 31 Cal. 174. Lands for the cultivation of potatoes, gram, vegetables, are lands for agricultural purposes, *King Emperor v. Alexander* 25 Mad 627 12 M L J. 393. But see *Umrao Bibi v. Sayad Mahomed*, 27 Cal. 205. 4 C.W.N. 76,

where it was held that a sale of land for agricultural purposes, not
 : : : : : not
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for the cultivation of coffee is an agricultural lease *Murugesu v Chinanthabai*, 24 M 421 Properties held or let for agricultural purposes are exempt from attachment under s 60 CPC and therefore they do not vest in the Receiver and he has no right to sell the property *Sardar v Novin Chandra*, 1937 A W R 78 1937 A L J 129 167 I C 940 1937 A L R (All) 26

Sub sec. (1), clause (c) Procedure for sale by Collector.

For the procedure to be followed by the Collector, vide the 3rd schedule of the CPC, 1908 After the sale proceedings have been transferred to the Collector under sec 60, the Insolvency Court has no authority of any kind to interfere with the proceedings Collector or his refer the case
1, *Girdhari Lal v*
1 R (A) 203

Distribution of Property

61. (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

Priority of debts

(a) all debts due to the Crown or to any local authority, and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition

(2) The debts specified in sub section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner

shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property, and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule.

Review.

This is section 33 of Act III of 1907, and is based on sec 33 of the Bankruptcy Act 1914, and sec 49 of the Presidency Towns Insolvency Act, III of 1909. The introduction of this section in Act III of 1907 was thus explained in the *Notes on Clauses* to that Act: "The list of preferential payments enumerated in sec 356 of the CPC, 1882 while including Crown debts gives no priority to the wages of service or labour rendered to the insolvent. On the other hand, the invariable preference given to mortgages over unsecured liabilities is not expedient. It is proposed therefore to adopt the principle accepted in sec 40 of the Statute of 1883 as supplemented by sec 1 of the Preferential Payments in Bankruptcy Act, 1888."

Scope of the section

The section deals with the distribution of the assets after realisation by the Receiver. It also lays down that in distributing the assets that may come to his hand the trustee must observe certain priorities, that is to say, he must pay certain classes of creditors in full before paying ordinary creditors anything at all. It will be convenient to consider preferential claims in the order in which they are preferred. "It should be mentioned that this section (sec 33, Bankruptcy Act) does not affect the rights of secured creditors," *Richards v Overseers of Kidderminster*, (1886) 2 Ch 212.

Sub-sec. (1) (a), Priority of debts due to the Crown.

In *Re Henly and Co*, (1878) L.R. 9 Ch D 469, James,

held, that whenever the right of the Crown and the right of the subject with respect to the payment of a debt of equal degree came into competition, the Crown right prevails. It was held that the Crown having a right of distress could proceed to distress and it was therefore right that the Crown debt should be paid in priority to other creditors. Cotton, L.J., held that the right existed even when Crown submitted to come in under the administration of the assets in the winding up of the company. A distinction has always been drawn between bankruptcy and winding up inasmuch as in the former the whole of the property is divested from the former, i.e. the company and passes to the trustee and becomes his property, while in the case of winding up the property remains in the hands of the company. In *Rex v Wells*, (1812) 1

of law that where the King's and the subject's claims are to be preferred, has been established. It is only when claims of the Crown and claims of common persons (to use an old expression) 'concur' or come into competition that the Crown is preferred. The Crown has no more right than a common person to seize A's property and apply it in or towards the discharge of a debt due from B. It is a matter of common justice and, it may be added of common honesty,' per Lord Macnaghten in *Ragho Prosad v Lala Mewa Lal*, 34 All 223 (PC) 15 CLJ 327 (PC) 16 CWN 433 9 ALJ 401. The Crown has priority over unsecured creditors in the payment of debts. Where there are funds in Court belonging to the debtor the Court can order payment of a Crown debt due by the debtor, on the application of the Crown without a formal attachment being issued, *Soniram Rameshur v Mary Pinto* 11 Rang 467. For a debt due to the Crown by the insolvent and which accrued due before he was adjudicated an insolvent the Government brought the insolvent's properties to sale and sold them in auction without reference to the Official Receiver. It was a debt provable in insolvency. It was held that the sale was invalid. After adjudication the insolvent's properties become vested in the Official Receiver under sec 28(2). The course open to the Crown is to prove the claim in insolvency and then under sec 61 to claim preference as a Crown debt, C M S A No 142 of 1930 (Madras), 65 MLJ 35 (Notes).

Rights of the Crown to prove.

A person who had executed a mortgage of his immovable

was held that if the Government wished to rely upon the protection given by s 55 Provincial Insolvency Act, to bona fide transaction prior to the date of the order of adjudication it was the duty of the Crown to have pleaded the protection of the section and

further the burden was upon the Crown to show that at the time of the transaction in question it had no notice of the presentation of an insolvency petition. It was further held that the sale should be set aside but that as the debt due to the Crown was contracted before date of adjudication the debt due to the Crown was provable in the insolvency under the provisions of sec 34 (2) and in proof of the debt the Crown should have priority in the distribution of the property of the insolvent under s 61 (1) (a). Consequently the proper course of the Crown to pursue was to prove in the insolvency the amount due on account of the rent as a debt and then to claim priority under s 61 (1) (a). *Secretary of State v S C Niyogi* 158 I C 361 1935 A I R (R) 273

Crown debts under the Indian Companies Act

Sec 229 of the Indian Companies Act makes the rules of bankruptcy applicable as far as may be. Where however there is a conflict between the Indian Companies Act and the Insolvency Act the provisions of the Companies Act must be given effect to. And section 230 of the Companies Act was enacted to deal specially with the same questions as to priority as were dealt with by sec 61 of the Provincial Insolvency Act with the object of superseding that section of the Insolvency Act and confining the decision on all such matters to the provisions of sec 230 of the Companies Act. Thus claims by the Local Government to the expenses of an investigation (under sec 138 of the Companies Act) into the affairs of the Company in liquidation not being such as are referred to in sub sec (1) (a) of sec 230 of the Companies Act are not entitled to priority. *Secretary of State v The Punjab Industrial Bank* 12 Lah 678 32 P L R 367 134 I C 200 1931 A I R (L) 351

No priority of Crown debts over mortgages

In English mortgages the ownership is wholly transferred to the creditor which is however liable to be divested by the repayment of the loan on the appointed day. The mortgagees have the right to enter upon possession of the property immediately upon the execution of the deed but the possession of the mortgagor is protected by the covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged. He has no debt provable in the insolvency until his security has been valued or realised. It stands outside bankruptcy. Crown is therefore not entitled to priority over the immovable property so mortgaged. *Dost Muhammad Khan v Manick* 29 All 337 *Ebrahim Khan v Rangaswami Nacker* 28 Mad 420. The rents and profits arising out of mortgaged land in the hands of a Receiver *prima facie* are not sums payable to the mortgagor but form part of the mortgaged property upon which the debt due to the mortgagee was secured. The Crown is not entitled

to be paid such rents and profits in respect of a debt due by the mortgagor to Government in priority to the party entitled to it, namely, the mortgagee decree holder, *Ma Joo Tan v The Collector of Rangoon*, 12 Rong 437. The second mortgagee has a right to redeem. The ownership of the property passes to the first mortgagee and he is therefore not entitled to priority over the Crown. *Bank of Upper India v Administrator General, Bengal*, 45 Cal 653. 2 C W N 793.

Debts due to any local authority

'The expression 'local authority' shall mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to or entrusted by the Government with the control or management of municipal or local funds' as s. 28 of the General Clauses Act, 2 of 1897. Under sec. 33 (1) (a) of the Bankruptcy Act, 1914, there shall be paid in priority to all other local debts 'all parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time and all the assessed taxes, land tax, property or income tax assessed in the bankrupt up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment'. Both under sec. 61 (1) (a) of this Act and sec. 49 (1) (a) of the Presidency Towns Insolvency Act there shall be paid in priority to all other debts 'all debts due to the Crown or to any local authority'. Since in a Hindu joint family the sons are liable to pay their father's suretyship debt, upon the insolvency of the father and the sons the interests of the sons also in the joint family are answerable in the discharge of such debts to a public body in priority over all the debts, whether of the sons or of the joint family. The priority is not restricted to the interest of the father alone. *In re Assaram Moti Ram*, 126 IC 477. 1930 AIR (S) 244. The Port Trust is a local authority. The words 'debts due the Crown or local authority' in sec. 61 means debts provable in insolvency, *Official Assignee v Trustees, Port Trust, Madras* 1 LR (1937) M. 178. The expression "debt due to the Crown or local authority" includes not only a debt which has become due to the Crown but also a debt which is provable in insolvency. *Secretary of State v Official Assignee* 174 IC 157. 1938 AIR (S) 49.

Clause (b); Salary or wages.

Under sec. 33 (1) (b) and (c) of the Bankruptcy Act "all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds, and all wages of any labourer or workmen not exceeding twenty five pounds whether payable for time or for piece work, in respect of services rendered to the bankrupt during two months before the receiving order will be paid in priority to all other debts provided that where any

labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, the priority under this section shall extend to the whole of such sum or a part thereof as the Court may decide to be due under the contract proportionate to the time of service upto the date of the receiving order'. Under section 49 (1) (b) of the Presidency Towns Insolvency Act, 'all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition not exceeding three hundred rupees for each such clerk and one hundred rupees for each such servant or labourer shall be paid in priority to all other debts'. Salary does not include the prospective earnings of a professional man in the exercise of his personal skill and knowledge *Exp Benuell re Hutton*, (1884) 14 QBD 301. Where a commercial traveller was employed at a fixed salary of £2 a week and a commission of 3¼ per cent on all business done by him *Bigham, J* held that the commission was part of the salary and must be paid in priority, *Re Klin, exp Goodwin*, (1906) 22 TLR 664. The wages or salary must be in respect of personal services rendered by the clerk or servant, not those which he pays some one else to render, *Cairney v Back*, (1906) 2 KB 746.

Clerk or servant.

Occasional clerk or servants are not entitled to the benefit of priority, *Ex parte Waller*, LR 15 Eq 412, *Cairney v Back*, (1906) 2 KB 746.

Labourer.

The expression 'labourer' denotes persons who earn their daily bread by personal manual labour or in occupations which require little or no art or skill or previous education, *J Chand v Aba*, Bom 132. Thus a person employed to spin cotton in a spinning mill is a labourer.

Other debts entitled to priority.

Besides the Crown debts and salary or wages of any clerk, servant or labourer as stated above there are other debts which, under the Bankruptcy Act, are entitled to be paid in priority, viz, all amounts not exceeding £100 due in respect of compensation under the Workmen's Compensation Act, 1906, and all contributions payable under the National Insurance Act, 1911, by the bankrupt in respect of employed contributors and workmen in an insured trade during four months before the date of the receiving order. Under the general law where the estate of a deceased debtor is being administered under the Bankruptcy law (sec 61, Provincial Insolvency Act), all expenses properly incurred by the person representative of the deceased are to be paid in full in priority.

all other debts [sec 130 sub sec (6), B Act, 1914] The trustee has power to prefer a claim where an apprentice or clerk was attached to the bankrupt prior to bankruptcy and a sum of money has in consequence been paid to the bankrupt as a fee or premium (sec 34, Bankruptcy Act)

Trust money.

By the Friendly Society's Act, 1896, trustees of a friendly society have, on the bankruptcy of an officer of the society, who by virtue of his office, has in his possession money or property of the society, a right to receive the same in preference to other debts and claims against the estate. The trustees of a savings bank are placed in a similar position to that of trustees of a friendly society [sec 33, sub sec (9), Trustees Savings Bank Act, 1863] Where a trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him. Where a banker, who was one of the trustees of an endowed school, had a sum of money belonging to the endowment entrusted to him by the co trustees, and he put that sum into his own business without the knowledge or consent of his co trustees and his business came to a stand still, and he was adjudicated an insolvent, it was held that the bankrupt's co trustees were entitled to a charge on the whole estate in the hands of the Official Assignee in priority to other creditors or on the basis of following moneys which have been misappropriated to the fund in which they must be supposed to be a bank sunk. *In re Haller's Estate*, Knatchbull v Hallett, (1879)

(1914) A C 398, Pennell v

Official Assignee of Madras

57 M L J 99 34 C W N

40 (Notes) Once a trust is established the right of the cestui que trust to follow the trust property or the proceeds thereof does not depend on a rightful or wrongful disposition of the property by the trustee. As between the cestui que trust and the trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however, much it may be changed or altered in its nature or character, and all the fruit of such property whether in its original or altered state, continues to be subject to or affected by the trust. The defendant received a sum of Rs 10 000 to be invested in his business in the name of the plaintiff, then a minor, and it was so invested. Subsequently the defendant was adjudicated insolvent, and the Official Assignee sold his stock in trade and had funds in his hands divisible among the insolvent's creditors. The plaintiff claimed preferential payment in respect of the sum of Rs 10 000. It was held (allowing the claim) that the transaction being admittedly a trust, the plaintiff was entitled to a charge upon the sale proceeds in the hands of the Official Assignee, *The Official Assignee of Madras v T Krishnaji Bhat*, 60 I A 203 56 Mad 570

(PC) 65 MLJ 1 1933 MWN 575 37 CWN 713. 57 CLJ 433 35 Bom LR 756 1933 ALJ 637 143 IC 162 1933 AIR (PC) 148 affirming *The Official Assignee of Madras v. Krishnaji Bhat*, 59 MLJ 718 31 LW 792 1930 MWN 362 125 IC 533 1930 AIR (M) 693.

Deposit is not Trust.

Mere deposit of money with a person who is afterwards adjudicated an insolvent does not entitle the depositor to claim a charge on the assets of the insolvent in the hands of the Official Receiver. To be entitled to such a charge it must be shown that the money was deposited with the insolvent for a specific purpose, *Satyamma v The Official Receiver, Kistna District*, 38 LW 891. 146 IC 699 1933 AIR (M) 917. When a trust money is handed over to any person, whether he be trustee or not, to use in his business subject to the payment of interest a relationship of creditor and debtor is set up. The circumstance that he can use the money as his own and that he has to pay interest has the effect of engrafting a contract upon the trust whereby title to the money is transferred and the trust can no longer look to that sum of money as its res or subject matter but to a promise to pay an equal sum. Where, therefore, a certain trust had been constituted on the footing that its fund could be invested and used by the insolvent trustee in his own name in consideration of his paying interest he becomes, when he invests the money in his business, only a debtor to the trust and the trust can have no charge on or preferential right in his general assets in insolvency, but must only rank with ordinary creditors, *Nagappa Chettiar v Official Assignee, Madras*, 60 MLJ 355 1930 MWN 1077 134 IC 161 1931 AIR (M) 251.

Rent due to landlord.

By virtue of the provisions contained in sec 101 of the Oudh Rent Act a landlord is a secured creditor of his tenant for his rent, and when the tenant becomes insolvent, the landlord is entitled to be paid the rent due to him, out of the proceeds of the sale of the crops of the insolvent before distribution is made among other creditors, *Bishambher Nath v Rukha*, 81 Ind Cas 647.

Secured debts.

A mortgagee who procures a Receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged property in the hands of the Receiver in preference to the Official Assignee. An equitable mortgagee who obtains the appointment of a Receiver of the mortgaged property establishes a claim to have the recoveries made by the Receiver earmarked for his benefit, in case the mortgaged property is not sufficient to satisfy his claim, and an Official Assignee cannot claim the rents and profits of the property in hands of the Receiver for the benefit of the general body

creditors, *Official Assignee v Punjab National Bank Ltd*, 26 S L R 61 1932 A I R (S) 82

Sub sec. (2) , Equality of debts entitled to priority.

It is provided by sec 33 (2) of the Bankruptcy Act, 1914, and sec 49 (2) of the Presidency Towns Insolvency Act and sub-sec (2) of this section that the debts specified in sub-sec (1) shall rank equally between themselves

Sub-sec. (3) , Cost of administration.

This is section 33 (3) of the Bankruptcy Act, 1914, and section 1 (1) (2) of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict, Ch 62) The preferred debts are to be paid forthwith subject to the retention of such sum as may be necessary for the expenses of administration or otherwise Under these sections the payment of Crown debts, salaries and wages of servants and clerks are deferred until the payment of the costs of administration

Arrears of rent.

Rent for the period from the date of passing of the order of adjudication to the date when the premises were vacated was to be treated as 'expenses of administration or otherwise' and was to be given priority while the rent due up to the date of the passing of the order of adjudication was to rank as debt provable under the law and in respect of which the landlord was to rank *pari passu* with other creditors who had their debts proved. *The Official Trustee of Property Tax v. The Official Assignee* 57 Cal 1210 34 C W N 751 51 C 1 R (C) 459 Hence it no doubt follows that the rent for premises in which the insolvent's goods are stored after adjudication comes under 'expenses of administration' within the meaning of sec 61 (3) and takes priority even over the debts of the secured creditor, yet where the premises are vacated before the order of adjudication is passed the owner of the premises is not entitled to claim priority under sec 61 (3) for the amount due to him as rent, *Mt Mohammadi Begam v Ahsan Ahsan & Co*, 39 P L R 314 171 I C 992 1937 A I R (L) 96 Under sec 49 of the Presidency Towns Insolvency Act, the rent due to a landlord from the insolvent not exceeding one month's rent is also entitled to be paid in priority to all other debts

Sub-sec. (4) : Distribution of partnership assets

As has been observed under sec 28 (2) where there is a joint adjudication the whole of the property of the bankrupt whether partnership or separate property, vests in the trustee and is administered by him, but if only one member of a partnership becomes bankrupt, his trustee becomes tenant in common with other partners subject, however, to an account, for, as Lord Tenterden said in *Holderness v Shackles*, 8 B and C 612 "It is clearly established

as a good principle of law that if one partner becomes a bankrupt his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership." The trustee does not become a co partner with the solvent partners, but the bankruptcy of one partner constitutes a dissolution of the partnership, (*Fox v Hanbury*, Cowp 445, *Eduards v Hooper*, 11 M and W 767).

the partners Sub section 33 of the Bankruptcy Act provides for the distribution of joint and separate estate laid down by Lord King in *Exp Cook*, 2 P Wms 500, which runs as follows "Joint creditors shall be first paid out of the partnership of the joint estate, and the separate creditor out of the separate estate of each partner and if there be a surplus of the joint estate besides what will pay the joint creditors the same shall be applied to pay the separate creditors, and if there be, on the other hand a surplus of the separate estate beyond what will satisfy the separate creditors it shall go to supply any deficiency that may remain as to the joint creditors." "Partnership" debt means a debt which is due from a partnership. The mere fact that a partner is personally liable for the partnership debt as a partner would not deprive it of its character as a partnership debt for the purposes of sec 61 (4). To hold that a debt for which a partner is personally liable ceases to be partnership debt would practically obliterate all distinction between the expressions "partnership" debts and "separate" debts as used in that section, *Hans Raj Khanna v Ramditta Mal*, 143 I C 755 1933 A I R (Lah) 639. Sec 49 of the Indian Partnership Act, IX of 1932 provides that "Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm." Where there are partnership debts and separate debts and some members of the partnership are those who are liable in respect of the separate debts, a creditor of the partnership in respect of a promote executed by one of the partners, has the right to elect to go against the partnership assets or against the separate assets of the executant, but having once elected, he is bound by his choice, and is not entitled to take up the other position without showing good reason for the change of election *Seshagiri Rao v Canara Bank Ltd* 1936 M W N 1070.

When an order of adjudication is passed either under the Provincial or the Presidency Towns Insolvency Act against a firm, not only does the property of the firm vest in the Official Receiver or Assignee, as the case may be, but also the property of each individual partner vests in him. Both these Acts provide for

procedure which the Official Receiver or the Assignee as the case may be is required to follow for dealing with such property. He is required to apply the partnership property in discharge of the partnership debts and likewise to apply the private property of each individual partner in discharge of his private debts in the first instance and it is only when there is a surplus of either kind of property that he has power to apply it in payment of the other debts. It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings and it would be unfair to an insolvent whose property has vested in the Official Receiver for the benefit of his creditors to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed on an application directed against him but against a firm in which he was a partner because for the sake of convenience the Court passed an order against the firm and did not pass a specific order against each individual partner in such firm *Heerji Jiraj v Firm of Valibram Mudi* 25 S L R 422 1932 A I R (S) 39

In order to show that certain persons are partners of a firm so as to make their estate available for distribution amongst their creditors it must be proved by evidence that the persons alleged to be partners have agreed to combine their property labour and skill in the business and to share the profits and losses in the same. From the mere fact that a person carrying on business is a co parcener in a joint Hindu family it does not necessarily follow that all his co parceners are his partners in that business. *Vilhal v Shah Khushad* 27 Bom 157 *Dinajpur Trading and Banking Company Ltd v Probhash Chandra Sen* 56 C L J 440

Where two person have joint and sepearate property and joint and separate debts the joint properties are applied in the first instance in payment of joint debts and if there is a surplus it is dealt with as part of the separate property in proportion to the right and interest of each partner in the estate. Similarly the separate property is applicable in the first instance in payment of their separate debts and after such debts are discharged the surplus if any is dealt with as part of the joint property. Where a receiving order is made against a partner any creditor to whom the partner is indebted jointly with other partners or any of them may prove his debt for the purpose of voting at any meeting of the creditors and may vote but he cannot where the partner is adjudged bankrupt receive a dividend out of the separate property until all joint of their separate
5 1930 A I R (S)
of the firm were
sufficient to pay in full the whole of the creditors on a careful realisation by the Receiver no question arises for administration of

the separate estates of the partners. On the other hand, there may be a deficiency in the assets of the firm. In that case, the creditors will have to resort to the assets of the separate estates of the partners and then it will have to be determined what are the separate assets of the partners and how far the creditors are to be paid from the assets of the separate estates. These are matters which are to be determined after adjudication, *Debendra Chandra Sikdar v Purusottam Das*, 55 IC 186. The petitioning creditor of an insolvent partnership is not entitled to payment out of the separate assets of the partners in competition with their separate creditors. The exception allowed in English law in his favour should not be allowed in applying the provisions of sub-sec (4) of sec 61 of the Provincial Insolvency Act, *Narain Das Dorilal v Mihir Lal*, 1934 ALJ 676 3 AWR 481 149 IC 935 1934 AIR (All) 521.

In bankruptcy there is only one administration of joint and separate estates, though for convenience of administration the creditors are divided into two classes, *Exp Findley*, (1881) 17 Ch D 334. Joint creditors may prove against and receive dividends out of each of the separate estates provided there is no joint estate and no solvent partner who can be sued *Exp Kensington* 14 Ves 447. *Re Budgett*, (1894) 2 Ch 557. In *Sardarmal v Arniyal*, 21 Bom. 205, the question arose whether, after a separate adjudication of insolvency against one partner a joint creditor can attach and sell the firm's property, or even the shares in it of the solvent partners as

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Act, 1890, where the goods of a debtor are taken in execution, and before the sale or completion of the execution notice is served on the Sheriff that a receiving order is made against the debtor, the Sheriff shall on request deliver the goods and any money seized or received in part satisfaction of the execution to the Official Receiver the costs of execution being a first charge upon the goods or money. In his book on 'Partnership' (P 692) Lindley, LJ, expresses the opinion that these clauses apply as well to cases where one partner is bankrupt and the same partner is the execution debtor as to those where all the partners are bankrupt and all execution debtors, and that they will also be probably held to apply where one partner only is bankrupt, and the execution is against the firm for a partnership debt, provided that the Court is in a position to ensure a proper distribution of the assets of the firm among the creditors thereof."

Where the creditors have double remedy open to them¹ they intentionally elect their remedy against the joint the firm, there is nothing to estop them from ..

remedy against the separate estate of the individual partners, *Ex parte Adamson In re Coolie*, (1878) 8 Ch 807 relied on in *Ahmad Haji Dossal Moosa v Mackenzie Stuart & Co*, 106 IC 366 1928 AIR (S) 46. A decree obtained against a partnership and one of its partners can, in the event of the insolvency of the partnership, be executed against the separate property of the partner under sec 61, cl (4) of the Provincial Insolvency Act, *Jethalal v Lallubhai*, 32 Bom LR 702 127 IC 335 1930 AIR (B) 380.

Where the insolvent firm is only one firm with different branches, there is no provision in the Act that creditors who had dealings with the foreign branch must realise their debts as far as possible from the foreign property before being entitled to share rateably with creditors in British India, *Mongat Rai v Lala Mohan Lal*, 149 IC 935 1934 AIR (Lah) 33.

For distribution of assets of Hindu family firm vide notes under sec 28 (2) page 265 supra

Debtor cannot prove against his own creditors.

The principle that a debtor cannot prove in competition with his own creditors generally prevents either the joint or separate estate from being augmented against each other, but to this rule there is an exception, and that is, where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of partnership, *Exp Sillitoe I GI & J* 374. In such a case the partner so defrauded, or if he be bankrupt his separate estate, may prove against his joint estate in competition with his joint creditors.

Sub sec (5) ; No priority in payment of scheduled debts.

This is sec 37 (7) of the Bankruptcy Act, 1914 and sec 49 (5) of the Presidency Towns Insolvency Act, III of 1909. After payment (1) of the costs of administration (2) Crown debts, salary or wages, (3) joint debts out of the joint property, (4) separate debts out of the separate property, the balance, if any, of the insolvent's assets will be paid rateably to all the creditors who have proved their debts and have their names entered under sec 33, in the schedule of creditors.

This section it must be noted, should be read subject to the provisions of sec 52 under which an execution creditor is entitled to be paid his costs of the suit and the execution in priority to the debts due to the other creditors where the property of the debtor against which execution has issued is delivered to the Receiver by the executing Court.

A debtor was adjudicated insolvent on a creditor's petition. Two of the debts due to the creditor were by the insolvent and his father, since deceased jointly. The insolvent inherited some property from his father which he disposed of before his insolvency.

Only one of such properties was recovered in the insolvency proceedings on the ground of undue preference. This being the only asset available to the creditors the adjudicating creditor claimed a preference over the other creditors in respect of the debts due jointly by the insolvent and his father. It was held that bankruptcy is essentially a proceeding in *personam* and only the personal debts due by the insolvent can be proved therein. The creditor could claim no priority over other creditors in respect of the joint debts in the son's insolvency. The creditor could have sued under sec 52 (2), C P C and made him personally liable for the debts of his father to the extent of the father's estate that had come into his hands and had been disposed of by him, and then could have proved in respect of this liability in the insolvency. But even in such a case the creditor could not claim priority in respect of the property disposed of and which had come into the hands of the Court by operation of the insolvency law, *P A A Chettyar Firm v T R M Chettyar Firm*, 12 Rang 602. On the question whether a creditor in insolvency who happens to hold a debt free from any taint of immorality or illegality incurred by a father as manager of a Joint Hindu family has any priority over the debts incurred by a son who was a junior member of the joint family, when both the father and son were adjudicated insolvents by one order in an insolvency petition, it was held that it is obviously the policy of the Insolvency law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt, it must necessarily be held to fall within the sub cl 5 of s 61 of the Provincial Insolvency Act, and no priority can legitimately be claimed in regard to the same. Viewed in this light of this section the unrealised simple debts of the father and that of the son would stand on the same footing. The fact that the father and the son were adjudicated jointly on the same petition should not make any difference. A joint application and even an order passed to adjudicate them both does not affect the situation. If the application and the order are split into two, and taken to have been presented and passed separately against the father and the son, the creditors of the one will not be entitled to claim any priority or a share in the property of the other. It would be difficult of course if a debt is proved to be payable not only jointly but also personally by the father and the son in which case the property of both will be jointly liable. *Thimmiah v The Official Receiver, Bellary*, (1939) 1 M L J 158.

Non-scheduled debts.

The Official Assignee distributed the assets of the insolvent after deducting commission, etc., to the two scheduled creditors though he had notice of claim by three other creditors, and their claims were neither admitted nor rejected. It was held that the Official Assignee was personally liable for the amount, of

three creditors had been deprived *Re Archibald Gilchrist Pearce* 20 CWN 653

Sub sec. (6). Payment of Interest subsequent to adjudication.

The rate of interest (six per cent) mentioned in sec 61 (6) is primarily to provide for those cases where the surplus does not admit payment of more than six per cent to any class of creditors. The object is not to reduce the rate of interest fixed by the contract between the parties when the assets are enough and there is a surplus. Sections 45 61 and 67 should be read together and if possible such construction should be placed on them as would make the said provisions not inconsistent with each other. A creditor of the insolvent to whom money is due under a promissory note which provides for a higher rate of interest than six per cent per annum is entitled to get interest on the principal amount due to him on the date of adjudication at the contract rate mentioned in the promissory note for the period between the date of adjudication and the date of payment of the principal amount by the Official Receiver when there is a sufficient surplus assets in the hands of the Official Receiver after paying the amount of debts included in the schedule unless there is some reason for reducing the contract rate of interest, *Chinn Venkataswami v Lakshminaraswami* 34 LW 143 1931 MN 937 134 IC 160 1931 AIR (M) 729

As soon as the debtor is adjudged insolvent his entire estate vests in the Court or the Receiver and his estate becomes liable to distribution at once. Ordinarily therefore interest ceases to run automatically, and for purposes of dividend the rate of interest for all creditors is a uniform rate of 6 per cent per annum. When however all the debts entered in the schedule have been paid off the creditors are entitled to a further amount by way of interest at the rate of 6 per cent per annum. But after this amount also has been paid the surplus goes to the insolvent *Ganga Sahu v Mukkanam Ali Khan* 97 IC 556 24 ALJ 441 1926 AIR (All) 361. The rule is clear, that when a creditor is competing with other creditors he cannot prove for interest accrued due after adjudication. Of course, if he has a security for his debts the case is different. But, in the absence of any security, a creditor cannot get interest on his debts accrued subsequent to the adjudication until the creditors, joint and separate have been satisfied the principal of their debts. Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent to be paid on such proved or admitted contract debts as expressly or impliedly carry interest from the date on which the insolvency petition was filed. In *Re Mithanai Shah* 13 Cal 66. See also In *Re Thomas Court*, 1 MHC R 217.

For general rule as to interest on adjudication vide sec 48, *supra* and notes thereunder

62. (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

Calculation of dividends

- (a) debts provable under this Act and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs ;
- (b) debts provable under this Act, the subject of claims not yet determined ,
- (c) disputed proofs of claims ; and
- (d) the expenses necessary for the administration of the estate or otherwise

(2) Subject to provisions of sub-section (1), all money in hand shall be distributed as dividends,

Review.

This is section 39 (1) and (2) Act III of 1907, and is based upon sec 64 of the Bankruptcy Act, 1914, and sec 71 of the Presidency Towns Insolvency Act, III of 1909. Sec 62 and the following sections deal with the rules of distribution of the assets of the insolvent realised by the Receiver. This is an accordance with "the theory in bankruptcy which is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at the date." It may be pointed out that though under sec 59 it has been provided that "the Receiver shall with all convenient speed realise the property of the debtor and distribute dividends among the creditors entitled thereto" there is no provision in the Act corresponding to sec 69 of the Presidency Towns Insolvency Act which provides that "the first dividend (if any) shall be declared and be distributed within one year after the adjudication, unless the Official Assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date and subsequent dividends, shall in the absence of sufficient reason to the contrary be declared and be payable at intervals of not more than six months." A similar provision in the Provincial Insolvency Act is highly needed for the speedy administration of the insolvent's estate.

three creditors had been deprived, *Re Archibald Gilchrist Peace*, 26 C.W.N. 653

Sub sec. (6) , Payment of interest subsequent to adjudication.

The rate of interest (six per cent) mentioned in sec 61 (6) is primarily to provide for those cases where the surplus does not admit payment of more than six per cent to any class of creditors. The object is not to reduce the rate of interest fixed by the contract between the parties when the assets are enough and there is a surplus. Sections 48, 61 and 67 should be read together and if possible such construction should be placed on them as would make the said provisions not inconsistent with each other. A creditor of the insolvent to whom money is due under a promissory note which provides for a higher rate of interest than six per cent per annum is entitled to get interest on the principal amount due to him on the date of adjudication at the contract rate mentioned in the promissory note for the period, between the date of adjudication and the date of payment of the principal amount by the Official Receiver, when there is a sufficient surplus assets in the hands of the Official Receiver after paying the amount of debts included in the schedule unless there is some reason for reducing the contract rate of interest, *China Venkataraju v Lakshmanaswami* 34 L.W. 143 1931 M.W.N. 937 134 I.C. 169 1931 A.I.R. (M) 729

As soon as the debtor is adjudged insolvent his entire estate vests in the Court or the Receiver, and his estate becomes liable to distribution at once. Ordinarily, therefore, interest ceases to run automatically, and for purposes of dividend, the rate of interest for all creditors is a uniform rate of 6 per cent per annum. When however all the debts entered in the schedule have been paid off the creditors are entitled to a further amount by way of interest at the rate of 6 per cent per annum. But after this amount also has been paid the surplus goes to the insolvent, *Ganga Sahai v Mukkaram Ali Khan*, 97 I.C. 556 24 A.L.J. 441 1926 A.I.R. (All) 361. The rule is clear, that when a creditor is competing with other creditors he cannot prove for interest accrued due after adjudication. Of course, if he has a security for his debts, the case is different. But, in the absence of any security, a creditor cannot get interest on his debts, accrued subsequent to the adjudication, until the creditors, joint and separate, have been satisfied the principal of their debts. Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent to be paid on such proved or admitted contract debts as expressly or impliedly carry interest from the date on which the insolvency petition was filed, *In Re Mahomea Shah*, 13 Cal 66. See also *In Re Thomas Pereira* 1 M.H.C.R. 217

For general rule as to interest on *adjudication* vide sec 48, *supra* and notes thereunder

62. (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

- (a) debts provable under this Act and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs,
- (b) debts provable under this Act, the subject of claims not yet determined,
- (c) disputed proofs of claims, and
- (d) the expenses necessary for the administration of the estate or otherwise

(2) Subject to provisions of sub-section (1), all money in hand shall be distributed as dividends,

Review.

This is section 39 (1) and (2) Act III of 1907, and is based upon sec 64 of the Bankruptcy Act, 1914, and sec 71 of the Presidency Towns Insolvency Act, III of 1909. Sec 62 and the following sections deal with the rules of distribution of the assets of the insolvent realised by the Receiver. This is in accordance with "the theory in bankruptcy which is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at the date." It may be pointed out that though under sec 59 it has been provided that "the Receiver shall with all convenient speed realise the property of the debtor and distribute dividends among the creditors entitled thereto" there is no provision in the Act corresponding to sec 69 of the Presidency Towns Insolvency Act which provides that "the first dividend (if any) shall be declared and be distributed within one year after the adjudication, unless the Official Assignee satisfies the Court that there is sufficient reason for postponing the declaration to a later date and subsequent dividends, shall in the absence of sufficient reason to the contrary be declared and be payable at intervals of not more than six months." A similar provision in the Provincial Insolvency Act is highly needed for the speedy administration of the insolvent's estate.

Sub sec. (1) (a) , Provision for creditors residing at a distance.

This section makes provisions for the payment of the dues of creditors who have not or who could not file proof of their debts in time. The Receiver before making any distribution of dividends must keep apart in deposit with him sufficient sum to meet the claims of such creditors. There is no provision for disposal of a dividend which has not been claimed as was the case under sec 44 of the Indian Insolvency Act. Where after the admission by the trustee of the creditor's proof against a bankrupt's estate and that creditor's participation in a first dividend, it was ascertained that he had proved for and received more than he was entitled to and upon an application to the Court his proof was reduced it was held that in the absence of any rule in bankruptcy, the well known principle of equity, that a beneficiary who has been overpaid is not entitled to receive any further payment out of the common fund, until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary, was applicable with the result that the overpaid creditor was not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof, *In Re Searle Hoare & Co.*, (1924) 2 Ch. D. 325.

Provision for secured creditor

See 47 must be read as corollary to and subject to sec 62. Before the Official Receiver is required to make any reserve, the claim must be submitted in the required form and further, the Official Receiver cannot reasonably be expected to retain any assets when he is not in a position to know the extent of the debt he is to provide for. Hence where there is no compliance by a secured creditor with sec 47 there is no debt provable in respect of which the Official Receiver can have retained moneys in his hands. *In re Jamnadas Vishandas*, 1935 AIR (S) 57. A trustee need not make any reserve in respect of the amount which may ultimately become provable by a secured creditor who has neither valued nor realised his security, but that where by special circumstances a secured creditor was prevented from realising his security before declaration of dividend the Court has power to give such direction as might be proper for preventing injustice. *Exp Good*, (1880) 14 Ch D 82. *In re P Macfadyen & Co*, (1908) 1 KB 675. — — — — — Agreement between the English trustee and the Indian trustee providing for a pool of the assets among the English and Indian trustees. — — — — — On the bankruptcy of a husband and his wife had been paying the premiums and interest on the life policy of her husband, it was held that even though all payments had been made during the bankruptcy, the Official Receiver should not be allowed to retain the policy moneys without the wife being

repaid the sums she had paid for premiums and interest, *In re Tyler*, (1907) 1 K B 865, *In re Hall*, (1907) 1 K B 875

Failure to retain assets.

Where the Official Assignee distributed the assets of the insolvent after deducting commission, etc., to the two scheduled creditors though he had notice of claim by three other creditors and their claims were neither admitted nor rejected it was held, that the Official Assignee was personally liable for the amount, of which the three creditors had been deprived, *Re Archibald Gilchrist Peace*, 26 C W N 653

63. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein

Right of creditor who has not proved debt before declaration of a dividend

Review.

This is sec 39 (3) of Act, III of 1907 and corresponds to sec 65 of the Bankruptcy Act, 1914 and sec 72 of the Presidency Towns Insolvency Act, III of 1909

Right of Creditor to prove debt after final discharge

Sec 33 (3) of the Provincial Insolvency Act prevents a creditor from proving his debt after the insolvent has been given a final discharge. Sec 63 does not give a creditor an absolute right to prove his debt at any time so long as there is money in the hands of the receiver. Sec 63 merely regulates the rights of the creditors, *inter se*. *The Bank of Chettinad Ltd v Ko Tim*, 14 R 529

Creditor's right to dividend.

A creditor can prove as long as there are assets available for distribution, *Re Mc Murdo*, (1902) 2 Ch 684. A creditor may come in and prove within any time before a final dividend is declared, *Exp Boddam*, 2 D F & J 625. In *Ajudhyanath v Ananidas*, 3 All 799, the creditor of an insolvent who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants, on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that

the plaintiff had not applied for its registration within the time notified by them. It was held that inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it. In *Re Cobbold* 36 Cal 512 the High Court allowed the claim of a creditor to be scheduled, in appeal. Creditors who prove their claims after declaration and payment of any dividends do not rank *pari passu* with between themselves but are, under sec 63 entitled to payment in full in the order of their proving their respective claims so long as there are funds left in the hands of the Official Receiver, liable for distribution. The claim of any such creditor cannot therefore be held up until the claims of all such creditors are decided, *Hiranand Mulchand v Official Receiver* 100 IC 791. The negligent creditors guilty of delay in proving their debts will not be entitled to disturb the distribution of any dividend already declared on the ground that no individual notices were sent by the Receiver though they may be entitled to be paid the dividend of dividends which they have failed to receive out of any money which may be in the hands of the Receiver before the declaration of any future dividend. *Vrij Lal Mansukhram v Chunilal Fatechand* 55 Bom 200 131 IC 881 33 Bom LR 148 1931 AIR (Bom) 210. So long as there are assets to distribute a creditor may come in and prove. But where such creditor has failed to submit his claim before the schedule of creditors has been framed, he may not be caused thereby to depend on the circumstances for their claims after he claims of any one in what remains of

the wreck to the extent of the dividends already declared. In *re Amalrai Godhumal* 1933 AIR (S) 370. A creditor who has been guilty of delay by not proving his claim in time is not entitled to disturb the distribution of any dividend already made whether or not it be the first and final dividend—though he may be entitled to be paid the dividend or dividends which he has failed to receive out of any money which may be in the hands of the Receiver before the declaration of any future dividend. It is the general policy of the Court not to interfere with the declaration already made in the case where a creditor comes in late, In *re Jamnadas Vishindas* 30 SLR 161 1935 AIR (S) 57.

Creditor's right to prove in a composition.

In a case in which a person had been adjudged an insolvent a composition scheme in which all creditors named in the insolvency application were to be paid at 4 annas in the rupee was approved by the District Judge and the adjudication was annulled. The scheme was based on a surety bond given by the surety by which he undertook to pay the creditors named in the scheme schedule

the four anna dividend provided by the scheme and also to pay into Court such sums as the Court ordered to be paid to such creditors as the Court thereafter brought on to the scheme schedule. In consideration of his surety bond the assets of the insolvent were handed over to the surety. On the application made by a creditor subsequent to the annulment of adjudication whose name appeared in the original insolvency petition schedule, but who had not been served with any notice of the scheme, the District Judge allowed him to prove his debt on foot of the composition scheme and directed the surety to pay him 4 annas dividend. It was held that the order was right and that although the annulment of adjudication puts an end to the insolvent's estate of insolvency, it does not, in case such as are contemplated by sec 37, when the Court still retains control of the insolvent's assets, put an end to the insolvency proceedings within the meaning of sec 28 of the Act. All creditors named in the insolvency petition schedule are bound by composition which has been approved by the Court and must come in on foot of it and cannot have any remedy *de hors* the insolvency schedule, unless the Court thinks his debt is due, when he proves his debt, be admitted on foot of the composition to have his name added to those already in the scheme schedule under sec. 39 of the Act and get his dividend at the same rate so far as there are still assets available for distribution, *Kamireddi Timappa v. Devasi Harpal*, 56 M.L.J. 458 . 115 I.C. 815 . (1929) A.J.R. (M.) 157.

Creditor's right to prove in case of summary administration.

In the case of summary administration under s 74, a creditor is entitled to come before the Court at any time before the single dividend is distributed and proving his claim to a share in the amounts realised. When a creditor makes an application to have his claim included before the distribution of the dividend, the Court is bound to entertain it and deal with it on the merits. The Court has under s. 74 (3) to enquire into the debts and assets at the hearing of the petition and cannot transfer the petition itself to the Official Receiver for disposal, as the Act does not provide for any such delegation to the official receiver of the power of disposing of the insolvency petition summarily under s. 74. If such a petition is transferred to receiver and he frames a schedule which is not required under s 74, that cannot make the ordinary procedure applicable to the case and when the dividend for which the Official Receiver prepares a schedule is the one and the only dividend that can be possibly declared in the insolvency, it is still a dividend under s. 64 of the Act, and not an *interim* dividend under s. 63, so as to bar the right of a creditor to prove his debt before the distribution of such dividend, when that creditor

not had any notice under s 64 *Gopalakrishnaiah v Venkataswamy* 1937 M W N 1160

Notice of declaration of dividend.

At the time of the declaration of the first dividend, it is not possible for the Receiver to be sure whether it will or will not be the final dividend. Unless it is quite clear that it is the final dividend it is not incumbent upon him to give individual notices as under sec 64, *Vij Lal Mansukhram v Chunilal Fatechand* 55 Bom 200 33 Bom L.R. 148 131 I.C. 881 1931 A.I.R. (Bom) 210

64. When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application, by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

Review.

This is sec 39 (4) of Act, III of 1907 and based upon sec 67 of the Bankruptcy Act, 1914 and sec 73 of the Presidency Towns Insolvency Act, III of 1909

Notice before final dividend imperative.

Under sec 64 of the Provincial Insolvency Act the Official Receiver is bound to give notice of a final dividend not only to those creditors who have notified their claims and whose names are entered in the Schedule by him but to all such creditors whose claims have been notified to the Official Receiver either by the creditors themselves or by the insolvent. The notice is not confined to debts referred to in sec 62, cl (4), sub-cl (b) (c) but extends to debts referred to in sub-cl (a) of that section, and if the Official Receiver has any asset in his hand he is bound to adjudicate on all such claims as are preferred to him in response to the notice of final dividend so issued by him, *In re Sunderjee Bhamji*, 107 I.C. 439

1928 A.I.R. (S.) 105. Unless it is quite clear that it is the final dividend it is not incumbent on the Receiver to give individual notices under sec. 64, *Vij Lal Mansukhram v. Chunilal Fatechand*, 55 Bom 200 33 Bom. L.R. 148. 131 I.C. 881. 1931 A.I.R. (Bom) 210. The notice under sec. 64 for the declaration should be one not calling upon the public to notify claims but one calling upon such of the creditors as have already notified their claims to prove their claims within a fixed time, *Hiranand Mulchand v. Official Receiver*, 100 I.C. 791

Form of notice.

Under sec. 39 (4) of Act, III of 1907, the particular form of notice to creditors whose claims have been notified but not proved, is prescribed whenever a final dividend is to be declared. In Madras the Rules under the Insolvency Act require a separate registered letter addressed to each creditor, and when a notice of that sort is prescribed by the Rules made under the statute a strict compliance with the Rules is necessary before the creditor's claim to share in the final dividend can be disallowed. Where a final dividend has been declared without giving the required notice to a creditor, the right of proof is not affected by mere laches on his part in not furnishing proof earlier, and he should be allowed to re-open the matter and given an opportunity of proving his debt within a time to be fixed by the Court, *Venkatanarayana Chetty v. Setugan Chetty*, 47 Mad 916. 47 M.L.J. 240. 80 Ind. Cas. 620. 1923 A.I.R. (M.) 769

Succession certificate not necessary to receive dividend.

Under sec. 64 of the Provincial Insolvency Act, the creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent without insisting on a succession certificate. Sec. 4 of the Succession Certificate Act, VII of 1889, (now sec. 214 of the Indian Succession Act, XXXIX of 1925) is not applicable to such payments, *Amayachi v. Ram Chandra Iyer*, 49 M 953 1926 M.W.N. 560

65. No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the schedule, order him to pay it and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

Review.

This is section 39 (5) of Act, III of 1907 and is based upon sec. 68 of the Bankruptcy Act, 1914, and sec. 74 of the Presidency Town Insolvency Act, III of 1909.

Receiver's refusal to pay dividend.

After the declaration of a dividend a party, who has proved his debt, requested the Official Assignee by letter, to send him the amount of his dividend in a post office order and promised to send a receipt by return of post. The Official Assignee did not send any answer. It was held that the silence of the Official Assignee amounted to such a refusal to pay the dividend as entitled the creditor to an order upon petition at the cost of the Official Assignee personally, *Exp Jackson* (1842) 3 Mont D and D 1.

Creditor's remedy on refusal to pay dividend.

It is provided that no action for dividend shall lie against a trustee, but the release of the trustee from the suit or action has not the effect of preventing the Court from having jurisdiction to make such an order upon him the trustee having the money in his hands, *Re Prager*, (1876) 3 Ch D 115. An assignee of debts due to creditors who have proved cannot obtain an order for payment to him of the dividends, but after satisfying the trustee of the validity of the assignments he can apply to the Court to give leave to the trustee to place on the file a proof by him in substitution for the proofs of the assignors *Re Frost* (1899) 2 Q B 50.

Personal liability of the Receiver

In *Re Archibald Gilchrist Peace* 26 CWN 653, the Official Assignee distributed the assets of the insolvent after deducting commission, etc., to the two scheduled creditors though he had notice of claim by three other creditors and their claims were neither admitted nor rejected. It was held that "the Official Assignee was personally liable for the amount of which the three creditors had been deprived. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more." A trustee need not personally make good dividends which he has refused to pay but he is personally liable for the interest for the time that it was withheld by him together with the costs of the application. A dividend not being a debt due from the Official Receiver or trustee to the creditor to whom it is payable, cannot be attached by garnishee proceedings to answer a judgment obtained against the creditor.

Appeal.

Although under the section no suit lies against the order of a Receiver refusing payment of dividend the remedy of a creditor lies in moving the Court in the first instance and then if necessary to move the High Court against the order of the Judge by way of appeal, by leave of the District Court or of the High Court, *vide sec* 75 (3), *infra*.

66. (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct

(2) The Court may, from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may, at any time, be varied or determined by the Court.

Review.

This is section 40 of Act, III of 1907, and is based on secs 57 and 58 of the Bankruptcy Act, 1914 and section 75 of the Presidency Towns Insolvency Act, III of 1909. By this section is intended to invest the Court with authority to allow an insolvent to manage his business for beneficially winding it up giving the insolvent such allowances for the maintenance of himself and his family as the Court thinks fit and proper.

Sub-sec. (1) ; Trade.

The term 'business' is wider in its application than the term 'trade'. An isolated business transaction is trade when the trader is engaged in carrying on a business for the purpose of gaining to gain his livelihood. *Foulton*, (1890) 8 Morr 1 "In 18 Bom 294 (P.C.) Lord

Morris observed that the expression 'carry on business' is a very elastic one and almost incapable of definition so that the tribunal must in each case look to the particular circumstances. In that case the question arose whether the high priest of a shrine who received personal offerings in money from his followers could be said to carry on business. The question was answered in the negative and it was with reference to such offerings that the Judicial Committee observed that the phrase *carry on business* was intended to relate to business in which a man might contract debts and ought to be liable to be sued by persons who had business transactions with him." *Maharajah Manindra Chandra v Chandu Charan*, 24 CWN 582. "What the priest did for pilgrims could not appropriately be described as business within the meaning of sec. 59 (c). And the exercise of this calling by the insolvent under sec.

(1) now 66 could not be deemed a trade *Ananda v Ganesh* 40 Cal 678

Property acquired in subsequent trade

The title of the Official Assignee to the subsequently acquired property of the insolvent is subject to two qualifications (1) when the insolvent has acquired property subject to lien and obligations in such a case the property taken is subject to equities and charges which affect it in the hands of the insolvent and (2) when the insolvent carries on a trade at subsequent period with the assent of the Assignee and the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade in priority to the claim of the Assignee *Moses Kerokoose v Benjamin Brookes* 8 MIA 339 4 W R 61 1 Suth PCJ 426

Sub sec (2), Allowance for the support of the insolvent and his family

In making the appropriation of income for the benefit of creditors the Court acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for the insolvent's proper maintenance according to his condition in life. The statute law in this country fixes the amount by sec 60 CPC read with sec 16 (2) now 28 (5) of the Provincial Insolvency Act. The Court acting under sec 40 (2) [now sec 66 (2)] cannot allow more than half the insolvent's salary for the maintenance of himself and his family *Tulsi Lal v Cirsham* 38 Ind Cas 410

Is it then that the amount of the insolvent's allowance irreversibly fixed by sec 60 CPC? In *Radha Mohan v M C Whyte* 43 All 364 21 ALJ 216 73 Ind Cas 413 1923 AIR All 466 Walsh J fully discussed this question and answered it in the negative. His Lordship held There is no doubt that in the case of a person in India in receipt of a salary the maximum which is divisible amongst the creditors is half. The maximum is fixed by statute. Sec 28 makes the whole of the property of the insolvent on adjudication divisible amongst the creditors but excepts by sub section 5 from the property so divisible any property which is exempted by the CPC from attachment. Sec 60 CPC exempts half the salary from attachment. The combined operation therefore of secs 28 (5) of the Provincial Insolvency Act and 60 (1) (i) 3 of the CPC is to make half his salary divisible among the creditors. The creditors in the appeal contend that this amount is not only the maximum but the minimum. The difficulty of accepting this is that sec 66 (2) provides that the Court may from time to time make such allowance as it may think just to the insolvent. If both the maximum and minimum are fixed by statute this position is nugatory and might as well be struck out of the Act. If the section is intended

to fetter the discretion of the Insolvency Court in the case of a man who is earning his money by salary and his half salary was already protected by the operation of sec 60 CPC the Legislature ought to have said so. The argument really invites us to legislate rather than to interpret. We hold that the law in India is precisely the same as in England on this matter. Indeed historically it is correct to say that the sub section in question viz sec 66 (2) is taken directly from the English legislation on the subject, and the Insolvency Courts in this country, inspite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by sec 60 CPC have an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent out of the remaining half which is otherwise divisible amongst the creditors. The Court is not bound to order that one half of it be given to the receiver for distribution among the creditors. It has an absolute jurisdiction to make a further reasonable allowance appropriate to the conditions and circumstances of the insolvent out of remaining one half which is otherwise divisible among the creditors. When the insolvent who was getting a salary of Rs 107 had to maintain five school going children besides his wife and widowed sister and his insolvency was due to unforeseen circumstances and the Court ordered Rs 20 to be paid to receiver for distribution among creditors it was held that the lower Court had exercised discretion properly and no interference was necessary. *Raj Singh v Official Receiver, Lahore* 160 IC 173 1935 AIR (L) 810

Maintenance for Wife and Children

It has been laid down in *Sunder Singh v Ram Nath* 7 Lah 12 27 PLR 229 93 IC 1013 1926 AIR (L) 167 that though the debtor was bound to maintain his wife and infant son, that obligation was a personal one and the payment of debts took precedence over the right of the maintenance. Following this case it has been held in *Khushiram Beharilal v Mt Sat Bhawan* 128 IC 320 31 PLR 661 that section 66 (2) provides that the Court may from time to time make such allowance as it thinks just to the insolvent out of his property for the support of himself and his family. It is obvious that what is meant is that money allowance may, in certain circumstances be given. Sec 66 (2) was clearly not meant for the purpose of reserving a house for the residence or maintenance of the wife and the family. *Vide Latha Mal v Tafa*, 40 PLR 151. Following *Khushiram Beharilal v Mt Sat Bhawan*, *supra* it has been held in *Firm Labhu Mal Binarasi Das v Mt Bibi*, 40 PLR 1057 1939 AIR (L) 39, that the wife and children of an insolvent have no legal right under the general law for any provision being made for their maintenance out of the immovable property of the insolvent. S 66 (2) is not meant for reserving the property of the insolvent for the residence and maintenance

the purpose of reserving
 ily gives discretion to Court
 the maintenance of him
 self and his family The section does not give any independent
 right to the members of the family of the insolvent to ask for any
 separate maintenance It is entirely a matter of discretion with the
 insolvent to give such support as he thinks fit to them and they are
 not entitled to any separate maintenance *Murad v Official Receiver,*
Sargodha, 37 P L R 577 1935 A I R (L) 952 In cases in which a
 question arises as to what sum should be paid out of the insolvent's
 salary for the benefit of his creditor there being no other assets
 available, the burden must be shared equitably between the in-
 solvent, the members of his family and the creditor It is not right
 creditors who should suffer
 ate sum out of the insolvent's
 In the matter of Maung Tun

12

67. The insolvent shall be entitled to any surplus
 Right of insolvent to remaining after payment in full of
 surplus his creditors with interest as pro-
 vided by this Act, and of the expenses of the proceedings
 taken thereunder

Review.

This is section 41 of Act, III of 1907 and sec 69 of the Bankrupt-
 cy Act, 1914 and sec 76 of the Presidency Towns Insolvency Act,
 III of 1909

Nature of the property vesting in the Receiver.

Farewell, J, in *Bird v Philpott*, (1900) 1 Ch 822 observed 'As
 I read the Bankruptcy Act, the trustee takes all the bankrupt's
 property not for an absolute estate in law but for limited purposes
 only, viz for the payment of creditors under that bankruptcy and
 that bankruptcy only—the principal and interest and all the costs
 of the bankruptcy Subject to that, he is a trustee for the bankrupt
 of the surplus" Any surplus that might remain after payment
 to the creditors did not belong to the trustee but was subject to
 a trust for the bankrupt, *Subbaraya v Vythilinga*, 16 Mad 85 Where
 in the exercise of the father's power of disposal the Official
 Receiver sold the family properties including the shares of the sons
 to discharge the debts of the father, the surplus if any, remaining
 after the satisfaction of the father's creditors should be returned
 to the sons, *Haridas v Lallubhai* 55 Bom 110 32 Bom L R 1362
 129 I C 153 1931 A I R (B) 50

Surplus.

The term refers to the remainder of the assets of the insolvent
 if any, in the hands of the Receiver after (1) payment in full of his

creditors, (2) with interest as provided by this Act (3) of the expenses of the proceedings taken under this Act "A debtor against whom a receiving order had been made, paid money into Court to satisfy his debts in full. The receiving order was then rescinded by an order which directed the Official Receiver after paying the debts and deducting his costs, charges and expenses to pay the balance in his hands to the debtor. A subsequent unsatisfied judgment creditor applied to the Registrar in bankruptcy for a charging order upon the balance of the fund in the hands of the Official Receiver. It was held, that the Registrar had jurisdiction to make the order", *In Re Prior*, (1921) 2 KB 333. It would seem that the bankrupt, at least after his discharge, will be entitled to have an account rendered by the Receiver if he shows reasonable ground for believing that there is a surplus—*Robson*, p 637. Where certain creditors failed to take further steps to prove their claim under a composition deed, it was held that the debtor was entitled to the unclaimed balance in the hands of the Official Assignee as trustee of the fund put up in connection with the composition arrangement, *Pareshram v Official Assignee, Calcutta*, 60 Cal 313.

Payment in full as provided by the Act.

The words "payment in full" in the section refer not merely to the payment of the creditors at the contract rate upto the date of adjudication and of interest at the statutory rate of 6 per cent from the date of adjudication under sec. 61 (6) but also the payment of the higher rate, if any, stipulated for in the contract with the creditor from the date of adjudication to the date of payment as indicated in sec 48 (2). So if after payment in full of all the debts there is a surplus left, the creditor of the insolvent to whom money is due under a promissory note providing for a rate of interest higher than the statutory 6 per cent is entitled to be paid interest at the contract rate from the date of adjudication to the date of payment before the insolvent can be entitled to the surplus, *China Venkataraju v Lakshmanaswami* 1931 MWN 937 34 L.W. 143 134 IC 169 1931 AIR (M) 729. For further notes as to what is payment in full, vide notes under section 35, *supra*.

Interest as provided by the Act.

The interest payable under the Act is provided by sections 48 and 61 (6), *supra*.

Expenses of the proceedings.

The provisions of the Act dealing with expenses of administration are laid down in sections 61 (3) and 62 (d), *supra*.

Insolvent's interest in the surplus.

Although, while the bankruptcy is pending the interest in the surplus will not give him or his assignee any

the property or the conduct
 10 Ch D 43; *Re Leithner*
 the surplus is one which
 the bankrupt can dispose of by will or deed or otherwise during
 the pendency of the bankruptcy even before the surplus is ascer-
 tained although such disposition would be ineffectual unless and
 until there proves to be a surplus *Bridg v Ph* 101 (1900) 1 Ch 922
 An insolvent can assign any prospective surplus that may remain
 over after his estate has been fully administered in insolvency.
 Such assignment is of a contingent interest and does not give the
 assignee the right to intervene until it is ascertained whether or
 not there is a surplus *Ramchandani Narayan v P V Nipunge* 23
 Bom LR 499 73 Ind Cas 379 1914 A I R (Bom) 79 A devise
 of real estate is not revoked by bankruptcy *Chamman v Chamman*,
 14 Ves 380 *Banks v Scott* 3 Mad 793

67A (1) The Court may if it thinks fit authorise the
 Committee of inspection creditors who have proved their debts to
 appoint a committee of inspection for the
 purpose of superintending the administration of the insolvent's
 property by the receiver

(2) The persons appointed to a committee of inspection
 shall be creditors who have proved their debts or persons
 holding general powers of attorney from such creditors

(3) The committee of inspection shall have such powers
 of control over the proceedings of the receiver as may be
 prescribed

Review

This section has been newly added by sec 3 of Act XXIV of
 1976 on the line of sec 19 and 20 of the Bankruptcy Act 1917
 as amended by the Bankruptcy (Amendment) Act 1966 and secs
 88 and 89 of the Presidency Towns Insolvency Act, III of 1920.
 The section has been added according to the recommendations of
 the Civil Justice Committee in the following terms. There is
 not in the Act of 1920 any provision corresponding to the provi-
 sions of the Presidency Towns Act for a committee of inspection
 in sections 88 and 89. So little use is made of these sections in
 Presidency Towns that one hesitates to recommend their intro-
 duction into the mofussil. In principle however it seems hopeless
 to expect good administration of a fund which really belongs to
 the creditors unless the creditors are given a means whereby they
 may have a proper voice in superintending the administration.
 Under the Presidency Towns Act a committee of inspection does
 not come into existence unless the Court thinks fit to authorise the

creditors, who have proved, to appoint one. We should very much like to see a commencement made in this respect at all events in some of the larger towns which come under the Provincial Act"—*Civil Justice Committee Report*, p. 235. "Provisions similar to those of secs. 88 and 89 of the Presidency Towns Act of 1909 should be inserted in the Act of 1920 so as to enable a Court to authorize the appointment from among the creditors of committees of inspection for the purpose of superintending the administration of the insolvent's property by the Receiver"—*Statements of Objects and Reasons*, Gazette of India, Part V, dated 21st August, 1926, pp. 136-7. The section as framed is without the qualifications and the safeguards of the English law. It does not make any provision for the constitution of the committee as is provided in sec. 20 of the Bankruptcy Act, which lays down that "the committee of inspection shall consist of not more than five and not less than three persons." The object of appointing a committee of inspection is for the purpose of superintending the administration of the bankrupt's property by the Receiver.

Qualification of members of the committee.

The committee of inspection as is provided in section 20 (2) of the Bankruptcy Act, shall consist of not more than five or less than three persons, possessing one or other of the following qualification—(a) that of being a creditor or holder of a general proxy or a creditor, provided that no proxy or general power-of-attorney shall be qualified to act as a member of the committee of inspection until the creditor has proved his debt and the proof has been admitted, or (b) that of being a person to whom a creditor intends to give a general proxy or a general power-of-attorney, provided that no such person shall be qualified to act as a member of the committee of inspection until he holds such a proxy or power-of-attorney, and until the creditor has proved his debt and the proof has been admitted.

Power of control over the Receiver

"The committee of inspection shall have such powers of control over the proceeding of the Receiver as may be prescribed" i.e., by rules framed under section 79 of the Act which have not as yet been framed.

Appeal to Court against Receiver.

68. If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court and the Court may confirm, reverse or modify the same.

the act or decision complained of, and make such order as it thinks just

Provided that no application under this section shall be entertained after the expiration of twenty one days from the date of the act or decision complained of

Review.

This is section 22 of Act III of 1907, and corresponds to sec 80 of the Bankruptcy Act 1914 and section 86 of the Presidency Towns Insolvency Act, III of 1909

Court's power over Receiver

'When a Receiver has been appointed he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer and for this purpose the Court may hold a summary enquiry. This view is in accord with that taken in the case of *Ex parte Cochrane* L.R. (1875) 20 Eq. 282, *Searle v Choat* (1884) 25 Ch D 773 and *In Re Rasul Huzi Cassum*, 13 Bom. L.R. 13, *Hanseshur v Rukhal* 18 C.W.N. 366. The Insolvency Court has inherent jurisdiction to rectify the Receiver's errors or mistakes or to reverse or modify his acts or decisions *Haveli Shah v Mt Zohara Jan*, 32 P.L.R. 693 133 I.C. 876 1932 A.I.R. (L.) 84

Act or decision of the Receiver liable to appeal.

Section 68 is intended to apply to provide an appeal to the Court against an act of the receiver and not appeal to the Court against acts of the Court done through the receiver. Where a receiver considers that certain property of which the insolvent is the trustee should be sold and merely invites bids under the instruction of the Court, and refers the bids received to the Court which accepts the highest bid the sale if a sale be held to have taken place, is not the act of the receiver and sec 68 does not apply to such a case. An application to set aside such sale does not therefore fall under sec 68. It falls under sec 4 and is not barred by time although filed after 21 days after the date of the sale *Deosthan Narsingji v V D Bhake* 178 I.C. 110 1938 A.I.R. (N) 320. The acts or decisions referred to against which an appeal lies must be acts or decisions of the Receiver in the discharge of his official duties both in regard to the control of the person and the administration of the property of the insolvent. A sale of property by the Receiver is an act of the Receiver within sec 68. Such a sale can be set aside by the Court whenever it is not a fair or just one. The discretion of the Court is not limited to cases of fraud,

collusion or material irregularity, *Venkatachelum Chettyar v. Murgesam*, 9 Rang 231 (SB) 131 IC 732 1932 AIR. (Rang.) 122 Where the Official Receiver attaches certain property alleged to belong to the insolvent in pursuance of the order of the Court ordering him to take possession of the property, the attachment is a mere ministerial act done in pursuance of the order of the Court and is not an act or decision of the Receiver within the meaning of sec 68. Consequently an application by the son of the insolvent alleging that the property attached was his own property falls within the scope of sec 4 and it is not barred though made more than 21 days after the date of attachment, *Nathu Ram v Madan Gopal*, 1932 ALJ 391 1932 AIR (All) 408. Even though an appeal lies to the District Judge under section 68 against any act or decision of the Official Receiver a mere refusal of the Official Receiver to take action under sections 53 and 54 cannot be deemed to be an 'act' of the Receiver under section 68 against which a creditor is competent to prefer an appeal to the District Judge, but the creditor can move the Court on refusal by the Official Receiver to take action under the Act, or prefer an appeal against the order of the District Judge, if the creditor indemnifies the Official Receiver against cost in the event of failure in such proceedings, *Ananihanarayana v. Sankaranarayana*, 47 Mad 673 79 Ind Cas 395 1924 AIR (Mad) 345. The Official Receiver has no jurisdiction to determine a claim preferred to the property alleged to be the insolvent's and the remedy against an order on a claim petition passed by the Official Receiver without jurisdiction is not by way of appeal under sec. 68, but by moving under sec 4 of the Provincial Insolvency Act, *Venkatarama Chetty v Angathayammal*, 38 L.W. 896 : 146 IC. 204. 1933 AIR (M) 471. An Official Receiver may sell the property of an insolvent as any other private individual, having disposing power over certain property vested in him. It is a distinct act of the Receiver which can be objected to by the insolvent before the Insolvency Court by an application under sec. 68. It is open to the insolvent to apply within 21 days after the Receiver decides to sell the property, which the insolvent alleges cannot be sold. In most cases the insolvent will be well advised of the objects or appeals at that stage, because if a sale actually takes place and rights of third persons come into existence, complications may be introduced, *Sardar v Natin Chandra*, 1937 A.W.R. 78. 1937 A.L.J. 129 : 167 IC. 940 1937 AIR (All) 226.

Nature of proceedings by way of appeal under S. 68.

The proceedings under sec. 68 Provincial Insolvency Act, are more akin to an appeal than to a suit and sec. 22, Limitation Act, cannot apply to them. It is not incumbent upon an applicant

the act or decision complained of, and make such order as it thinks just

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of

Review.

of 1 - corresponds to sec 80
Ins the Presidency Towns

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is directed against an action of the Official Receiver and not formally he is the only necessary party to be heard against the application. But the Court may hear other parties who are interested as for instance a purchaser from the Official Receiver. But it is not necessary that the purchaser should be formally named as a party at the hearing of the application. *Mai Chand v Official Receiver Ferozepur* 168 I C 389 1937 A I R (L) 611

Who can appeal

An insolvent or any of the creditors or any other person aggrieved by any act or decision of the Receiver may appeal to the Court. To entitle a person to appeal he must be aggrieved by any act or decision of the Receiver. The conduct of an Official Receiver in any particular respect may be brought to the notice of the Court by any person with a view of having the Receiver's act or decision in any particular matter reversed or modified it is not merely the insolvent or the creditors but any aggrieved person who can take action in this respect, *Dataram v Dioki Nandan* 58 Ind Cas 6

Person aggrieved

Person aggrieved means a person who has suffered a legal grievance a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something it is not sufficient that he has lost something which he could have obtained if another order had been passed. *Ex parte Sidebotham* (1880) 14 Ch D 458. Any person who makes an application to the Court for a decision or any other person who is brought before the Court to submit to a decision is if the decision goes against him thereby a person aggrieved by that decision. *Keraki v Sarathkumari* 20 C W N 995

Appeal by the insolvent

A decision by an Official Receiver that a certain debt is due by the insolvent is appealable under this section as such decision would aggrieve the insolvent. *Anandji Damodar v James Finlay & Co* 62 Ind Cas 441. As a matter of law during the administration of an insolvent's estate an insolvent has no legal interest in the property vested in the trustee and no *locus standi* in the administration of the estate. Section 68 of the Provincial Insolvency Act enables the insolvent to make an application to the Insolvency Court against any act or decision of the Receiver if he is aggrieved by such act or decision. He cannot be aggrieved in the legal sense of the word by the sale of the property in which he had no interest. *Sakhuat Ali v Radha Mohan* 41 All 243 17 A L J 299 49 Ind Case 816. So long as insolvency exists the insolvent cannot be allowed to challenge the correctness of the debts entered in the schedule and therefore his application disputing the correctness of those

debts and requesting the Court to enquire into the accounts of the creditors cannot be entertained *Ganga Sahai v Mukkaram Ali Khan* 24 A L J 441 97 I C 556 (1926) A I R (A) 361 An insolvent whose estate has vested in the Official Receiver is not entitled to appeal against an order of the Judge rejecting his objection to a sale of his estate by the Official Receiver *Venkatarama nayya v Bangarayya* 40 L W 864 67 M L J 942 *vide also Safdar Ali Khan v Mian Umar Bakhsh* 163 I C 621 1936 A I R (Pesh) 151

Appeal by creditor

A creditor who is entitled to a decision in respect of sale of the property of the insolvent is a person aggrieved *Thiruvenkatachariar v Thangiamal* 39 Mad 497 A creditor has no *locus standi* in an application against the estate of an insolvent by a third person claiming adversely The Receiver is the only person competent to take such action as he thinks fit and proper and the creditor has no right of appeal *Jhabba Lal v Shib Chunder* 39 All 152 A mortgagee is not a person aggrieved *Hanseshar v Rakhal* 18 C W N 366 18 C L J 359 20 Ind Cas 683

Appeal by any other person

Where a Receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent a third person claiming to be the owner of the property is a person aggrieved *Charu Chandra v Hem Chandra* 47 Ind Cas 72 *Mulchand v Muralilal* 36 All 8 An assignee by deed of the property of an insolvent may be an aggrieved person *Haji Jackeria v Selha* 12 Bom L R 27

Election of remedies

The word may in sec 68 does not mean must Sec 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it But it is not the only remedy open to him It is open to a third person who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court *Mt Maharana Kanwar v E V David* 1924 A I R (A) 40 77 Ind Cas 57 A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Court when aggrieved by an act of the Official Receiver or he may apply under sec 68 of the Provincial Insolvency Act but if he takes the latter course he must comply with the terms of the section *Bhairu Pershad v S P C Das* 17 A L J 787 51 Ind Cas 113 *Husaini v Muhammad Zamur Abed* 74 Ind Cas 802 (1924) A I R (Oudh) 294 Ordinarily the party feeling aggrieved by the conduct of the Receiver should seek redress against him in the very proceedings in which he was appointed *Kamatchi v Sundaram Aiyar*, 26 Mad 492 *Pramatha v Khetra* 32 Cal 270 9 C W N

247 A stranger has the ordinary right to seek redress for trespass committed whether by the Receiver or by anybody else in the ordinary Civil Court and is not bound to apply to the Insolvency Court. But if he does so apply under sec 22 (now sec 68) he must comply with the terms of the section and if he obtains a decision in the matter the decision is final, *Bhaino Pershad v S P C Das* 17 ALJ 787 1 UPLR 18 51 Ind Cas 113. Where the Receiver seizes the property not without power alleging it to be the property of the insolvent and if the authority of the Insolvency Court is to be invoked to revise that act of the Receiver, this can only be done under sec 68. The remedy under sec 68 is not the only remedy open to a person aggrieved by an act of the Receiver. A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Court or he may apply under sec 68, but if he takes the latter course he must comply with the terms of the section. He cannot be heard to say in order to avoid the effect of the plain terms of the proviso to sec 68 that he makes his application under sec 4 and not under the section. Though the powers of the Court in deciding such an application are defined in sec 4 it does not mean that the application itself is made under sec 4 and clearly it cannot, for sec 4 contains no provision as to how the Court is to be moved to exercise its powers, *Ma Sein Au v U Mg Mg*, 149 IC 43 1934 AIR (R) 97.

Res Judicata

There seems to be a conflict of authority as to whether a person aggrieved by an order of the Insolvency Court can bring a regular suit after an adverse decision of the Insolvency Court. The trend of authority is in favour of the view that where the aggrieved person elects to have his remedy from the Insolvency Court the order of the Insolvency Court would be final and binding and operate as *res Judicata*, and he cannot litigate the matter over again in a regular suit. An adjudication of the Insolvency Court under sec 22 (now sec 68) would bar a subsequent suit in the Civil Court for the same relief because (1) the adjudication amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely against him but absolutely, within the meaning of sec 41 of the Evidence Act, (2) the application heard and disposed of by the Insolvency Court is a suit within the meaning of sec 11 of the CPC so that the adjudication would operate as *res Judicata*, (3) upon the general principles of law apart from sec 11 of the CPC, a litigant who has voluntarily elected to submit to the decision of one out of two alternative Courts which are open to him cannot turn round after the decision of the one Court and litigate the matter over again. *Pitaram v Juj* the decision of the Court which has attached the property to the Receiver in insolvency is conclusive and no suit

will lie as it is precluded by sec 4, *Burra Begum v Babu Sheo Narain*, (1923) A I R (All) 239 Under sec 4 (2) of the present Act any question of title or priority of law or fact that may be decided by the Insolvency Court will be binding for all purposes as between on the one hand the debtor and the debtor's estate and on the other hand all claimants against him or it and all persons claiming through or under them or any of them Therefore the decision in *Hukumat Rai v Padam Narain*, 39 All 353, that the judgment of the Insolvency Court is not *res judicata* is no longer good law A suit is barred by the previous order of the Insolvency Court, *Irshad Hussain v Gopinath*, 41 All 378 49 Ind Cas 590 17 A L J 374

Contrary view. A contrary view has been taken in *Harnam v Ganpat* 73 Ind Cas 367, in which it was held that where an Insolvency Court disallows the claims of a person to property attached and sold as the property of the insolvent, a regular suit to establish his right to the property is maintainable So also in *Raman Chetty v A V P Firm*, 31 Ind Cas 884, it was held that an order under this section does not preclude a party from pursuing an ordinary civil remedy Also in *Sanchi Khan v Karam Chand*, 73 Ind Cas 705, it was held that "the only question is whether the plaintiff having sought his remedy in the Insolvency Court and having been unsuccessful there is competent to bring a suit for possession The Courts below have relied on some rulings of the Allahabad High Court which are against the plaintiff in the matter" and in *the Lahore High Court Hossain*, 40 Ind Cas 100, in which it was held that a person who claims a right to property taken possession of by the Official Receiver as belonging to an insolvent and whose claim had been disallowed by the Insolvency Court may bring a regular suit to establish his rights "

Estoppel.

Where a person fails to appeal to the Court against an order of the Receiver, it is not open to him afterwards to raise the question at a subsequent stage of the insolvency proceedings whatever may be his rights in a separate regular proceedings, *Panfa Ram v Gurraju*, 18 L.W 282 76 Ind Cas 877 1924 A I R (Mad) 147 Under the new Act if a question of the title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final, and the question cannot be reopened in a separate regular suit This, however, does not mean that exclusive jurisdiction has been conferred on the Insolvency Court and that the only remedy open to the aggrieved stranger is to appeal to the Court Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as

decision within the meaning of sec. 4 (2) he is at perfect liberty to have recourse to the ordinary Civil Courts. *Mt Maharana Kunuar v. E. V. David*, 1924 A I R. (All) 40 77 Ind Cas. 57.

Leave for civil suit.

A third party who is not a creditor claiming property adversely to the insolvent is not affected by the special provision of sec. 16 (2) [now sec. 28 (2)] of the Provincial Insolvency Act : he can consequently maintain a suit against the Official Receiver in a Civil Court without obtaining previous leave of the Insolvency Court, such a suit is not barred by sec 22 (now sec. 68) It is always dangerous for Indian Courts to apply English common law rule of procedure unless such rule has been expressly adopted, *Musummut Halima v. Mathura Das*, 10 S L R 179 40 Ind Cas. 122.

Discretionary power of the Court when moved.

Where the trustee or Receiver claims only the same right as the insolvent would have had, the insolvency Court ought not, as a rule, to exercise jurisdiction, *Ex parte Dikin*, 8 Ch D 377 ; *Ex parte Price*, *In re. Roberts*, (1882) 21 Ch. D. 553 If, for instance, property seized by a Receiver as that of the insolvent is claimed by a third person as his, the Receiver stands in the shoes of the insolvent and the third person has a right to sue in a Civil Court for the establishment of his right without resorting to the remedy provided in sec. 68, *Naginlal Chumilal v. Official Assignee, Bombay*, 35 Bom. 473. The Official Assignee or the Receiver merely steps into the shoes of the insolvent for the purpose of his rights and liabilities He is merely the legal representative of the debtor with such right as he would have had if not bankrupt, *In Re Mapleblack*, *Ex parte Butt*, 4 Ch. D 150

This section does not require the Court to hold an enquiry. This section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under this section the Court simply ratifies, reverses, or modifies, the executive acts of its officers, *Raman Chetty v A V P. Firm*, 31 Ind. Cas. 884. Where an application under sec 68 is made to the Insolvency Court it is the duty of the Court to entertain it and after hearing the applicant on the one hand and the other to decide the issues raised. *Jyhar Sing*, 39 All

626 The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interest of the creditors, *Rambarda Chetty v Ramaswami Chetty*, 44 M.L.J. 284 : 73 Ind. Cas. 375. A Hindu father was adjudicated insolvent and the Official Receiver proceeded

to sell the joint family property. The insolvent's son objected that the share of the insolvent alone should be sold and not the entire family property. It was held that it was the duty of the Official Receiver to adjudicate upon the questions raised before bringing the properties to sale, and that an order merely notifying to the buyers the son's claim without deciding it was extremely irregular, *Pan/a Ram v Gurraju* 18 L W 282 76 Ind Cas 877 1924 A I R (Mad) 147

Though under the provisions of sec 68, the act or decision of a Receiver in insolvency must be challenged, if at all, by an application presented within 21 days from the date of such act or decision there is nothing in the Act that all the grounds upon which it is challenged must be stated in the application or that the grounds mentioned therein may not be supplemented or amplified later on. Where the question of an insolvent's title to property is *sub judice* it is the clear duty of the Insolvency Court to give notice of the fact to the intending bidders in a sale of property belonging to the insolvent. Where a purchaser has been misled into purchasing the property of an insolvent the title where to was being questioned in a pending litigation of which he was kept in ignorance, he is entitled to have the sale set aside and the purchase money refunded, *Hem Chandra v Uma Sadhan*, 103 IC 605 (1927) A I R (C) 659

The Insolvency Court has no jurisdiction to set aside a sale held by the Receiver in the absence of proof of fraud or collusion or material irregularity or illegality in conducting the sale or misconduct on his part causing injury to the estate or where the Receiver does not act beyond his authority far in excess of the powers conferred upon him. *Maung Tha Thun v Po Ka*, 5 R 768 107 IC 172 (1928) A I R (R) 60. But in *Venkatachalam Chettyar v Murugesan Setai*, 9 Rang 231 (SB), 131 IC 732 1931 A I R (Rang) 122, it was held that 'the Court would not readily set aside the sale held by the Receiver of the property of the insolvent unless in the circumstances of the case the Court is satisfied that it would not be fair and just that the sale should stand. No doubt if the fraud or collusion is proved in connection with the sale that would be a ground upon which the Court would set aside the sale or again possibly if there is material irregularity in the conduct of the sale. But the Court is not fettered in its discretion to set aside the sale in any case in which it thinks that the sale was neither a fair nor a just one. Where the two creditors of the insolvent are the only two prospective bidders, it is neither fair nor reasonable that the Receiver should hold the sale in the absence of the other creditor at an earlier hour than that at which sales normally are held and long before the other creditor could reasonably be expected to be present and without making enquiries to ascertain whether the creditor was at that place or giving him an opportunity to

present when the sale took place' The High Court has no jurisdiction to hold an enquiry into the conduct of the Official Receiver after the insolvency has come to an end though in an existing insolvency it might as a special case tender advice or give directions to the insolvency Judge *Narayan Das v Chim Lal* 25 A L J 219 (1927) A I R (All) 266 Where the ancestral property of an insolvent has been leased out by the Official Receiver the reversioners have no present interest in the property they cannot ask for a declaration that the lease of the land by the Official Receiver shall not be binding on them after the death of the insolvent, they must bring a separate suit to prove that the debts in satisfaction of which the lease has been given were incurred for illegal or immoral purposes It is neither necessary nor even convenient to go into the question in the course of the insolvency proceedings *Murali v Official Receiver Sargodha* 37 P L R 517 1935 A I R (L) 952 A Court sitting in insolvency proceedings cannot summarily cancel a registered sale deed Accordingly where an Official Receiver sells a house belonging to the insolvent at a public auction and one A offers the highest bid and deposits one fourth of the price but subsequently one B makes a higher offer and the Official Receiver under the orders of the Court executes a registered sale-deed in favour of B A cannot apply to the Insolvency Court for cancellation of the sale deed It was held that his remedy lay in a properly framed suit and all that the Insolvency Court could do was to give him leave if necessary for filing the suit against the Receiver, and the person claiming rights under the sale deed *Keshub Deo v Rajendra Kumar*, 1935 A W R 506 155 I C 563

Period of limitation for appeal

The District Judge has no jurisdiction to confirm the Receiver's report except by consent of parties until 21 days have elapsed within which the creditors aggrieved can apply to the Court for the reversal or modification of the act or decision by which they are aggrieved *Gomda Chandra v Hariharan* 94 I C 332 (1926) A I R (C) 826 A District Court has no jurisdiction to entertain an application under Or XXI r 90 to annul a contract of sale completed by a Receiver unless made within 21 days as prescribed by this section *Atanashi v Muthukruppam* 34 M L J 319 1918 M W N 345 44 Ind Cas 885 If the application is not under sec 22 (now sec 68) then it is not subject to the limitations prescribed *Hanseshur v Rakhal* 18 C W N 366 Sec 68 empowers the insolvent when aggrieved by an act of the Receiver to move the Court and on being so moved the Court will examine the proceedings and decide whether the act of the Official Receiver should be upheld or not The insolvent however must take action within the period prescribed by the proviso to sec 68 which lays down that no application under this section should be entertained after the expiration of 21 days from the date of the act or

decision complained of, *Shakar Khan v Sarmukh Singh*, 33 P L R 332 136 I C 267 1932 A I R (Lah) 320

Application of secs. 4 and 5 of the Limitation Act to appeals under sec. 68.

In the Provincial Insolvency Act there is no provision expressly excluding the applicability of sec 4 of the Limitation Act to applications under sec 68. By clause 10 of the General Clauses Act (X of 1897) it is provided that "where by any Act of the Governor-General in Council or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken on the next day afterwards on which the Court or office is opened provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act applies. The question therefore, is whether sec 4 of the Indian Limitation Act applies to an application under sec 68. In *Ma Than May v The Bailiff*, 9 Rang 150 134 I C 223 1931 A I R (Rang) 209, it was held that by reason of the express terms of sec 29 (2) (a) of the Limitation Act, sec 4 of the Act does apply to the application under sec 68, Provincial Insolvency Act.

In computing the period of limitation viz, 21 days, the principle that an application under sec 22 (now sec 68), does not fall within the scope of sec 5 of the Limitation Act as held in *Thakur Pershad v Punna Lal*, 35 All 410, and also the principle that the time for taking copies of the Receiver's order cannot be excluded as held in *M Devasuami v Munakhisundra*, 16 M L T 246 and in *Suaramayya v Bhujanga*, 39 Mad 593, can no longer hold good in view of sec 78, *infra*.

When limitation begins to run.

Where an Official Receiver rejects proof of debt and the party is apprised of the order, time for appeal against the order will run even though the formal notice prescribed by the Insolvency Rules has not been conveyed to him, *Vedarathu alias Lakshmi Amma v S Sadasita Rao*, 57 Mad 1030 40 L W 145 68 M L J 65

Appeal beyond time.

A Court has inherent power to rectify errors or mistakes of a Receiver or to reverse or modify his acts or decision. In such a case the time limit prescribed by sec 22 (now sec 68) would be no bar to action being taken by the Court, *Dataram v Deokinandan*, 58 Ind Cas 6. Where the sales were made by a person who was

Sankara Rao v Tirupur (1924) AIR (Mad) 461 Where the land of an agriculturist was sold by the Receiver contrary to the provisions of the Punjab Alienation of Land Act and the validity of the same was contested by the insolvent by means of an application more than 21 days after the sale but all the time the Official Receiver's report was before the Judge for confirmation it was held that the Judge could refuse to confirm the action of the Official Receiver in having sold the property and that the question whether he acted rightly in entertaining the insolvent's application after 21 days did not therefore arise for decision *Mahomed v Official Receiver* 132 IC 701 1931 AIR (L) 133 But where the application though purporting to be made under this section was not made within the time prescribed it was held that the person claiming as his own property which was advertised by the Receiver as the property of the insolvent is not precluded from suing for a declaration of title thereto by reason of his having made an application with the same object in Insolvency Court *Kundan Lal v Khem Chand* 44 All 620 (*Pitaram v Jughar Sing* 39 All 626 distinguished)

Appeal against order of the Court

An appeal lies against an order passed by a Subordinate Court under sec 68 to the District Court and by a District Court to the High Court with the leave either of the High Court or of the District Court. An insolvent has no right of appeal against an order of the Insolvency Court confirming the sale of a part of the estate by the Official Assignee the insolvent has after adjudication no legal interest in his estate which is vested in the Official Assignee and he has therefore no legal right to interfere in the realisation of the estate and he cannot be treated as aggrieved by the order passed in the course of such realisation *Hari Rao v Official Assignee Madras* 1926 MWN 364

PART IV

So far we were dealing with the property of the insolvent and its administration. Bankruptcy also affects the person of the debtor in many important respects: it subjects him to civil obligations and exposes him in cases of serious misconduct to criminal proceedings. It is an offence to obtain the protection afforded by the laws of insolvency without rendering all possible assistance for the realisation and distribution of the assets.

PENALTIES

69 If a debtor, whether before or after the making of an order of adjudication,—
Offences by debtors

(a) wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorised by the Court to take possession of it, or

(b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,—

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

(c) fraudulently with intent to diminish the sum to be divided among his creditors or to give a undue preference to any of his creditors,—

- (i) has discharged or concealed any debt due to or from him, or
- (ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction with imprisonment which may extend to one year.

Review.

This section is new. It has been substituted in place of section 43 of Act III of 1907 and is based on section 154 of the Bankruptcy Act, 1914 and section 103 of the Presidency Towns Insolvency Act, III of 1909. The introduction of this section has been thus explained in the *Statement of Objects and Reasons*: "Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires to take action. The wording of sub-section (2) of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence, and experience has shown that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43A and 43B inserted by clause 16 of the Bill, which also inserts a new section 43C containing provisions similar to those of section 105 of the Presidency Towns Insolvency Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted."

Amendment.

The last but one line of the section as it originally stood was as follows — "he shall be punishable on conviction by the Court with imprisonment." By the schedule under sec 2 of the Repealing Act XII of 1927 the words "by the Court" where they occurred for the second time, (in the last but one line) in sec 69, have been omitted. These words have been omitted as they became unnecessary by reason of the amendments made in sec 70 by Act IX of 1926, by which the Insolvency Court is divested of the power of trying the offences committed under sec 69.

Scope of the section

The section provides a punishment by way of penalty and before an insolvent can be punished under this section he must be shown

by legal evidence to have committed on some specific occasion one or other of the offences enumerated in this section, *Rash Behari v Bhagwan Chandra*, 17 Cal 209. Sec 69 is peculiar to India, inasmuch as it embraces acts 'whether before or after making an order of adjudication'. Under the English legislation from which much of this legislation is derived, these penalties are confined to conduct after the presentation of the petition. A comparison of the language of the two sections shows that the provision in the Indian Act is a special provision for cases in this country. If it were intended to confine the conduct entirely to conduct in the insolvency proceedings, the Legislature must have said 'after the presentation of the petition'. But, while the general language, viz., 'before the making of an order,' is sufficiently wide to cover almost any distance of time, the definition of the specific acts complained of narrows down the generality of the foregoing provisions so as to confine the offences strictly to matters affecting the investigation of the insolvent's affairs under the Act, the duties to be performed by him under the Act, the distribution of the property, or money, between the creditors and the concealment or making away with property, or falsification of his books, with the intention of defeating the objects of the Act, *Ganga Prosad v Madhuri Saran*, 25 A L J 331 100 I C 550 (1927) A I R (A) 352.

Prosecution lies only on adjudication.

The gist of offence under sec 69 is that a man whose property is required by law to be distributed among the creditors in the statutory manner, is doing something to get his property distributed in another manner. In the absence of an order of adjudication no prosecution can be started under sec 69 against the debtor for failure to produce all his books of account in Court. It is only after adjudication that prosecution can be started under sec 69 for acts or omissions which took place before the order of adjudication. Consequently proceedings under sec 69 cannot be taken after a petition for adjudication has been dismissed and it is known that the alleged debtor is not going to be made insolvent at all. An order to prosecute passed under those circumstances is entirely *ultra vires*. *Gangabishnu Singha v Khan and Khan & Co*, 58 Cal 334 134 I C 534 1931 A I R (Cal) 508. Similarly where an order of adjudication is annulled under sec 43 no prosecution under sec 69 will lie inasmuch as the insolvency proceedings automatically come to an end except so far as they are kept alive by order under sec 37. *Prima facie*, if the adjudication is annulled under section 43 the insolvent is placed *status quo ante* the insolvency, *Bhadramma v Partateesam Ayyarani*, 63 M L J 414.

It has been laid down as a general principle (*Udaichand v Ramkumar*, 15 C W N 213 12 C L J 400, *Samiruddin v Kadumoyee* 15 C W N 244, *Chatrapat Sing v Kharagsing*, 21 C W N 497, & that whether the debtor has or has not committed act of bad f

is not to be determined by the Court at the preliminary stage when the order of adjudication has to be made, but has to be enquired into only at the final stage when the application is made for an order of discharge. Hence it is argued that the question of bad faith specified in sec 43 (now sec 69) cannot be gone into by the Insolvency Court at any time previous to the passing of the order of final discharge and the Insolvency Court has no jurisdiction to take proceedings under this section *before* considering the application for final discharge. On the authority of the cases

the observation of Jenkins CJ in *Engal* 24 C.W.N 418, to the effect

laid down it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved," it is argued that the question of bad faith specified in sec 43 (now sec. 69) cannot be gone into by the Insolvency Court at any time previous to the passing of the order for final discharge and that the Insolvency Court has no jurisdiction to take proceedings under this section before considering the application for final discharge. This argument is based on a misapprehension of the different scopes of secs 24 and 69 of the Act, corresponding to secs 14 and 43 of Act, III of 1907. The above cases lay down that for the purpose of adjudication questions of bad faith are not all necessary to be enquired into. This does not show that the Court is not competent to institute criminal proceedings against the insolvent for acts of bad faith under sec 43 (2) [now sec 69], at any time before the final discharge and it had been held in *Nanni Mal v Emperor*, through *Raghubir Pershad* 17 O.C. 138 25 Ind Cas 363, that "the Court is quite competent to take cognisance of any act of bad faith at any time whether before or after the order of adjudication under sec 43 of Act III of 1907 although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved."

It has been held also in *Ram Behari Lal v Jagannath*, 19 O.C. 89 that "a Court is not bound to defer taking action and awarding punishment when necessary, in respect of acts and omissions mentioned in sec 43 of Act, III of 1907 until the insolvent applies for an order of discharge." It is also held in *Ubkobin v District Court*, 3 U.B.R. (1918), 97 49 Ind Cas 55 that the terms of sec 43 are clear and the Court's power under that section can at any time be put in motion by a creditor and the Court is then bound to consider whether the debtor has made false entries or lists or committed any other act of bad faith. It is not necessary that the Court should wait till the debtor makes an application for discharge.

Nature of offences by the debtor.

The offences dealt with under this section are in the nature of disciplinary offences that is offences committed by the insolvent

in the nature of breaches of duty to the Court and not offences against the general law, *Ladu Ram v Mahabir Pershad*, 39 All 171 37 Ind Cas 996 It will be noticed that all the offences enumerated in this section have in common one feature of the highest importance, that is, fraud or fraudulent intention to conceal the state of affairs or to defeat the law or to defeat and delay the creditors But if in any case it is proved that the bankrupt had no intent to defraud there is no offence, *R v Dyson*, (1894) 2 Q B 176 Failure to perform the duties imposed upon the debtor with intent to defraud is an offence under the Insolvency Act. When it appears that his refusal to reveal a certain part of his property was not in order to defraud his creditors but because under legal advice it was held that there was no offence and the conviction wrong *R v Page*, (1819) Rus & Ry 392

Clause (a) , Wilful failure to perform duties.

The offence under this clause consists in (1) wilfully failing to perform the duties imposed on the debtor by section 22 , or (2) wilfully failing to deliver up possession of any part of his property which is divisible among his creditors to the Court or to the Receiver The duties imposed upon the debtor by sec 22 are (i) production of his books of accounts (ii) giving inventories of his properties list of his creditors and debtors and of the debts due to and from them (iii) submit to examination in respect of his property or his creditors, (ii) attend before the Court or the Receiver, execute instruments and (i) generally do all such acts and things in relation to his property as may be required The Insolvency Court has power to direct the insolvent to appear for his examination touching his estate and effects and dealings and it is his duty to appear for the examination although he may reside more than 200 miles away from the Court house In *Re Couasji Polkerji*, 13 Bom 114 See also In *Re Ganeshdas Paratal* 32 Bom 198 , In *Re Naoroji Sarabji* 33 Bom 462 To fulfil the requirements of the word 'wilfully' in sec 69 (a) it will have to be proved that the account books required to be produced were in the possession or power of the debtor *Akhoy Chand Beguani v Emperor*, 61 Cal 537 38 CWN 642 149 IC 352 1934 AIR (C) 409 It is impossible to hold that unless until the Court or the official receiver issues orders to the insolvent in person that he has been actually adjudicated insolvent on a creditor's petition that the insolvent must carry out the duties imposed on him by s 22 of the Act at the pain of being prosecuted if he does not do so , otherwise the insolvent cannot be said 'wilfully' to fail to perform those duties under s 69 (a) of the Act and his prosecution should not have been sanctioned *Ramaswami Goundan v. Emperor*, 1935 MWN 919 In *S A Santiago v Emperor*, 166 IC 303 1936 AIR (N) 237 it has been laid down that the debtor, not liable under s 22 for failure to comply with processes,

prohibition and injunction issued by an Insolvency Court on a creditors petition until he has due notice of the same under s 19 (2) of the Act. The Insolvency Court has jurisdiction to issue such processes as prohibition and injunction to prevent alienation of his property by the debtor. Where however the processes issued were full of defects and do not purport to give notice to the debtor of the admission of any insolvency petition at all the debtor on whom they are served is not legally liable to comply with them and cannot be convicted under s 69 (a) on his failure to comply with them. The insolvent might have an idea of what the proceedings really are but that it is not sufficient to fix him with liability in a criminal case.

When non-delivery of property is no offence

By virtue of sec 4 of the Provident Funds Act neither the Receiver nor the creditor of an insolvent has any right to money drawn by the insolvent from the compulsory deposits in a Railway Provident Fund. There can therefore be no fraudulent dealing in respect of such money such as is made punishable by sec 60 (a). *Nagindas Bhukhandus v Ghelachai Gulabdas* 44 Bom 673 22 Bom L R 372 56 Ind Cas 450. Similarly property held in trust by the insolvent the contingent interest of a reversioner to succeed after the death of a Hindu widow agricultural holdings political pensions need not be set forth in the schedule of assets and the withholding of these properties and the others mentioned in the notes under sec 2d (1) which do not vest does not constitute an offence punishable under this section.

When omission to enter properties in schedule is no offence

Where an insolvent not knowing or forgetting that an equity of redemption is a valuable asset failed to show in his schedule of assets certain land to two of his creditors with possession of the land he is not guilty of any offence under this section. *272 44 Ind Cas 128*. Entries in the inventory must be a *bona fide* mistake or unintentional inaccuracies do not come under this section. *Sukrit Narain v Raghumath* 7 All 445. *Karim Baksh v Musri Lal* 7 All 295. *16 Cr Lj*

Clause (b), Fraudulent concealment of affairs

The offence under this clause consists in fraudulently (1) destroying preventing or withholding any document relating to his affairs (2) keeping false books or (3) making false entries or falsifying any document relating to his affairs. Concealment destruction mutilation or falsification of any book or document relating to his affairs or being privy thereto by the debtor is an offence under this section unless it is proved that the insolvent had no intent to conceal the state of his affairs or to defeat the

law," *R v Beck* (1889) 6 Cox CC 718, Halsbury, Vol II, 348. Where an insolvent is charged with purposely withholding documents it is the duty of the prosecution to establish that such books did in fact exist. Mere suspicion cannot be allowed to pose as proof, *J M Lucas v Official Assignee, Bengal*, 24 CWN 418, 56 Ind Cas 577. In *Ganga Prosad v Madhuri Saran* 25 ALJ 331, 100 IC 550 (1927) AIR (A) 352, it was held that there being no evidence as to who in fact kept the books what actual system was adopted of making entries and who was actually responsible, whether individually or collectively, according to the ordinary course of business and where there are more than one partner and it is sought to establish this charge against any one or two of them it must be proved as a fact who were the persons actually responsible for keeping such books.

Joinder of charges.

On a charge framed under sec 69 (a) the Court cannot convict an accused under sec 69 (b), as the elements of the offences contemplated by the two clauses are not the same and so there may be prejudice to the accused if such a procedure is adopted, *Akhoy Chand Beguan v Emperor*, 61 Cal 537 38 CWN 642 149 IC 352 1934 AIR (C) 409. Sec 103, Presidency Towns Insolvency Act, falls into two parts, the intention under each being different, and under each part there are several cases of specific offences. A joinder of three distinct charges, each charge comprising offences under cl (a) (iii) and cl (b) (ii), sec 103 is illegal under sec 233, Criminal PC, *Khimchand A Mehta v Emperor* 1934 Cr Cases 1036 (Bom) 36 Bom LR 639.

Clause (c), Fraudulent concealment of property.

The offence under this clause consists in fraudulently (1) discharging or concealing any debt due to or from the debtor or (2) making away with, charging mortgaging or concealing any part of his property, with intent to diminish the sum to be divided among the creditors or to give undue preference to any of the creditors. Sec 69 (c) (i) refers to debts incurred before the order of adjudication and not to debts incurred after that order, *Zibal v Laxman*, 27 NLR 304 134 IC 861 1932 AIR (Nag) 17. In *Hari Charan Ghose Sadhukhan v Dimesh Chandra Roy Choudhury*, CR No 1363 of 1934, dated 29th January 1935, in setting aside the order of prosecution under sec 69 (c) the High Court observed that 'when the terms of a deed of gift are susceptible of two interpretations it is wrong to hold that there was want of *bona fides* in the matter of non mentioning a particular sum and that there was fraudulent concealment of property when under one interpretation the sum is exempt from attachment under sec 60, CPC'. The mere execution of a mortgage deed is not an offence. It is only when it is combined with the fraudulent intent to defraud

creditors that it can be brought within the purview of sec 69
Trikamji v Emperor 145 IC 550 1933 AIR (N) 33 Where
 the insolvent was in jail and had only omitted to mention the
 equity of redemption of certain property which he had mortgaged
 many years ago and he admitted the mortgage at once when the
 fact was brought to his notice it was held that the prosecution of
 the insolvent was not warranted under sec 69 of the Act *Allad n*
v Firm Kirpa Ramsundar Dass 39 PLR 213 170 IC 849 1937
 AIR (L) 432

On the plain grammatical construction of the words any part
 of his property of any kind whatsoever in cl (c) (ii) it is clear
 that they are governed not only by the words charged mortgaged
 but also by the words made away with It cannot be doubted
 that the words any part of the property of any kind whatsoever
 would include property both movable and immovable The only
 manner in which immovable property could be made away with
 would be by means of a gift or sale A case of gift fraudulently
 made by the insolvent with intent to diminish the sum to be
 divided among his creditors is as much punishable under the
 section as a case of charge or mortgage The words made away
 with are sufficiently wide to cover cases of gifts of immovable
 property *Har Pershad v Dargahi Lal* 1932 AIR (O) 61

In order to constitute the offence of undue preference under
 a creditor and not to an alleged
 is not admitted as such by the
 solvent transfers property and the
 question is whether in so doing he acted in good faith the fact that
 there was valuable consideration for the transfer adequate to the
 occasion would negative the inference that there was an absence
 the transfer was in favour of
 signee *Bengal* 24 CWN 418
Emperor 43 All 407 19 ALJ
Ish JJ held that a man in the
 position of an insolvent who has the means of ascertaining where
 property of his has been disposed of even if he has not been
 actually a party to the making away with it and who does not use
 the means, is just as guilty of concealment within the meaning of
 this section as if he actively concealed the locality in which the
 property actually was Fraudulent removal by the debtor of any
 part of his property with a view to save it from being distributed
 among the creditors is an offence The fact that the Receiver may
 have recovered the removed property does not in any way affect
 the criminal liability of the debtor *Re Ward Exp Monkhouse*
 (1879) 40 LT 296

The 'property removed must be proved to be the debtors
 property A prisoner executed an assignment of his property to
 trustees for the benefit of his creditors The assignment was neither

registered as a bill of sale and the insolvent remained in possession as bailiff of the trustee and removed stock to the value of more than £10. He then made an arrangement as to his affairs and a trustee was appointed. It was held that a prosecution must fail because though the assignment being unregistered was void as against the new trustee yet it was otherwise in force and hence the property removed was not the prisoner's but the first trustee's at the time of the fraudulent removal *R V Creese* (1874) LR 2 CCQ 105 Hals Vol II 347. So a person at sometime had a certain amount with the bank. He afterwards withdrew a part of it and deposited Rs 4,000 in the bank in the name of his wife. Subsequently the wife brought a suit to recover the amount against the director and the suit was compromised. What happened to the money afterwards was unknown. The person filed an insolvency petition 19 months afterwards and when he filed his schedule he did not mention the amount of Rs 4,000 involved in the suit against the bank by his wife. He was convicted under s 69 Provincial Insolvency Act. It was held that the husband could not be convicted it being doubtful whether the amount was in existence at all and whether it really belonged to the insolvent. The Judge in insolvency would have been perfectly justified in refusing him his discharge unless he had made a better disclosure. But the person could not be convicted on a criminal charge when facts did not disclose criminal intention beyond pre-adventure *Hari Pada Moitra v Emperor* 169 IC 101 1937 AIR (C) 234.

A judgment debtor against whom a decree had been obtained was adjudicated insolvent and the Insolvency Court which was conducting a summary administration of the insolvent's estate put the flour mill of the insolvent to auction and obtained a bid from the decree holder for certain amount which was deposited by the purchaser. The mill was however never delivered to the purchaser. Subsequently the essential parts of the machinery were removed by the insolvent. It was contended by the insolvent that he could not be convicted under sec 69(c)(ii) because the machinery had already been sold to the purchaser who had paid the amount which was available to the creditors. It was held that the sale was not a sale in execution but a private contract between the Court in which the property of the insolvent vested and the purchaser. If the Court was unable to deliver the goods which it had sold the purchaser would have been entitled to recover the money which he had paid. The insolvent removed parts of the machinery which he was not entitled to remove and his conduct was such that the only inference could be that he was intending to cause wrongful loss to the creditors. Hence he could be convicted under s 69(c)(ii) *Ganesh v Emperor* 1938 ALJ 1217 1939 AIR (All) 166.

Where the insolvent was proved to have received certain sum of money within a few days after his adjudication the Court may

under sec 114 of the Evidence Act presume that the source of the trade which brought those sums into the hands of the insolvent consisted of undisclosed assets in his possession at the time of the adjudication and a conviction based on such presumption was held not to be bad in law, *Ramchandra Naidu v Emperor* 1931 MWN 1312

Before directing a prosecution of the insolvent for concealing his assets in the proper exercise of the Judge's judicial discretion there should have been some sort of the proportion between the value of the property alleged to have been concealed and that of the indebtedness of the insolvent. If the total amount of the indebtedness of the insolvent is say a crore of rupees and if the value of the articles said to be concealed say ten rupees it would be ridiculous to direct a prosecution of the insolvent for concealing the assets. In the exercise of discretion under sec 69 (c) (ii) a proper sense of proportion between value of property alleged to have been concealed and that of the indebtedness of the insolvent ought to be exercised by the Judge in directing the prosecution. *Janku Das Mariani v Mangi Lall Bajrang Lall* 16 PLT 140 1935 AIR (Pat) 126

Initiation of prosecution

The Receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent the Court can authorise him to ascertain facts and to report them to it with a view to the adoption of such steps as may be necessary in the interests of justice. *Monmohan v Hemanta*, 23 CLJ 553

Nature of prosecution

Prosecution may be either under the general Act secs 421 and 424 of the IPC or under sec 43 of Act III of 1907 (now sec 69 of Act V of 1920). When a special enactment such as the Provincial Insolvency Act deals with an offence similar to the offence which is dealt with by a general enactment such as the Indian Penal Code secs 421 and 424 it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution may be under either of these enactments as provided by sec 26 of the General Clauses Act (X of 1897). *Sigubalah v Ramasamiah* 6 LW 283 42 Ind Cas 608

Appeal.

Before 1926 the offences under section 69 were triable by the Insolvency Court and an appeal lay under schedule I against a decision or order passed under section 69 to the High Court by a person aggrieved. *Bhagwant Kishore v Samual Das* 19 ALJ 701 61 IC 802, *Gujar Shah v Barkat Ali Shah* 1 Lah 213 56 IC 744 *Palaneappa v Subramaniam* (1920) MWN 135 54 IC

740 ; *Iyappa Namar. v. Manicka Asan*, 40 Mad. 630 ; *Digendra v. Ramani*, 22 C.W.N. 958 : 48 I.C. 333 : *Virchand v. Bulakidas*, 55 I.C. 717 ; *Karuthan Chettiar v. Raman Chetty*, 79 I.C. 340 ; *James Finlay & Co. v. Amanmal*, 118 I.C. 198 : 1930 A.L.R. (S.) 2.

By Act, IX of 1926 section 70 of the Provincial Insolvency Act was amended in a manner so as to divest the Insolvency Court of its power to try the offences punishable under section 69. The Insolvency Court thus being divested of its power to try the offences under section 69 of the words "by the Court" which occurred in the last but one line of section 69 and the entry—"conviction and sentence of debtor for an offences under this section"—in schedule I relating to section 69 regarding appeals, became redundant and were omitted by Act, XII of 1927. Hence after the amendment mentioned above no question of appeal from an order or decision under sec. 69 arises.

The case of *Jita Mal v. Madan Lal*, 1931 A.L.J. 999 : 133 I.C. 907 : 1932 A.L.R. (All.) 4, though decided after the amendments, has however, held : "The last serial number of schedule I attached to the Act (restored by Act, XVIII of 1928) allows an appeal from an order of conviction and sentence of a debtor for an offence under section 69." But it may be pointed out that though Act, XII of 1927 has subsequently been repealed by Act, XVIII of 1928 the repeal has not affected the entry relating to section 69 in the General Clauses Act, X of 1929 inst an order under section 69.

An appeal from a conviction by a magistrate of the first class lies to the Court of the Sessions under section 408 of the Cr. P. Code, 1898. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge on the application of a creditor, he allows the prosecution to proceed. *Sriknshna v. Emperor*, 1923 A.L.R. (All.) 193. On an appeal from a sentence of imprisonment under the section the appellate Court has power to suspend the sentence until the appeal is disposed of, *Nagindas Bhukandas v. Ghelaboi Gulabdas*, 56 I.C. 449.

70. Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in section 69 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complain

manner laid down in the Code of Criminal Procedure, 1898

Review.

This section is new and has been substituted in place of section 70 of Act, V of 1920 by Act, IX of 1926 Acts, X and XII of 1927 and Act, XVIII of 1928. The section is as it originally stood in Act, V of 1920 in as follows —

- (1) Where the Court is satisfied that there is ground for enquiry into any offence referred to in section 69 the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure 1898 for service of a summons, calling on him to show cause why a charge or charges should not be framed against him
- (2) The notice shall set forth the substance of the offence and any number of offences may be set forth in the same notice
- (3) At the hearing of such notice and of any charge framed in pursuance thereof the Court shall so far as may be, follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898 and nothing in Chapter XXIII of the said Code relating to trials before High Courts and Courts of Sessions shall be applicable to such trial
- (4) Any number of offences under this section may be charged at the same time
Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding
- (5) The Court may instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure 1898
Provided that it shall not be necessary to examine the complainant

History of the amendment.

In the Act of 1907, section 43 which dealt with offences in the course of insolvency proceedings provided "If a debtor, whether before or after the making of an order of adjudication wilfully makes false entries in the inventories etc the Court may sentence

him by order in writing to imprisonment for a term which may extend to one year and in every such case the Court shall record the facts constituting the offence with the statement (if any) made by the debtor. In practice the wording of the section was found to be vague and unworkable and it was therefore considered necessary to make it more explicit. Section 43 of the Act of 1907 was accordingly replaced by section 70 of the Act of 1920. Section 70 of the Act of 1920 authorized the Insolvency Court either to enquire into the offence itself and punish the accused or to send him to a Magistrate for trial.

of the Civil Justice Committee
the criminal offence created
stance the same as those created by the Presidency Act of 1909. In practice the procedure whereby the insolvency Judge takes upon himself the duties of a Magistrate trying a warrant case has in the past been highly unsatisfactory. The prosecution is in the hands of the Official Assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the Court. By the Act of 1920 however section 70 sub-section 5 the Insolvency Court instead of proceeding itself to try the case as a warrant case tried by a Magistrate may make a complaint to the nearest first class Magistrate who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency Towns Insolvency Act by an amendment of section 104. We think however that the necessity for notice to the insolvent might well be discarded altogether and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy Court without consulting the bankrupt on the subject the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of arrangement would seem to be that the receiver or if he refuses a creditor should be given power to apply to the Court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried on by the Local Government through such officer as it may appoint for the purpose. In England it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution he can abandon it if he thinks on investigation that the case cannot be proved the insolvent is only concerned with the proceedings as any ordinary accused is concerned with criminal proceedings against him—namely to defend them when they have been instituted.—*Civil Justice Committee Report 1924 25 para 16 page 233*

Following the above Report of the Civil Justice Committee a Bill to amend the Presidency Towns Insolvency Act 1909

the Provincial Insolvency Act, 1920 was presented to the Legislative Assembly on the 2nd February, 1926 and published in the *Gazette of India*, Part V, dated February 6 1926 on which the Select Committee made the following observations in their Objects and Reasons: 'We have carefully considered the provisions of the Bill which deal with the trial of offences committed in connection with Insolvency that is to say, the proposed new section 104 in the Presidency Towns Insolvency Act, 1909, and the proposed new sub-sections (1) and (2) of section 70 of the Provincial Insolvency Act 1920. We are of opinion that the trial of these comparatively minor offences by the High Courts and District Courts is a waste of the time of those Courts and that in any case it is undesirable that the Court dealing with the insolvency proceedings should itself try offences of this kind in regard to which it may reasonably be supposed to have formed an opinion prejudicial to the alleged offender. We have accordingly provided that all such cases shall be tried by Magistrates on complaints preferred by the Insolvency Courts, under the same procedure as is laid down by section 476 of the Code of Criminal Procedure, 1898. Our redraft of these sections removes the ambiguity which has been pointed out in some of the opinions as to the stage of the trial at which the Court was under the Bill as introduced, to frame a charge.

Act IX of 1926

The Bill to amend the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 was passed as Act IX of 1926 and by section 11 (c) of the said Act the present section as given above was substituted in place of sub-sections (1) (2) and (3) of section 70 of Act V of 1920 leaving sub-sections (4) and (5) undisturbed.

Act X of 1927.

By the amendment of 1926, the sub-sections (4) and (5) of section 70 had become redundant and meaningless. This omission was subsequently discovered and Act X of 1927 was passed. By the second schedule under sec. 3 of Act X of 1927 the sub-sections (4) and (5) of sec 70 were repealed leaving section 70 as it now stands.

Act XII of 1927.

By the schedule under section 2 of Act XII of 1927, section 3 and the second schedule of Act X of 1927 were repealed.

Act XVIII of 1928.

Again Act XII of 1927 was repealed by the second schedule under section 3 of Act XVIII of 1928, the effect of which is to leave sec. 70 as it now stands [vide sec 6 (a) of the General Clauses Act X of 1897].

Preliminary inquiry by Insolvency Court.

The plain and natural meaning of the words "after such preliminary enquiry" in the section introduced by the Act of 1926 is that they make it discretionary with the judge (1) to hold a preliminary enquiry and (2) if it holds one, to have it of such a nature as it thinks necessary. In other words the judge may or may not hold a preliminary enquiry, if he decides to hold one, he may make such inquiry as he thinks necessary in order to satisfy himself that there is ground for inquiry into the offences referred to in section 69. That seems to be the ordinary sense in which the words have been used leaving it entirely to the discretion of the judge to determine how he will be satisfied before ordering the prosecution of the insolvent. "Preliminary" enquiry in section 70 does not mean judicial enquiry upon sworn testimony, *Jewraj Kharwal v Doyal Chand Johury*, 55 Cal 783 47 CLJ 250 111 IC 372 (1928) AIR (C) 211.

Notice.

Section 70 (1) as it stood before the amendment did not provide that notice is to be served on the debtor to show cause why a complaint in writing should not be made. It only required that a notice should be served calling on him to show cause why a charge or charges should not be framed against him, *Virjilal v. Dharamdas*, 106 IC 486 (1928) AIR (S) 85, *Kailash Nath v Nallasani Pillai* 106 IC 487. Section 70 (2) provided that "the notice shall set forth the substance of the offence, and any number of offences may be set forth in the same notice. Under the new section the service of the notice as contemplated by section 70 (1) and (2) is dispensed with by the repeal of sub sections (1) and (2) of sec 70 following the recommendations of the Civil Justice Committee which is to the following effect: 'We think, moreover, that the necessity for the notice to the insolvent might well be discarded altogether, and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the Bankruptcy Court, without consulting the bankrupt on the subject, the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the Criminal Court. The simplest form of arrangement would seem to be that the receiver or, if he refuses, a creditor should be given power to apply to the Court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried out by the Local Government through such officer as it may appoint for the purpose'."

Considering the history of sec 70, Provincial Insolvency Act, it would appear that the Legislature intended that the Judge should satisfy himself in any way he thinks proper before ordering a prosecution, and this interpretation is justified by the omission from the

amending Act of the direction which made it necessary for the Court to serve a notice on the debtor and hear him before ordering his prosecution. As the section now stands the Court may pass an order under sec. 70 *ex parte* and in the absence of the insolvent, *Jeuraj Kharwal v. Doyal Chand*, 55 Cal 783 47 C.L.J. 250 111 I.C. 372 : (1928) A I R. (Cal) 211

Duty of the Court before making complaint.

The effect of the amendment made by Act IX of 1926 is to take away the power from the Insolvency Court of itself trying the insolvent and sentencing him to punishment, and also to dispense with the necessity of serving notice on the debtor setting forth the substance of the offence and of hearing him in answer. In place of the latter provision in the Act of 1920 it was enacted that the Insolvency Court might hold a preliminary enquiry, if any, before ordering the prosecution of the insolvent. The judge may or may not hold a preliminary enquiry and, if he decides to hold one, he may make such enquiry as he thinks necessary in order to satisfy himself that there is ground for enquiry into the offences referred to in section 69. What the section requires is that the Court should be satisfied that there is ground for enquiry, *Jeuraj Kharwal v. Doyal Chand supra*. Under s. 70 as amended by Act IX of 1926, it is not obligatory on the insolvency Judge to give notice to the insolvent before holding that there are *prima facie* grounds for enquiry into an offence under s. 69 against the insolvent. Indeed the amended section leaves it to the discretion of the Judge even to hold a preliminary enquiry into the matter. *Harchand Rai v. Khairuddin*, 38 P.L.R. 1160. 1936 A.I.R. (L) 871.

Matters to be considered before making complaint under s. 69.

In considering whether a complaint should be made under sec. 104 (s. 69 of the Pro Ins Act.) the Court has not only to take into account the probability of the criminal proceedings being successful or the reverse, but also must determine upon a consideration of the case as a whole whether it is desirable in the public interest that an example of an insolvent whose conduct has been so bad that criminal proceedings ought to be taken against him as deterrent against the same or similar offences being committed by other insolvents. The Court can proceed under sec. 69 with or without preliminary enquiry being made but it is often of g
run
not
13 R. 525

an oppor-
tunity should
D. D. Desai,

Receiver's report.

For being satisfied that there is ground for enquiry into an offence under sec. 69, the District Judge is within his rights in attaching importance to the report of the Receiver. At the stage of the

preliminary enquiry there is no question whether the report of the Receiver is admissible in evidence according to the Evidence Act, it is the report of an officer of the Court bringing certain facts to its notice, and the Court, after perusing the report, may, in its discretion, call for proof of the facts alleged or act upon the report. The report of the Official Receiver is not by itself legal evidence. It is to be noted that wherever it was intended by the Legislature that the report of an Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with the matter, i.g., in section 38 and 42 of the Provincial Insolvency Act. Therefore, the report of the Receiver is not *per se* legal evidence on which a finding can be based, *Basanti Bai v Nanhi Mal* 23 A L J 792 89 I C 357 (1926) A I R (A) 29

Place of trial

The debtor carried on trade at Yeotmal and got involved. His assets were in Amroati and Yeotmal. He executed a mortgage at Bombay with a view to defraud his creditors. He was tried at Yeotmal for an offence under sec 69 (c) (i) of the Provincial Insolvency Act. The jurisdiction of the Court being challenged it was held that the jurisdiction to try the offence should be determined under the Criminal Procedure Code and was not derived from the Insolvency Act and that as under sec 179, Cr P Code the offence could be tried either at the place where the offence was committed or at place where the consequence ensued and as the offence consisted not merely of the execution of the mortgage but also of the fraudulent intent to defraud the creditors the offence could be tried at Yeotmal where the consequence ensued, namely, the actual diminution of the sum divisible among creditors at the place where the assets were held, *Trilamji v Emperor*, 145 I C 550 1933 A I R (N) 33

Prosecution

Proceeding against a debtor under sec 43 (2), (now sec 69) is in the nature of a criminal proceeding and as in all criminal cases, it is necessary that there should be a charge a finding and a conviction as a foundation for the sentence and everything should be strictly and accurately pursued and if on any of these three points a substantial defect should appear it would be a ground for reversing conviction, *Hanhar v Maheswar* 18 C W N 692, *Amiruddi v Jadat*, 19 C L J 430 (27 Bom 39) referred to. An offence mentioned in sec 103 of the Presidency Towns Insolvency Act, corresponding to sec 69 of the present Act, may be committed by an insolvent either before or after adjudication of insolvency and the section not only applies to cases of destruction of an insolvent's books before they were produced before the Official Assignee but also to cases of destruction in the Official Assignee's office they have been taken possession of, by the Court, *Joseph Perry*

Official Assignee, Calcutta, 24 C.W.N. 425 31 C.L.J. 209 56 Ind Cas 778

Procedure on prosecution

A law of this kind the intention of which is to punish, should be administered as criminal law is administered, i.e. specific offences should be charged, not technically specific in the sense of a specific offence concerned with the offence, but so that the accused may be in a position to adduce evidence to rebut the charge of that offence, and the Judge must specifically find what offence the insolvent is guilty of, *Rash Behari v Bhagwan Chandra*, 17 Cal 209. It is the duty of the prosecution to prove the offences with which the insolvent is charged and mere suspicion cannot be allowed to pose a proof, *J M Lucas v Official Assignee, Bengal* 24 C.W.N. 418 56 Ind Cas 577. 'Proceedings under sec 43 (2) (now 70) should not be based merely upon evidence on behalf of the creditor when opposing the application of a debtor to be adjudged insolvent, but evidence as to specific acts alleged against the debtor should be recorded *de noto*' *Nathumul v District Judge of Benares*, 32 All 547 7 A.L.J. 702 6 Ind Cas 870, *Nand Kishore v Suraj Mul*, 37 All 426, *Naghchock v M Pua*, 1914 U.B.R. 1 24 Ind Cas 767, *Nauab v Topan Ram* 62 P.W.R. 1916 35 Ind Cas 494. It would be an assistance to judges dealing with offences under the Insolvency Act to frame the charges strictly in the language of the section, which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, particularly an offence under the Penal Code. 331 1001 C 550 (1914) 1001 C 550.

Appeal.

No appeal lies against an order of a District Judge sitting in insolvency passed under sec 70 making complaint, after a preliminary enquiry to a Magistrate to be dealt with by him under sec 69. If there is any appeal against such an order, it can only lie under sec 75 (3) and only by leave either of the District Court or the High Court. But a very strong case will be needed to justify the granting of such leave. Where such leave has not been obtained, the appeal is incompetent, nor does an appeal lie from the order under provisions of sec 476 B, *Criminal P.C. Madan Mohan Sarkar v Emperor*, 11 L.R. (1938) 2 C 478 42 C.W.N. 787 1939 A.L.R. (C) 264. But an appeal lies to the District Judge against an order passed by a Subordinate Judge under sec 70, under section 75 which is very general and clearly covers an order passed by a Subordinate Judge.

under s 70 recording the finding that there are *prima facie* grounds for an enquiry in'o the offence referred to under sec 69, and appearing to have been committed by the insolvent, and making a complaint of the offence in writing to a Magistrate of competent jurisdiction. Such order under sec 70 is appealable *Harchand Rai v Khairuddin* 38 P L R 1160 1936 A I R (L) 871

Who can appeal.

A creditor has no right of appeal to the District Court under s 75 of the Act from an order of the Insolvency Court refusing to sanction a prosecution of the insolvent under sec 69 of the Act. The creditor to have a right of appeal under 75 must be aggrieved by the order and he is not aggrieved within the meaning of that section when the Court in the exercise of its discretion refuses to prosecute the insolvent *Maung Tun Tin v K P A R Chettyar Firm*, 1937 R L R 264 1937 A I R (R) 472, *Allahdin v Kirpa Ram Sundar Dass*, 38 P L R 213 1937 A I R (L) 432

71. Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved

Criminal liability af
ter discharge or com
position

Review.

This is section 162 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act, 1926 and section 105 of the Presidency Towns Insolvency Act, III of 1909. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted.—*Statement of Objects and Reasons* Gazette of India, dated 7th September, 1918

Prosecution for offences under sec. 69 lies
even after discharge.

It is worthy of note that although the discharge of the debtor from bankruptcy, or by the acceptance and approval of a composition or scheme of arrangement, frees him from liabilities provable in the bankruptcy it is in no case a bar to criminal prosecution. 'Sec 71 of the Provincial Insolvency Act provides for the criminal liability of an insolvent after his discharge, but only for the offences specified under sec 69 and not for the offences specified under sec 72 (1),' *Jordon v Firm of Mahadeo Lal* 61 Cal 605 59 C L J 399 151 I C 1026 1934 A I R (C) 764

72. (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that the is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine or with both

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1) the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such trial

Review.

This is section 53 of Act III of 1907 and corresponds to section 155A of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and section 102 of the Presidency Towns Insolvency Act, III of 1909 Under the English Act (sec 155, Bankruptcy Act) 'where an undischarged bankrupt engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt, he shall be guilty of a misdemeanour'

Obtaining credit.

Under the Presidency Towns Insolvency Act an undischarged insolvent has a right to deal with property acquired by him after the adjudication order in any manner he likes, subject only to intervention by the Official Assignee. Obtaining a loan on a mortgage of immovable property is not "obtaining credit" within sec 102 of that Act. Consequently an undischarged insolvent who obtains a loan without informing or that reason to be wns Insolvency Act (corresponding to sec 72 of the Provincial Insolvency Act), *Prem Chand Mullick v Nilmoni Das*, 38 CWN 283 1934 Or Cases (Cal) 791. A 'jangad' transaction is a 'sale or return' and involves a representation that the purchaser will (a) signify his approval or acceptance of the goods and pay for it, and (b) if not, return the same within the period fixed for their return, or where no time is fixed, on the expiration of reasonable period. But until one or the

other condition is fulfilled, no property passes to the buyer. The delivery of goods under such a contract, therefore, means that the buyer obtains the goods subject to certain conditions and subject to an option to become the owner thereof, in which case he is liable to pay the price. Therefore obtaining goods on 'juring' from a person by an undischarged insolvent without informing him that he is an undischarged insolvent amounts to 'obtaining credit' within the meaning of the section, *Emperor v Phirozshah Manekji Gandhi*, 36 Bom L R 731 1934 Cr Cases (Bom) 1132.

Non-disclosure of insolvency

The provision by its express terms imposes an absolute obligation upon an undischarged bankrupt who obtains credit to give information regarding his position. The object of the section is to protect the person from whom the bankrupt seeks to obtain credit. That person is not protected unless disclosure is actually made to him of the fact that the person obtaining the credit is an undischarged bankrupt. It is not enough that the undischarged bankrupt should show that he sought through an agent to give the information, and that he believed on reasonable grounds that it had been given. The disclosure must be made in fact to the person giving the credit and if the credit be obtained without disclosure having in fact been made to that person then whatever may have been the state of mind of the undischarged bankrupt, the offence is committed. *The King v Edward Fitzgerald Duke of Leicester*, (1924) 1 KB 311. In order to convict an insolvent against whom an adjudication has been made, but who has not been discharged, it is not necessary to show any intent on his part to defraud on obtaining credit. *Reg v Dyson* (1894) 2 QB 176.

Forum.

A charge of obtaining goods on credit by undischarged insolvent by false representations is triable by the Court having jurisdiction where the goods were obtained, and not necessarily where the false representations were made. *Reg v Ellis* (1898) 19 Cox CC 210.

Leave for prosecution.

In England it is settled that a prosecution shall not be instituted against any person except by order of the Court. In India the question arose in *Ashutosh Ganguly v E L Watson* 53 Cal 929 44 CLJ 350 98 IC 116 (1927) AIR (C) 149, as to whether a private party can prosecute on his own motion if he is aggrieved by what has occurred. On account of a difference of opinion between the two judges the matter was referred to a third judge and it was held that "section 72 lays down the only mode by which a person accused of an offence under the first sub-section may be proceeded against, that is by the method laid down in sub-section (2). Both clauses of section 72 should be read together

72. (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that the is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine or with both

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1) the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence on such trial.

Review.

This is section 53 of Act III of 1907 and corresponds to section 155A of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and section 102 of the Presidency Towns Insolvency Act, III of 1909 Under the English Act (sec 155, Bankruptcy Act) where an undischarged bankrupt engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt, he shall be guilty of a misdemeanour "

Obtaining credit.

Under the Presidency Towns Insolvency Act, an undischarged insolvent has a right to deal with property acquired by him after the adjudication order in any manner he likes, subject only to intervention by the Official Assignee. Obtaining a loan on a mortgage of immovable property is not 'obtaining credit' within sec 102 of that Act. Consequently an undischarged insolvent who obtains a loan on a mortgage of an after-acquired property without informing the mortgagee of his insolvency is not liable for that reason to be convicted under sec 102 of the Presidency Towns Insolvency Act (corresponding to sec 72 of the Provincial Insolvency Act), *Prem Chand Mullick v Nilmoni Das*, 38 CWN 283 1934 Cr Cases (Cal) 791. A 'jagad' transaction is a sale or return and involves a representation that the purchaser will (a) signify his approval or acceptance of the goods and pay for it, and (b) if not, return the same within the period fixed for their return, or where no time is fixed, on the expiration of reasonable period. But until one or the

other condition is fulfilled, no property passes to the buyer. The delivery of goods under such a contract, therefore, means that the buyer obtains the goods subject to certain conditions and subject to an option to become the owner thereof, in which case he is liable to pay the price. Therefore obtaining goods on 'jagad' from a person by an undischarged insolvent, without informing him that he is an undischarged insolvent amounts to 'obtaining credit' within the meaning of the section, *Emperor v. Phirozshah Manekji Gandhi*, 36 Bom L R 731 1934 Cr Cases (Bom) 1132

Non-disclosure of insolvency

The provision by its express terms imposes an absolute obligation upon an undischarged bankrupt who obtains credit to give information regarding his position. The object of the section is to protect the person from whom the bankrupt seeks to obtain credit. That person is not protected unless disclosure is actually made to him of the fact that the person obtaining the credit is an undischarged bankrupt. It is not enough that the undischarged bankrupt should show that he sought through an agent to give the information, and that he believed on reasonable grounds that it had been given. The disclosure must be made in fact to the person giving the credit, and if the credit be obtained without disclosure having in fact been made to that person, then whatever may have been the state of mind of the undischarged bankrupt, the offence is committed, *The King v. Eduard Fitzgerald, Duke of Leicester*, (1924) 1 KB 311. In order to convict an insolvent against whom an adjudication has been made, but who has not been discharged, it is not necessary to show any intent on his part to defraud on obtaining credit, *Reg v. Dyson* (1894) 2 Q B 176.

Forum.

A charge of obtaining goods on credit by undischarged insolvent by false representations is triable by the Court having jurisdiction where the goods were obtained, and not necessarily where the false representations were made, *Reg v. Ellis*, (1898) 19 Cox CC 210.

Leave for prosecution.

In England it is settled that a prosecution shall not be instituted against any person except by order of the Court. In India the question arose in *Ashutosh Ganguly v. E. L. Watson*, 53 Cal 929 44 CLJ 350 98 IC 116 (1927) AIR (C) 149 as to whether a private party can prosecute on his own motion if he is aggrieved by what has occurred. On account of a difference of opinion between the two judges the matter was referred to a third judge and it was held that "section 72 lays down the only mode by which a person accused of an offence under the first sub-section may be proceeded against, that is, by the method laid down in sub-section (2). Both clauses of section 72 should be read together

and no prosecution under the first clause can be initiated without the Insolvency Court sending the case for trial to the nearest Magistrate of the first class" Duval J, held *contra* that "sec 72 only lays down the procedure which the Court may adopt when it determines to prosecute for an offence under this section. This sub-section cannot take away the right of a private party to prosecute of his own motion if he is aggrieved by what has occurred"

Prosecution

In considering an application under sec 72 the Court has to consider (a) if the applicant is an undischarged insolvent, (b) if he obtained credit to the extent of Rs 50 or upwards (c) if he in fact informed the person from whom he obtained credit that he was an undischarged insolvent. An application was presented on behalf of a firm for being adjudicated insolvent. The names of the parties of the firm were disclosed in the application and the Court passed an order that the applicant be adjudicated insolvent. One of the parties was adjudicated an insolvent some years latter in another insolvency, and a question arose in respect of an application under section 72 whether he was an undischarged insolvent with reference to the first insolvency. It was held that the applicant in the first insolvency was the firm and not the individual partner who filed the application and the order of adjudication was an order against the firm and against each and every partner in that firm. The expression 'obtaining credit' would include within its ambit the securing of goods on trust that they will be sold and sale proceeds handed over. In the matter of *Firm of Utma Mullick Vishen Das*, 107 IC 442 (1928) AIR (S) 114. The offence is committed where the bankrupt keeps goods to the statutory extent (£10 under the English law) though the order was for a less amount, *R v Jubv* 55 LT 788 35 WR 168.

No prosecution under sec 72 lies after discharge

After an insolvent has been discharged the Insolvency Court cannot proceed against him under sec 72 even though an offence was committed within the meaning of that section before the order of discharge. The reason for this is that after the order of discharge the person from whom the insolvent has obtained credit during the insolvency can proceed against the insolvent in the ordinary course of law. Further under sec 71 of the Act it is laid down that the insolvent shall not be exempt by reason of obtaining his discharge where he has committed an offence specified in sec 69, but the offences which are clearly and fully set forth in sec 69 do not include the offence of obtaining credit within the meaning of sec 72, *Zibal v Laxman*, 27 NLR 304 134 IC 861 1932 AIR (N) 17. Sec 71 of the Provincial Insolvency Act provides for the criminal liability of the insolvent after his discharge but only for the offences specified under sec 69 and not for the offences specified

under sec 72 (1) The Court has no jurisdiction to make an order under sec 72 after the insolvent's discharge. Sec 72 does not apply to a discharged insolvent who had committed an offence during his insolvency and prior to his discharge. Orders under sec 72 can only be made at some time during the insolvency and prior to the date of discharge. The Court has, therefore, no jurisdiction to pass an order under the section after the insolvent had been discharged, *Jordon v Firm of Mohadeo Lal* 61 Cal 605 59 CLJ 399 151 IC 1026 1934 AIR (C) 764

Appeal

No creditor, Receiver or third party can be aggrieved by an order made under section 72 whether it is an order directing the prosecution of the debtor or whether it is an order declining to direct the prosecution. The only person who can appeal against an order under section 72 is the debtor himself in the case where his prosecution has been ordered. An order by an Insolvency Court refusing to take proceedings against an undischarged insolvent obtaining credit without disclosing the fact is therefore final. *Pursingh v Aladkhan* 28 NLR 286 1933 AIR (Nag) 9

73. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

- (a) being appointed or acting as a Magistrate ,
- (b) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached , and
- (c) being elected or sitting or voting as member of any local authority

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

- (a) the order of adjudication is annulled under section 35, or
- (b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part

(3) The Court may grant or refuse such certificate as it thinks fit, but any order of refusal shall be subject to appeal.

Review.

This section is based upon sections 32, 33 and 34 of the Bankruptcy Act 1883 which are not repealed. Under the English Bankruptcy Acts an adjudication of bankruptcy is a disqualification for being or acting as a Member of either of the Peace, a Mayor or Alderman, Overseer of the Poor, Member of a Sanitary Authority, Burial Board, Vestry or County Council, etc., and if he is adjudicated bankrupt whilst holding any of these offices the offices thereupon become vacant. The disqualification is removed and ceases (1) if and when the adjudication order is removed and ceases, (2) when the bankruptcy was caused by misfortune, and not by any misconduct on the part of the bankrupt, but the bankrupt may appeal from a refusal of it.

Retrospective effect of the section.

This section does not apply retrospectively to disqualify persons from acting in the capacities as mentioned in this section. The Provincial Insolvency Act of 1920 is an Act to amend and consolidate the law of insolvency in British India, and created disqualifications and disabilities which had not before attached to bankruptcy. "It is a well recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment." *In Re School Board Election for the Parish of Pulborough*, (1894) 1 Q B 725 (737). In that case it has been held that 'sec 32 of the Bankruptcy Act, 1883, has not a retrospective operation and therefore the disqualifications created by it do not attach to a person made a bankrupt before the passing of the Act. Similarly disqualifications imposed on a discharged insolvent by sec 22 (1) (d) of the Calcutta Municipal Act, III of 1923 and by sec 22 (1) (d) of the Bengal Municipal Act, XV of 1932 can not affect the vested interest of persons acquired before the passing of those Acts.

Reasons for disqualification.

The reasons for the enactment of this new section are explained thus: "Under the Indian law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person of this position, but it appears desirable that

the sense of the country should be stimulated by providing certain statutory disqualification in addition to those already imposed, e.g., by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in sec. 32 of the Bankruptcy Act, 1883."—*Notes on Clauses*. "We propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. That is if I may say, fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of the others"—*Speech by Sir George Loundes in Council*

Disqualification of a pleader.

The High Court in its disciplinary jurisdiction has full power to suspend the sanad of a pleader who has been adjudicated an insolvent until he obtains a discharge, if, in the circumstances of the case it considers that the insolvency coupled with surrounding circumstances supplies a "reasonable cause for such suspension." Under certain circumstances a pleader who is adjudicated an insolvent may be able to satisfy the Court that he should be permitted to continue his professional practice. In such cases the burden of proof is upon the pleader to show that this can be done with safety, *The Government Pleader v D Narain Deshpande*, 52 Bom 559

Removal of disqualification.

The disqualification begins from adjudication. The disqualification which an insolvent is subject to under this section is removed and ceases if (a) an order of adjudication is annulled under section 35, or (b) he obtains from the Court an order of discharge whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part. The Court may grant or refuse such certificate. Where an insolvent is discharged as an insolvent under sec 351, C. P. C. (Act XIV of 1882) immediately upon the granting of the application, for adjudication in considering the status for such person subsequently and for the purposes of sec 14 (3) (d), U P Municipalities Act, it is not requisite for the Court to consider the effect of the various sections in Act III of 1907, *L. Parmeshwar Das v Municipal Board, Bareilly*, 133 I C. 909 (1932) A I R. (All) 58

Appeal.

It is in the discretion of the Court to grant or refuse a certificate to the effect that insolvency was caused by misfortune and without any misconduct on the part of the insolvent. An appeal lies against an order of refusal to grant such certificate but not against an order granting such a certificate, under sec. 73 (3)

PART V.

SUMMARY ADMINISTRATION

74. When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely

- (i) unless the Court otherwise directs, no notice required under this Act shall be published in the local official Gazette ,
- (ii) on the admission of a petition by a debtor, the property of the debtor shall vest in the Court as a receiver ;
- (iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provision of section 38 ,
- (iv) the property of the debtor shall be realised with all reasonable despatch and thereafter, when practicable, distributed in a single dividend ,
- (v) the debtor shall apply for his discharge within six months from the date of the adjudication , and
- (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly

Review.

This section 48 of Act III of 1907 and is based on section 129 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and corresponds to section 106 of the Presidency Towns Insolvency Act

Object of the section

"The summary administration of petty insolvencies is now largely governed by Rules made by the High Courts under sec 15 (2) (c) of the Act, but it seems desirable that the Act itself should contain more detailed provisions than at present, and that further simplification of procedure should be effected"—*Statement of Objects and Reasons* "We propose to simplify the procedure further in order that there may be more expeditious winding up and distribution of assets"—*Speech in Council by Sir George Londe*

Summary administration.

This section provides for the Court being the Receiver in cases where the debtor's property is not likely to exceed five hundred rupees. No notice is required in such cases to be published in the local Official Gazette and no schedule be framed under section 33. An order to effect these matters called an order for summary administration, may be made by the Court apparently at any time after petition, on proof or report of the Official Receiver as to the value of the debtor's property. After the order is made the proceedings continue as in ordinary bankruptcies. The general provisions of the Act and the Rules apply as in ordinary cases subject to the express modifications given in sec 74 (i) to (ii). These modifications, however, do not in any way affect the provisions of the Act relating to the examination and discharge of the debtor. In summary administration the provisions of the Act and of the Rules that are to be modified are prescribed by Rules 30, 34, 23, and 25 of the Calcutta, Allahabad, Madras and Bombay High Courts respectively.

Value of the property not exceeding Rs. 500.

The debtor's property, after deduction of, (1) property in the hands of secured creditors, sec 28 (6) (2) debts which are excluded from the schedule under sec. 34, i.e., debts enforceable by distraint, (3) property exempted from attachment under the CPC (4) the costs of execution and preferential debts sec 52, should not exceed in value Rs 500

Vesting of property in summary administration.

When summary administration of the estate of a debtor been ordered the property of the debtor under sec 74 (ii) of Provincial Insolvency Act vests in the Court as a Receiver date of the admission of the insolvency petition, in the

which the term is used in sec 28 (2) and not merely as an interim Receiver, and when the property is so vested it cannot without the permission of the Court, be the subject of an execution sale. But if property which has so vested in the Court is sold in execution without the permission of the Court, a purchaser who has bought in good faith is entitled to retain the property and the creditors of the insolvent are entitled to the sale proceeds of the property as assets for distribution among them, *Ramanatha Mudaliar v Vijayaraghavalu Naidu* 30 MLT 369 106 IC 34 (1927) AIR (M) 983

Power of Court to stay sale in Execution

The effect of sec 74 (ii) is that the property of the insolvent has vested in the Court as a receiver. But there is nothing in the section which would give the Insolvency Court jurisdiction to stay execution proceedings elsewhere. *G C Chikritarti v E White* 63 C 535 40 CWN 336

Proof of debt in summary administration

In the case of a summary administration under S 74 of the Act, a creditor is entitled to come before the Court at any time before the single dividend is distributed and proving his claim to a share in the amounts realised. Where a creditor makes an application to have his claim included before the distribution of the dividend the Court is bound to entertain it and deal with it on the merits. The Court has under S 74 (3) to enquire into the debts and assets at the hearing of the petition and can not transfer the petition itself to the official for disposal as the Act does not provide for any such delegation to the official of the power of disposing of in solvency petition summarily under S 74. If such a petition is transferred to the receiver and he frames a schedule which is not required under S 74, that cannot make the ordinary procedure applicable to the case, and when the dividend for which the official receiver prepares a schedule is the one and only dividend that can be possibly declared in the insolvency. It is still a dividend under S 64 of the Act and not an interim dividend under S 63 so as to bar the right of a creditor to prove her claim before the distribution of such dividend when that creditor has not had any notice under S 64. *Gopalakrishnayya v Venkataswamy* 1937 MWN 1160

PART VI

APPEALS

75. (1) The debtor, any creditor, the receiver or
Appeals any other person aggrieved by a decision
come to or an order made in the exercise
of insolvency jurisdiction by a Court subordinate to a
District Court, may appeal to the District Court, and the
order of the District Court upon such appeal shall be
final

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The periods of limitation for appeal to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively

Review.

This is section 46 of Act III of 1907, and corresponds to sec. 11 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amend)

which the term is used in sec 28 (2) and not merely as an interim Receiver, and when the property is so vested it cannot without the permission of the Court, be the subject of an execution sale. But if property which has so vested in the Court is sold in execution without the permission of the Court, a purchaser who has bought in good faith is entitled to retain the property and the creditors of the insolvent are entitled to the sale proceeds of the property as assets for distribution among them, *Ramanatha Mudaliar v Vijayaraghavalu Naidu*, 30 M L T 369 106 I C 34 (1927) A I R (M) 983

Power of Court to stay sale in Execution.

The effect of sec 74 (u) is that the property of the insolvent has vested in the Court as a receiver. But there is nothing in the section which would give the Insolvency Court jurisdiction to stay execution proceedings elsewhere. *G C Chakravarti v E White*, 63 C 535 40 C W N 336

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In the case of a summary administration under S 74 of the Act, a creditor is entitled to come before the Court at any time before the single dividend is distributed and proving his claim to a share in the amounts realised. Where a creditor makes an application to have his claim included before the distribution of the dividend, the Court is bound to entertain it and deal with it on the merits. The Court has under S 74 (3) to enquire into the debts and assets at the hearing of the petition and can not transfer the petition itself to the official for disposal, as the Act does not provide for any such delegation to the official of the power of disposing of an insolvency petition summarily under S 74. If such a petition is transferred to the receiver and he frames a schedule which is not required under S 74, that cannot make the ordinary procedure applicable to the case, and when the dividend for which the official receiver prepares a schedule is the one and only dividend that can be possibly declared in the insolvency. It is still a dividend under S 64 of the Act, and not an interim dividend under S 63 so as to bar the right of a creditor to prove her claim before the distribution of such dividend when that creditor has not had any notice under S 64. *Gopalakrishnayya v Venkataswamy* 1937 M W N 1160

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Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit .

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule L come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The periods of limitation for appeal to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively.

Review.

This is section 46 of Act III of 1907, and corresponds to sec. 105 of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amend-

which the term is used in sec 28 (2) and not merely as an interim Receiver, and when the property is so vested it cannot without the permission of the Court, be the subject of an execution sale. But if property which has so vested in the Court is sold in execution without the permission of the Court a purchaser who has bought in good faith is entitled to retain the property and the creditors of the insolvent are entitled to the sale proceeds of the property as assets for distribution among them *Ramanatha Mudaliar v Vijayaraghavalu Naidu* 30 M L T 369 106 I C 34 (1927) A I R (M) 983

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APPEALS

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Appeals
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(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court

(4) The periods of limitation for appeal to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively

Review.

This is section 46 of Act III of 1907, and corresponds to sec. 12 of the Bankruptcy Act, 1914 as amended by :
11, (Amend)

ment) Act 1926 and sec 8 (2) (b) of the Presidency Towns Insolvency Act. The section deals with appeals in insolvency matters. Section 75 allows only one appeal against the order passed by a subordinate Court in the exercise of its insolvency jurisdiction. This appeal lies to the District Court and the section expressly provides that the order of the District Court upon such appeal shall be final. However the first proviso to that clause shows that the High Court can exercise its powers of revision in respect of such orders passed by the District Court on appeal. But no appeal lies to the High Court on order in appeal by the District Court. Section 75 gives a right of appeal against orders made in the exercise of insolvency jurisdiction by Court subordinate to a District Court not only to a person aggrieved by the decision but also to any creditor.

Har Pershad v. Dargahi Lal 1932 A I R (O) 61

Sub sec (1) Who can appeal—Amendment

The amendments introduced in the section by the present Act (Act V of 1920) are thus explained in the Select Committee Report dated 24th September 1919. There are conflicting decisions of the High Courts as to the meaning of the words *any person aggrieved*. We have therefore proposed further amendments in sec 46 of the Act with the object of making it clear that creditors as well as the Receiver are entitled to the benefits conferred by that section. In the case of *Naidar v. Ramji Lal* 47 All 849 23 ALJ 503 88 IC 944 1925 AIR (A) 549 a preliminary objection was taken that no appeal lay on the ground that a creditor was not a person aggrieved and therefore had no right of appeal. The respondent relied upon the decision in *Jhabba Lal v. Shib Charan Das* 39 All 152. Daniels J in delivering the judgment held that was a decision under Act III of 1907. Under that Act there was a difference of opinion between the Allahabad High Court and the Madras High Court. The Allahabad High Court held that the Receiver was a person aggrieved whereas the Madras High Court held that the Receiver was not a person aggrieved. This conflict of opinion has been set at rest by an alteration in the language of the present Insolvency Act. Sec 46 of Act III of 1907 gave a right of appeal to any person aggrieved by an order in the exercise of insolvency jurisdiction. In sec 75 of Act V of 1920 these words have been changed to *a decision come to or an order made in the exercise of insolvency jurisdiction*. In sub section (2) these words are summed up as *any such person aggrieved by any such decision*. The alteration in the language of the Act is intended to bring within the scope of the right of appeal a creditor who is aggrieved by a decision of the Receiver in the exercise of his powers. The decision of the Receiver in such a case is a decision of the court and the creditor is a person aggrieved by it. The amount of property out of which he is entitled to claim a dividend

The Civil Procedure Code can in no way supersede the express provisions of the Provincial Insolvency Act as to who may appeal, *Pursingh v Aladkhan*, 28 N L R 286 1933 A I R (N) 9

Appeal by debtor.

The language of sec 75 is materially different from that of sec 46 of Act III of 1907 Under the old Act the right of appeal was given only to a "person aggrieved" but under the new Act, the debtor, any creditor, the Receiver or any other person aggrieved by a decision is allowed to appeal The insolvent has a right of appeal, *Ram Chand v Mohra Shah*, 11 L L J 198 119 I C 427 (1929) A I R (L) 622 An adjudicated insolvent is entitled as a person aggrieved to appeal against an order admitting a person as a creditor, *Subramania v Theetheappa*, 47 Mad 120 45 M L J 166 Though in *Mahomed v Official Receiver*, 132 I C 701 (1931) A I R (L) 133, it has been laid down that when the Receiver sells lands of the insolvent, which under the Punjab Alienation of Land Act cannot be sold, the insolvent is entitled to object to the confirmation of the sale, in *Vekataramanya v Bangarayya*, 40 L W 864 67 M L J 922, it has been held that an insolvent whose estate has vested in the Official Receiver is not entitled to appeal against an order of the Judge rejecting his objection to a sale of his estate by the Official Receiver The words "any such person" in s 75 (2) of the Act includes the debtor also An appeal to the High Court by the debtor against an order of the District Court declining to expunge certain debts from the schedule and declaring that they have been proved by the creditors is competent, *Makhan Lal Gound ram v Bhagwan Singh Mustn* 17 P 201 19 P L T 821 1938 A I R (P) 471

Parties in appeal by debtor.

The Insolvency Court having refused protection as regards all the debts due from the insolvent he appealed to the District Judge impleading only the three creditors who had appeared in the District Court to contest the insolvent's application for protection and obtain a protection order from the District Judge Subsequently the appellant who was not one of the three creditors, took out execution of his decree praying for the insolvent's arrest It was held that the order of the Insolvency Court of appeal, though *general in its terms must be limited to the debts due to the three creditors*, who had been impleaded and as against whom the order of the first Court was set aside But as regards the other creditors, including the appellant the order of the first Court became final, and the appellant was therefore entitled to execute his decree against the insolvent, *Jitmal Ram Gopal v Nathu Ram*, 1932 A L J 407 1932 A I R (All) 385 In an appeal by an insolvent from the order rejecting the insolvent's objection and confirming the sale of the insolvent's property the purchaser of the property is a neces-

sary party as obviously in order cannot be passed against him without his being impleaded *Ram Karan v The Official Receiver Ferozepore* 31 Punj LR 18 121 IC 373 Where an appeal is brought by a debtor if there is a necessary party who vests all the property

all creditors have an interest in the order The effect of an appeal from an adjudication order if the appeal is successful is to take the property out of the Official Assignee's hands and to deprive the creditors of the benefit of the trusts of the property which was in the hands of the Official Assignee *Gulam Mustaffa v Madanlal* 58 C 624 130 IC 877 (1931) AIR (C) 167

Appeal by legal representatives of debtor

The right to contest an order of adjudication is not a purely personal right of the debtor having no connection with his property and that there was nothing in the Provincial Insolvency Act to justify the view that the death of the debtor or insolvent would bring about a complete abatement of the proceedings preventing the survival of a right in the heirs of the debtor and that the maxim *actio personalis moritur cum persona* could not be applied to bankruptcy proceedings and that the heirs of the deceased debtor are therefore entitled to prosecute and continue the appeal under s 75 of the Act *Piarey Lal v Sa'amatullah Khan* 1 LR (1937) All 616 1937 ALJ 491 1937 AWR 413 170 IC 535 1937 AIR (All) 435

Appeal by creditor

If the interest of the individual creditors conflict then the Official Receiver cannot represent the interest of the creditor who is standing on his individual rights as opposed to those of the general body so far as that right is concerned Such a case would occur e.g. when the Official Receiver or some creditor wishes to have the debt of another creditor struck out as fictitious or when one creditor wishes to be ranked as a secured creditor or when an alienation in favour of one creditor is sought to be declared void under section 53 or sec 54 of the Act The general principle thus would seem to be that where the insolvency proceedings under consideration concern only an individual creditor and his interest he alone can agitate the matter both in the original Court and in the appeal Court *Choudappa Gounder v Kattaperumal Pillai* 50 MLJ 602 96 IC 944 (1926) AIR (M) 801 Where a person is adjudicated insolvent at the instance of the creditors the creditors are obviously the aggrieved party and have a right of appeal *The firm Joysingh v Narmal Das* 7 LLJ 553 26 PLR 837 92 IC 235 (1926) AIR (L) 24 Creditors who have tendered their proof are persons aggrieved by the order of the Court annulling adjudication and they are entitled to appeal as persons aggrieved *Challa*

Abbireddi v Challa Venkatareddi 51 MLJ 60 23 MLW 644 (1926) MWN 256 94 IC 351, (1927) AIR (M) 175

Sec 43 (1) does not say by whom the application for annulment has to be made. But it is clear that a creditor who is affected by the adjudication is certainly a person entitled to apply to the Court under sec 43, and if his claim is dismissed without proper reason under sec 75, adopting *arte Sidebotham*, (1880) and *Cas 955 A* creditor

has no right of appeal against an order made under sec 43 (now sec 69) as he is not a person aggrieved. *Iyappa v Manicka Asari* 40 Mad 630. Where an insolvent called upon to produce his books and give inventories of his properties etc fails to produce them and an application by a creditor under old sec 43 (now sec 69) for action to be taken against the insolvent was dismissed by the Court it was held that there was no appeal at the instance of the creditor under sec 46 (now sec 75) against the order refusing to proceed against the insolvent inasmuch as the provisions contained in sec 43 (now sec 69) are of a disciplinary character and that the person if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance had not been rendered by the debtor and not any person who sets the Court in motion. *Palamappa Chetty v Subramaniam*, 1920 MWN 135 38 MLJ 388 54 Ind Crs 740

A creditor is entitled to appeal against an order of the Insolvency Court which affects him with other creditors and it is not necessary under s 75 that he alone should be affected by the order appealed against and not jointly with other creditors. *Ganda Ram v Shib Nanda Ganesh Das* 1937 AIR (L) 757. A creditor is entitled to appeal to the High Court against an order of the District Judge under s 41 of the Provincial Insolvency Act granting an absolute discharge to the insolvent. *Habib ur Rahman v Nurul Hasan Khan* 1937 OWN 923 170 IC 540 1937 AIR (O) 450

Parties in an appeal by a creditor.

A Receiver is not a necessary party in an appeal against an order of adjudication. *Mou Ram Premchand v Kewal Ram Dharamchand* 9 LLJ 550 105 IC 596 (1928) AIR (L) 202. Where the sons of a judgment debtor sue for and obtain a declaration that certain property was not saleable and attachable under certain decrees one of which is a decree obtained by a creditor of the judgment-debtor and prior to the date of the decree the judgment-debtor is adjudicated an insolvent, the Official Receiver is a necessary party to the proceedings in appeal by the creditor decree holder. *Harnam Chander v Rup Chand*, 1932 ALJ 361 1932 AIR (All) 382

Appeal by Receiver.

The general scheme of the Act is that in insolvency proceedi

creditors cannot act individually and independently but are represented by the Official Receiver who alone may ordinarily take action. Clearly the Official Receiver can act for the whole body of creditors only when the interests of the whole body are homogeneous. *Choudhary Gounder v Kattaperumal Pillai*, supra. An Official Assignee can appeal when he is an aggrieved person. *Official Assignee v Ramachandra* 33 Mad 134. If the Court refuses to annul a transfer under sec 53 of the Act the person aggrieved by the Court's order is the Receiver and he alone has a right to appeal against the order. The creditors of the insolvent are not persons aggrieved by the order within the meaning of sec 75 and therefore have no *locus standi* to appeal against the order. *Isu v Dis v Latha Ram* 62 Ind Cr 824. The Official Receiver removed from office has under sec 75 a right of appeal as a person aggrieved by the order. *Official Receiver Tanjore v Nataraj Sasirajal* 46 Mad 405. 72 Ind Cr 225. 1923 A I R (M) 355. A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under sec 43 (now sec 69). *Bhagwant Kishore v Sanual Das* 19 A L J 701. 61 Ind Cas 802. Where an *ad interim* Receiver's application under sec 52 is refused the judgment debtor cannot appeal but the Receiver is the proper party to appeal. *Arifuddin Feroedin v Niamat Ali* 129 I C 213 (1930) A I R (L) 970.

Appeal by any other person aggrieved.

As was pointed out by Lord Esher in *Ex parte Official Receiver in re Reed* (1887) 19 Q B D 174 a person aggrieved is a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand. The same view was expressed by James LJ in *Exp Sidebotham* (1880) 14 Ch D 451. Lord Esher further drew attention to the remarks of Bramwell CJ in *Exp Sidebotham* supra pointing out that the appeal must be by the party i.e. by one of the parties to the dispute before the Court who has endeavoured to maintain the contrary of that which has taken place. *James Finlay & Co v Tulsidas Amanmal* 118 I C 198. 1930 A I R (S) 2.

The opening words of section 75 cannot be interpreted as meaning that the debtor any creditor or the Receiver may appeal in every case associating the words aggrieved by a decision with any other person only. The debtor creditor or Receiver must be himself aggrieved by an order before an appeal may be made. *Pursingh v Aladkhan* 28 N L R 286. 1933 A I R (Nag) 9. An aggrieved person must be one who is affected by the order appealed against. An alienee of the insolvent's property is not a person aggrieved by the order admitting proof in creditor's favour. *Alagappa Chettiar v Vellachami Servai* 112 I C 623 (1928) A I R (M) 981. Where an alienation of property made by an insolvent prior to adjudication is

annulled under sec 36 the transferee is an aggrieved party and he is entitled to appeal *Lalji Sahay v Abdul Gani* 15 CWN 253 12 CLJ 452 The proper person to make an application under sec 26 is the Receiver and the transferee is a necessary party to such a proceeding *Hanseswar v Rakhal* 18 CWN 366 18 CLJ 359

A man who is disappointed of a benefit which he might have received if some other order had been passed is not a person aggrieved *Radhamohan v Ghasiram* 40 Ind Cas 96 38 PWR 1917 93 PR 1917 The expression aggrieved person means a person who has got a legal grievance that is a person who is wrongfully deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment Where the Judge of the Insolvency Court granted a lease of a hotel to the highest bidder at an auction and the prior lessee of the hotel appealed against the order granting the lease it was held that the appellant was not an aggrieved person within the meaning of section 75 and the appeal was incompetent *Ram Das v Rogers* 32 PLR 438 133 LC 436 1931 AIR (L) 586

An order of a District Judge dismissing a claim preferred by a stranger to money ordered to be paid to a Receiver in insolvency is a decision in a question of title within the meaning of section 4 of the Provincial Insolvency Act and is appealable under section 75 of the Act The creditors of the insolvent are not necessary parties to an appeal from such an order *Munshi Ram v Shaikh Ghulam Dastgir* 107 LC 400 (1928) AIR (L) 423 Under sec 75 cl (1) any aggrieved person may prefer an appeal against an order passed by the Judge in insolvency It was held accordingly in a case in which an application filed by one of the creditors under sec 68 was withdrawn by him collusively and was dismissed that another creditor who was aggrieved by the order was though not a party to the application under sec 68 competent to appeal against it *Pulli Goundan v Kumaraswami Goundan* 55 Mad 313 61 MLJ 714 1932 MWN 552 1932 AIR (M) 162 When a creditor is allowed to intervene in an insolvency proceeding although his debts have not been proved before the Court he is a person aggrieved and as such he has a right of appeal *Dnappur Trading & Banking Company v Protash Chandra Sen* 56 CLJ 440 following *Rustomji Derabjee v K D Brothers* 53 Cal 866

Parties in appeal by any other person aggrieved

Where a person is adjudged insolvent on the application of two creditors and on failure of the Official Receiver to apply for annulling a mortgage executed by the insolvent the above creditors apply for the same and get the mortgage annulled both creditors and the Official Receiver also are necessary parties to the appeal filed by the mortgagee and if all of them are not impleaded the appeal is incompetent Where necessary parties are not impleaded not

mistake but owing to gross negligence, amendment to add new parties cannot be allowed, *Ghulam Sharaf v. Lachman Das*, 148 I C 329 1934 A I R (L.) 36 Certain creditor advanced loan to a joint Hindu family firm, secured attachment before judgment of the firm property and subsequently obtained decrees on their loans. Another creditor of the firm instituted proceedings in insolvency in the Court of the District Judge. The District Judge made an order of adjudication and appointed receiver in whom the firm property vested. The creditors who have obtained attachment before judgment appealed against the order and in appeal it was held that petitioning creditor was not a necessary party to the appeal as he has been represented by the receiver, *Indubala Dass v. Bikheswar Banerji*, I L R (1937) 2 C, 675 41 C W N 1079 1937 A I R (C) 517

Appeal from orders and decisions of Subordinate Courts.

Though under sec 3 "the Local Government may invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under the Act," still however anomalous it may seem, the appeals from the decisions of a Subordinate Judge having concurrent power with the District Judge should lie to the District Judge. Section 75 (1) clearly contemplates the exercise of insolvency jurisdiction by a subordinate Court, and expressly provides that appeals against such order shall lie to the District Court. This state of things is not uncommon as for instance, it may be pointed out that appeals against the decisions of subordinate Judges in suits below Rs 5,000 lie to the District Judge although in respect of such suits they have concurrent jurisdiction, *Nidhan Mullick v. Ramani Mohan*, 63 Ind Cas 848. The Provincial Insolvency Acts (both of 1907 and 1920) provide for appeals in a manner different from that provided for by the Civil Courts Act. From the decisions passed by a subordinate Judge exercising insolvency jurisdiction an appeal lies to the District Court, though the value of the property affected might be more than rupees five thousand, *Alagirisubba Nauk v. The Official Receiver, Tinnevely*, 54 Mad 959.

Courts of Additional District Judges are not subordinate to the orders of the Courts Court, *Makhanlal v. 162, Chiranjilal v. appeal against an l Causes exercising the powers of a Sub-Judge will lie to the District Judge, and this appellate jurisdiction is not dependent upon either the value of the decree in respect of which the order in insolvency was obtained or on the amount of the debts entered in the schedule of debts filed*

by the applicant for a declaration of insolvency, *Debi Prasad v Jamuna Das*, 23 All 56. See also *Sitharam v Vaithilinga*, 12 Mad 472 followed in *Changmull v Jamaram*, 15 CLJ 239 16 CWN LXXX (notes), *Vaikunta v Moidin*, 15 Mad 89, *Shanker v Vithal*, 21 Bom 45, *Manekshah v Dadabhai*, 27 Bom 604.

In the Punjab the Divisional Court is deemed to be the District Court or principal Civil Court of original jurisdiction for the purposes of any proceedings under the Provincial Insolvency Act, *Ram Kissen v Umrao Bibi* 18 PWR 1916 33 Ind Cas 730, when a Deputy Commissioner sets aside a transfer made by the insolvent in a case transferred to him by the District Judge after adjudication, an appeal against the order of the Deputy Commissioner lay to the District Court and not to the High Court, *Changmull v Jamaram* 15 CLJ 239. Again in *Chandrabhuj v Hiralal*, 80 Ind Cas 858 1925 AIR (Cal) 335, it has been held that the Court of a Deputy Commissioner who has been invested with powers of a Subordinate Judge is subordinate to the Court of the District Judge within the meaning of sec 75 (2) and an appeal against his order in the exercise of jurisdiction lies to the District Judge and not to the High Court. Where, the law being clear, there was no excuse for preferring to the High Court an appeal which lay to the District Judge the High Court refused to return the memorandum of appeal, and following *Debi Prasad v Jamuna Das*, 23 All 56, *Maneck v Dadabhai* 27 Bom 604, dismissed the appeal. Proceeding under the Provincial Insolvency Act is a 'suit' within the meaning of the Santal Parganas Civil Justice Regulation (V of 1893) and that therefore an appeal from an order of the Deputy Commissioner in a proceeding under that Act of which the value exceeds one thousand rupees lies to the High Court in Patna, *Mohit Kumar Mukherji v Surendra Nath Ghosh*, 9 Pat 664.

All orders of subordinate Courts are appealable.

The sub sec (1) which deals with appeals to the District Court from orders made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, imposes no restriction and makes no enumeration of the orders from which alone an appeal lies. The question for consideration is whether any order and every order made by an Insolvency Court, subordinate to a District Court, is appealable or whether there are limits to the right of appeal. Sec 5 of this Act says, "subject to the provisions of this Act, the Court in regard to proceedings under the Act, shall have the same power and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction". There are certain orders which are not appealable under the Code of Civil Procedure. Sec. 104 and Or XLIII, C P Code enumerate the various orders from which an appeal will lie. If sec 75 of this Act is to be regarded as complete and self-contained, then it might be contended t

an order would be appealable under the Insolvency Act though a similar order to which the provisions of the C P Code are applicable would not be appealable. That this is the reasonable construction of the section would appear clearly from the Statement of Objects and Reasons to Act III of 1907 which runs thus:

As usual the question of appeals presents features of no inconsiderable difficulty. The solution here suggested is first to subordinate all other Insolvency Courts secondly to the District Court of 1883 so as to give an appeal from orders to the District Court whose appeal shall be final thirdly to limit strictly to particular classes of orders the right of appeal from orders made by a District Court otherwise than in appeal and fourthly for this purpose to treat as a District Court any subordinate Court to which the District Court may have transferred an appeal.

It will be seen that Schedule I refers only to appeals which lie to the High Court from the decisions and orders of the District Court. But there is no schedule of decisions and orders of the Subordinate Courts from which an appeal lies to the District Court. The sub-section (1) lays down that the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of Insolvency jurisdiction by a Court subordinate to the District Court may appeal to the District Court. Therefore an appeal lies from all orders passed by a subordinate Court to a District Court provided they are made and passed in the exercise of insolvency jurisdiction. *Munna Lal v Kunj Bihari Lal* 44 All 605 20 A L J 517. An appeal from an order of an Assistant District Court passed in the exercise of its insolvency jurisdiction lies to the District Court and not the High Court. *Ah Fuaik v Receiver District Court of Insein* 12 Rang 302. The father of the minor petitioners was adjudicated insolvent and the Official Receiver obtained an *ex parte* order that his debts were binding on the minors and sold the full interest in the property and the purchaser obtained an *ex parte* order for delivery of the property. After delivery the mother as guardian of the minor petitioners applied under Or 47, r 1 and sec 151 C P C to review the order. The first Court dismissed the petition. On appeal the District Judge held that no appeal would lie under Or 47 r 7. In revision it was held by the High Court that the order of the Subordinate Judge passed without notice to the petitioners was beyond his competence and passed without jurisdiction and hence it will be appealable under sec 75 of the Provincial Insolvency Act and liable to review under Or 47 r 1 C P C. *Ramaraja Nadar v Chidambara Nadar* 1933 M W N 75 37 L W 720 143 I C 613 1933 A I R (M) 345.

Order of the District Court in appeal is final

The words shall be final evidently mean not open to second

appeal. But orders passed in the exercise of insolvency jurisdiction by a subordinate or District Court are subject to review. *In Re Bhagwan Das* 4 Bom 489 *Mool Chand v Sarjoog Pershad* 7 C.L.J. 268 12 C.W.N. 273. An order made in appeal by a District Judge in an insolvency proceeding, directing the lower Court to take and submit additional evidence is not a final order within the meaning of sec 75 (1) and the High Court has power in revision to set that order aside *Gangadhar v Shridhar* 61 Ind Crs 589. A District Judge sitting as an Appellate Court in insolvency has the same powers as an Appellate Court under the Code of Civil Procedure. *Inter alia* he is competent to review his judgment in appeal and if he does so an appeal from that order will only lie to the High Court if the provisions of Or XLVII r 7 C.P.C are applicable *Muana Lal v Kunj Bihari Lal* 44 All 605 20 A.L.J. 517.

Proviso (1), Power of revision by High Courts

Though by sub section (1) of section 75 it is provided that the order of the District Court in appeal from orders of subordinate Courts is final yet the High Court for the purposes of satisfying itself than an order made in any appeal decided by the District Court was according to law may call for the case and pass such order with respect thereto as it thinks fit. Exception has been generally taken to the restriction placed on the rights of appeal by clause 42 of the Bill is introduced. We now propose to confer upon the High Courts in respect of any cases decided on appeal by a District Court powers analogous to those which are conferred on them by sec 25 Provincial Small Cause Courts Act 1887 — *Select Committee Report to Act III of 1907*. The High Court has very wide powers of revision under the Insolvency Act and is immaterial whether a second appeal from an order passed by an Insolvency Court is treated as an appeal or a revision. The High Court has to satisfy itself in any event whether the order passed by the lower Court was according to law or not *Rathu Mal v Kunj Bihari Lal* 1936 A.W.R. 1149 166 I.C. 801 1937 A.I.R. (All.) 4 *Kamla Bai v Chatra Prasad* 1937 A.W.R. 1111 1937 A.L.J. 1221. Upon the failure of a firm which had been adjudicated an insolvent to apply for a discharge the Court annulled the adjudication and directed the assets to be distributed among the scheduled creditors. This order was not appealed against. Subsequently two creditors with a view to participation in the assets directed to be distributed applied to be entered in the schedule of creditors. This application being refused they appealed to the High Court. It was held that although the previous order directing distribution of assets had not been brought before the High Court in appeal still it was open to High Court to alter that order under its power under sec 115 C.P.C. inasmuch as that order was without jurisdiction *Pinna Lal v Official Receiver* 53 All 313. Where

pellate order passed in insolvency proceedings is sought to be revised the proper section under which to entertain the petition is sec 75 of the Provincial Insolvency Act and not under sec 115 C P C, *Madho Prasad Vyas v Madho Prasad* 50 All 241

The fact that the wrong party was called upon to begin taken alone, might not be a sufficient ground for a new trial. But when the trial judge has taken an erroneous view of the law in regard to onus and when his mind is coloured by that view and he is thereby disabled from weighing evenly the evidence and thus the said party is placed at disadvantage is the direct result of the trial judge's error the High Court can interfere in revision to set aside the judgment of the lower Court *Chudambaram Pillai v Subramaniam Ayyar* 1932 A I R (M) 513. No second appeal lies from an order under section 54 setting aside a transfer but a revision under proviso to sec 75 is competent *Dina Nath v Labhu Ram* 33 P L R 255 1932 A I R (L) 321. At present there is no second appeal against an order passed by the appellate Court under sections 53 or 54. The only remedy open to a person aggrieved is by way of filing a revision petition to the High Court on a question of law under sec 75 (1) first proviso *Alagirisubba Naik v The Official Receiver Tinnevely* 54 Mad 989. The High Court will not interfere in revision with a discretionary order under sec 43 granting extension of time for applying for discharge *Selvan Chettiar v Venkatachalam Chettiar* 1930 M W N 673 32 L W 446 129 I C 36 59 M L J 710 1931 A I R (M) 10. Where no second appeal is competent under sec 75 High Court can treat it as a petition for revision where the contention is that, the District Judge has based his order on points which were never raised in the grounds of appeal and in support of which there is no evidence on the record. An order of the District Judge refusing to grant an absolute discharge to an insolvent cannot form the subject of second appeal. It can however be the subject of revision *Gokal Singh v Krishnan Lal* 35 P L R 114 150 I C 80 1934 A I R (L) 198. Sec 75 contemplates that the High Court should be very reluctant to interfere in revision with the findings arrived at by a District Judge on appeal under the Act unless his order is perverse or palpably wrong *Bairnath v Gojadhari Prasad* 1935 O W N 375.

Inherent power to order security for costs

An application in revision was made to the High Court under S 75 of the Pro Ins Act 1920 against an order made by the Assistant Judge of Poona. Pending the revisional application the opposite party applied for security for costs against the original petitioner on the allegation that the petitioner was not residing in British India and had not any immoveable property in British India. A preliminary objection was taken that the application was incompetent as there was no provision in the Civil Procedure

Cas 140 Under section 4 of the Provincial Insolvency Act, the Insolvency Court can deal with and decide questions of title as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which on the other hand is claimed by the stranger as his irrespective of the value of the property involved Under section 75 of the Act an appeal lies to the District Judge against a decision of the subordinate Judge under section 4 and a second appeal lies to the High Court, *Fool Kumari v Khirod Chander*, 31 CWN 502 102 IC 115, 1927 AIR (C) 474 Where no question of title or priority arises no second appeal lies to the High Court, *Ghulam Rasul v Kidar Nath* 36 PLR 5 150 IC 305 1934 AIR (L) 807 No second appeal lies against an order made by a District Munsiff annulling a sale under sec 53 *Alagirisubba Naik v Official Receiver Tinnevely* 54 Mad 989 61 MLJ 820 1931 AIR (M) 745

An annulment of a transfer of property by an Insolvency Court acting under the powers as conferred by sec 53 does not constitute a decision under section 4 and no second appeal therefore lies from an order annulling a transfer under sec 53 *Ramchandra v*

dismissed and appeal therefrom to the District Judge was also dismissed It was held that sec 53 was clearly applicable to the case and not sec 4 and that no second appeal lay under sec 75 *Chet Ram Ramrachh Pal v Atma Ram* 34 PLR 960 146 IC 490 1933 AIR (Lah) 634 In respect of an application under secs 53 and 54 of the Provincial Insolvency Act to set aside an alienation as fraudulent no second appeal lies *Ramasamy Narakar v Venkatasami Nareker*, 38 LW 494 65 MLJ 298 145 IC 876 1933 AIR (M) 653 An order for conditional discharge of an insolvent is not covered by sec 4 and consequently no second appeal lies from it, *Gopal Das v Official Receiver, Sialkkt*, 133 IC 526 1931 AIR (L) 647 No second appeal lies against an order dismissing an application of an interim receiver under sec 47, CPC or under Or 21, r 90 CPC for setting aside a sale *Mohitosh Dutta v Rai Satish Chandra Choudhury*, 35 CWN 971 1932 AIR (C) 203 Order under section 27 extending time during which to apply for discharge is not one that can be taken to be under section 4 Proviso (2) of section 75 will not apply to such an order and second appeal will not therefore lie *Sombamurthi v Ram Krishna*, 55 MLJ 837 (1929) AIR (M) 43

Where the Official Receiver in an insolvency propounds a scheme which receives the approval of the Insolvency Court

also of the District Judge on appeal no second appeal lies to the High Court under S 75 (1) of the Act on the ground that the scheme in question allows a higher rate of interest on the debts than is permissible under the Act. Such a question is not one in respect of which a second appeal lies to the High Court from the District Court. *Budhsen v Asharfi Lal* I L R (1938) All 50 1937 A L J 1071 1938 A L R 68 172 I C 997 1938 A I R (All) 28

Sub sec (2), Appeals from District Court to High Court without leave

It should be noted that the appeal from an order passed by the District Judge in his original insolvency jurisdiction and not in his appellate jurisdiction lies to the High Court as also from orders of Additional District Judges. Courts of Additional District Judges are not subordinate to the District Courts and therefore appeals from the orders of the Court of Additional District Judge lie to the High Court. *Makhan Lal v Sital* 34 All 382 9 A L J 371 14 I C 162 *Chiranjilal v Emperor* 12 A L J 1105 25 I C 686. The original decisions and orders from which an appeal lies to the High Court under this section are mentioned in Schedule I. A decision on a question whether an insolvent three years before the insolvency sold his property merely with the intent to defraud and delay his creditors is a decision on a question of title within the meaning of sec 4 of the Provincial Insolvency Act and is appealable under sec 75 (2) of the Act. *Shikri Prasad v Hafiz Aziz Ali* 19 A L J 862 63 Ind Cr 601. An order made by the Insolvency Court rejecting a claim preferred by a third party to property secured by a Receiver in insolvency and deciding that the property is assets of the insolvent is appealable without leave of the Court. *Ghani Muhammad v Lala Dina Nath* 108 I C 602. The dismissal of a claim under sec 4 (3) really tantamounts to a decision under sec 4 and entitles the appellant to an appeal under sec 75 read with sch I of the Act. *Monomohan Roy Choudhury v Bhupal Chandra Roy Choudhury* 58 C L J 118 1934 A I R (Cal) 122.

Sub sec (3), Appeals from District Court to High Court with leave

This subsection provides that decisions and orders of the District Judge in his original jurisdiction other than those mentioned in Schedule I i.e. against which no right of appeal is provided may be appealable to the High Court with the leave of the District Judge or with the leave of the High Court. A right of appeal is given to the High Court from any order made by a District Court in the exercise of original insolvency jurisdiction but except in regard to certain specified orders subclause (3) of the section requires the leave of either of the District Court or of

the High Court to be first obtained —Select Committee Report to Act III of 1907. An appeal from an order of a District Judge disallowing the objections of an insolvent to the sale of his properties by the Official Receiver and confirming the sale effected by the latter does not lie without the sanction of the District Judge or of the High Court. *Thakur Singh v Ganga Singh* 9 LLJ 257 103 IC 623 (1927) AIR (L) 424. An order annulling an adjudication on account of the failure of the debtor to apply for discharge within the time fixed by the Court falls within the purview of sec 43 of the Provincial Insolvency Act and cannot therefore be appealed from except with the leave of the Court. *Gopal Ram v Magan Ram* 7 Pat 375 (FB) 107 IC 830. An order of the District Judge under section 68 dismissing the application of the aggrieved party on the ground that it was made beyond 21 days after the Receiver had taken possession of the property is appealable by leave and therefore section 115 CPC does not apply. *Chandra Nath v Nandram Nath* 107 IC 467 (1928) AIR (C) 263. The order refusing to restore an appeal dismissed for default is covered by sec 75 (1) and is therefore appealable with the leave of the Court. *Ganga Ram v Official Receiver Delhi* 33 PLR 5 1932 AIR (L) 248. A creditor on behalf of himself and other creditors made an application to the District Judge under S 151 CPC read with S 5 of the Provincial Insolvency Act praying that the order annulling the adjudication passed by the predecessor of the District Judge should be modified by vesting the insolvent's estate under S 37 in the Official Receiver till the debts due to the unpaid creditors were paid under the insolvency law. The District Judge refused to modify the order passed by his predecessor. It was held that the order of the District Judge was appealable with leave of the District Judge or of the High Court. *Ramakrishna Reddy v Official Receiver Bellary* 1938 MW N 18 176 IC 48 1938 AIR (M) 461.

Appeal from dismissal of application for restoration of appeal

If an appeal pending in a District Court is dismissed for default on the ground that the appellant had failed to put in the process in time and an application for the restoration of the appeal is dismissed it was held that under sec 5 of the Provincial Insolvency Act the provisions of Order 41 of the Civil Procedure Code were applicable and that an appeal lay to the High Court. *Bir Singh v Firm Chanchal Singh* 133 IC 626 (1932) AIR (L) 28. It may possibly have been the intention underlying the provisions of sec 75 sub-sec (3) that it should apply only to orders of the District Court in the exercise of its original jurisdiction but that is not what the section says. It cannot be contended that the order refusing to set aside an ex parte order in appeal is itself an order in appeal though it might be contended that it is an order passed in the

exercise of the appellate jurisdiction of the Court. An appeal from such an order is therefore competent *Banakur Basappa v Hansaji Gulaband Firm* 11 L R 59 M 1049

Grant of leave

An appeal without leave is incompetent *Gulap Sing Ram Sing v Hukmatrai* 1939 A J R (S) 45. Leave to appeal by sec 75 (3) can be granted at any stage of the proceedings and even in oral application made in the course of the hearing of the appeal before the High Court *R K Banerjee v Kanuthal Achu* 164 I C 893 1936 A I R (R) 413. Where in an appeal the leave of the High Court is not obtained as required by sec 75 (3) Provincial Insolvency Act but the appeal is admitted the irregularity can be cured in a case in which leave ought to be granted by granting such leave at the time of the hearing of the appeal *Mahabir Prasad v Rim Tahal* 1 L R 16 P 724 18 P L T 839 1937 P W N 865 172 I C 737 1937 A J R (P) 665

Grant of leave by the District Court

The statute does not provide that leave may be granted on question of fact nor does it provide that the District Court should not grant leave. The matter is in the discretion of the District Court. *Chand* 104 I C 613 (1928). It is a matter of course

the Court will refuse leave in unimportant cases where no question of law is involved. In *Re Campbell* (1884) 14 Q B D 32. An appeal from an order refusing to annul a transfer under section 53 and 54 does not lie as of right and can only be allowed either by leave of the District Judge or the High Court under sec 75 (3) and leave to appeal from such an order should not be given to a creditor unless the District Judge or the High Court is satisfied that the Receiver had been requested and had refused to appeal. *Puri v Chand v Ram Chandra Gupta* 33 P L R 65 132 I C 531 1931 A I R (L) 651. Where a District Judge has passed an order directing the sale of an occupancy holding belonging to the insolvent who objected to the sale on the ground that it is not transferable by custom the District Judge acts properly in giving leave to appeal under sub section (3) inasmuch as the order finally decided the matter between the parties namely whether the holding should be sold. *Arman Sardar v Satkhira Ji* 20 Ind Cas 273. An appeal does not lie against an order giving or refusing leave. *Louis v Esdale* (1891) A C 210

Grant of leave by the High Court

The High Court having concurrent jurisdiction with the District Judge to grant leave to appeal from an order the Insolvency Act can do so when such leave has been refused by the District Judge. When such leave is granted by the High Court there is no necessity

for a further hearing under Or XLI r 11 of the C P C *Madha Sudhan v Parbati Sundari* 19 C W N 760 Where property was sold in insolvency proceedings and the sale confirmed and under sec 45 (2) [now 75 (3)] the District Judge refused to grant leave to appeal the High Court is competent to grant such leave *Jugal Kishore v Ishar Dass* 63 P R 1919 41 Ind Cas 625

An application for leave to appeal under section 75 (3) of the Provincial Insolvency Act may be filed even after the filing of the appeal and when granted takes effect with retrospective operation *M W Elliot v Kopparruppu Subbiah* 53 M L J 742 26 L W 218 105 I C 138 The admission of an appeal by a Division Bench of the High Court from an order annulling adjudication on account of the failure of the debtor to apply for discharge within the time fixed by the Court may under proper circumstances amount virtually to the granting of leave to appeal It is open to the Appellate Court to grant such leave even after the hearing of the case *Gopal Ram v Magni Ram* 7 Pat 375 (F B) 107 I C 830 Following this case it was held in the *Dinajpur Trading and Banking Company Ltd v Protash Chandra Sen* 56 C L J 440 that the fact that the appeal

admitted and allowed to be heard was tantamount to leave to appeal by section 75 (3) Where an appeal is admitted but subsequently leave is obtained after the period of limitation limitation may be reckoned upto the date on which the memorandum of appeal is presented or in any case the delay in filing the appeal can be excused under sec 78 *Ramasuamy v Pouer* 151 I C 625 1934 A I R (R) 117

Though it has been held in *Thakur Singh v Ganga Singh* 9 L L J 257 103 I C 523 (1927) A I R (L) 424 that the mere fact that the High Court admitted an appeal to hearing does not amount to the granting of such sanction it has since been held over and over that when there is a prayer for leave and the appeal is admitted without specially stating that leave is granted there was substantial compliance with the provisions of sec 75 (3) and the appeal must be held to have been instituted with the leave of the Court *Ram Chand v Shah Mohra Sha* 11 L L J 198 119 I C 427 1929 A I R (L) 622 Where a petition praying for grant of permission under sec 75 of the Provincial Insolvency Act is filed with the memorandum of appeal and the Motion Bench admits the appeal it must be assumed that the petition for grant of permission has been accepted *Ganesh Das v Khitanda Ram* 119 I C 703, (1929) A I R (L) 636 Leave to appeal under sec 75 (3) can be given at the time of hearing of appeal by the High Court even though there is no such prayer for leave to appeal if the request is made after the expiry of the period of limitation *Ram v Official Receiver, Delhi* 119 I C 703 (1929) A I R (L) 636 Where an appeal which lies only with the leave of the Court is admitted by a Division

Bench without such leave being expressly granted it should be considered that the leave had been granted and appeal should be disposed of on the merits *Lorind Chand Pirma Vandi Maulvi Mohammad Akram Khan* 34 PLR 827 145 IC 474 1933 AIR (L) 642 Where no application for leave to appeal has been made it cannot be inferred that leave was granted because the appeal was admitted Leave was granted at hearing and time was extended under sec 5 Limitation Act *Mangat Rai v Lal Mohan Lal* 149 IC 935 1934 AIR (L) 33

Appeal to Privy Council

The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist Where an application for insolvency was dismissed under sec 15 (now sec 23) of the Insolvency Act and an appeal was also dismissed in the High Court under Or XLI r 11 it was held that an appeal to the Privy Council was competent if the matter was appealable in other ways *Chatrapat Sing v Kharag Sing* 40 Cal 685 17 CWN 752 17 CLJ 547 A judgment passed by the High Court in its appellate sitting a prior order is appealable to the Privy Council *Anna* 1925 AIR (Mad) 243 In *Maung* 12 Rang 194 (PC) it has been held that in a case where the Act gave a right to appeal to the High Court an appeal from the decision of the High Court lies to the Privy Council under and subject to the Code of Civil Procedure

Leave for appeal to Privy Council

In an insolvency matter original or appellate an appeal to the Privy Council lies under clause 39 of the Letters Patent even if no 109 C P Code *Annamalai Chetty* (Mad) 243 Where the High Court order of the District Judge rejecting an insolvent on the ground of the abuse of the process of the Court it is proper to the High Court to certify the case as a fit one for appeal to the Privy Council *Chatrapat Sing v Kharag Sing* 40 Cal 685 17 CWN 752 17 CLJ 547 When leave to appeal against a second appellate decision is granted the reasons which led to the decision should always be recorded *Alagirisubba Naik v The Official Receiver of Tinnevely* 54 Mad 989 In *N C Gallhara v A M Murugappa Chetty* 12 Rang 355 the petitioner applied to the District Court for adjudication of the respondent The respondent by way of demurrer raised a plea that the petition did not disclose an available act of insolvency but the District Court entertained the petition On appeal the High Court dismissed the petition The petitioner applied for leave to appeal to His Majesty in Council under sec 110 of the C P C It was held that the order of the High Court was a final

order passed on appeal within cl 37 of the Letters Patent and secs 109 and 110 of the C P C and that under sec 110 it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not and whatever may be the value of the property in respect of which a claim or question is involved in the appeal no appeal lies under sec 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order and from which he seeks to be relieved by His Majesty in Council is Rs 10 000 or upwards

Court of appeal , Its power and procedure

Where a Court is appealed to as one of the ordinary Courts of the country the procedure orders and decrees of that Court will be governed by the ordinary rules of the Code of Civil Procedure *Maung Ba Thau v Ma Pin* 61 I A 158 12 Rang 194 (P C) 38 C W N 449 (P C) Section 47 (2) [now section 5] of the Provincial Insolvency Act and section 108 (2) of the C P C apply the procedure of the C P Code to appeals filed under section 46 (now 75) of the Provincial Insolvency Act hence a respondent in such an appeal is entitled to file a memorandum of cross objections under Or XLI r 22 C P Code *Algappa Chettiar v Chokalingam* 41 Mad 904 (F B) 84 I C 203 A Court exercising jurisdiction under this section has power to go behind a judgment and enquire into the validity of a debt if there are circumstances which tend to show that there has been fraud collusion or miscarriage of justice *Anandji Damodar v James Finlay & Co* 62 Ind Cos 441

Abatement of appeal

In an appeal by one of the creditors all the creditors need not be joined as party respondents *East India Cigarette Mfg Co Ltd v Anando Mohun Basak* 24 C W N 401 The auction purchasers are necessary parties *Khaira v Saleemraj* 51 Ind Cas 985 The death of a creditor respondent in an appeal from an order disallowing the objections of an insolvent to the sale of his properties by the Official Receiver and confirming the sale effected by the latter and the nonjoinder of his representatives in time does not cause the abatement of the appeal inasmuch as the real person interested in the appeal is the Official Receiver *Thakur Singh v Ganga Singh* 9 L.L.J 257 103 I C 623 (1927) AIR (L) 424 Though it is not necessary for a petitioning creditor to implead all the creditors yet if a creditor is impleaded his legal representatives must be brought on the record in an appeal in case of his death otherwise the appeal would abate *Lorind Chand Parma Nand v Maulvi Mohammad Khan* 34 P L R 827 145 I C 474 1933 AIR (L) 642 An appeal by an insolvent against an order refusing his application for discharge on the objection of a creditor abates wholly if the

of one of the creditors respondents be not substituted within time although the deceased creditor may not himself have raised any objection to the discharge. Such an appeal however does not abate by reason of the absence of the heirs of one of the creditors if there be a receiver in insolvency appointed in the case and he be on the record representing all the parties concerned *Jatindra Nath Saha v Katihar Oil Mill Ltd* 39 CWN 1292 1935 AIR (C) 644. Creditors served with a notice under Rule 9 of the rules framed under sec 79 of the Act to appear at the hearing of the insolvent's application for discharge do not become parties to the proceeding in the same sense as Plaintiffs and Defendants are parties in a civil suit. When one such creditor dies during the pendency of an appeal brought by the insolvent from an order refusing discharge and his heirs are not substituted the competency of the appeal must be judged by whether the heirs are likely to be affected adversely by their non substitution. Heirs whose names have already been entered in the schedule of creditors their predecessor in interest having proved his debt and on the other hand heirs of a creditor who had failed even to prove his debt are not likely to be adversely affected by non substitution. *Kazi Abdul Sattar v Dinaspur Trading and Banking Co Ltd* 42 CWN 1153 69 CLJ 229.

Sub sec (4), Limitation for appeal

This sub section should be read with sec 78 *infra* Act III of such secs 5 and 12 of the be applicable to applications Under Act III of 1907 no

appeal or application could be filed after the period prescribed even if there was sufficient cause and the time requisite for obtaining copies of the orders or decrees appealed against was not excluded. On account of the conflict of decisions in the several High Courts as to the applicability of secs 5 and 12 of the Limitation Act to the Provincial Insolvency Act it has been specially enacted by sec 78 *infra* that these sections should apply to insolvency proceedings. In *Dropadi v Hiralal* 34 All 496 FB and *Ram Kissen v Umrao Bibi* 18 PWR 1916 33 Ind Cas 730 it was held that secs 5 and 12 of the Limitation Act would apply to insolvency matter but in *Suvarimah v Bhuyanga* 39 Mad 593 *Jugal Kishore v Gur Narain* 33 All 738 and *Kopparthi v Araveni* 41 Mad 169 it was held that the general provisions of the Limitation Act should not be introduced into the construction of sec 46 (4) [now 75 (4)].

In computing the period of limitation for appeals under this Act principles of secs 5, 9 and 10 of the General Clauses Act X of 1897 should be applied i.e. the date on which the order appealed against is passed and the last day if *des non* should be excluded. *Chaitani Ramaswami v Venkateswara* 42 Mad 13 35 MLJ 531 48 Ind Cas 92. When an appeal is dismissed as filed out

of time a memorandum of cross objection filed by a respondent under or XLI, r 22 cannot be heard, *Alagappa Chettiar v Chocklingam*, *supra*. Omission to file a copy of the order appealed from before the expiry of the period of limitation will not necessarily bring an appeal which is itself filed within time, outside limitation. It is sufficient if the formal order is filed before the hearing of the appeal, *Sant Lal v Raj Narain* 119 IC 4

PART VII.

MISCELLANEOUS

76. The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had

Review.

This is section 49 of Act III of 1907 and corresponds to section 90 (2) of the Presidency Towns Insolvency Act and is based upon sec. 109 (1) of the Bankruptcy Act, 1914 as amended by the Bankruptcy (Amendment) Act, 1926 "We propose to allow the Court a full discretion in the matter of awarding costs subject only to Rules made in this behalf"—*Select Committee Report to Act III of 1907* Under Rules 31, 35, 22 and 27 of the Calcutta, Allahabad, Madras and Bombay High Courts Provincial Insolvency Rules respectively, "all proceedings under the Act down to and including the making of an order of adjudication shall be at the costs of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be payable out of the estate." All proceedings down to and including the making of a receiving order are at the cost of the petitioner, but when the receiving order is made on a creditor's petition the petitioning creditor's cost (including the costs of the bankruptcy notice, if any, sued out by him) shall be taxed and payable out of the estate (vide Rule 187, B. Act.) Under Bankruptcy Rule 150 and under Rules 56 of Bombay and 70 of Calcutta framed under the Presidency Towns Insolvency Act, III of 1909, a petitioning creditor who is resident abroad, or whose estate is vested in a trustee under any law relating to bankruptcy or against whom a petition is pending under the Act, or who has made default in payment of any costs ordered by any Court to be paid by him to the debtor, may be ordered to give security for costs to the debtor

Costs of publication.

costs are not deposited the only remedy for the Court is to recover the costs from the insolvent's property, if the property is sufficient for the purpose, or to remit the costs if the property is insufficient, *Harkishore v. Masum Ali Khan*, 6 O W N 1093 1930 A.I.R. (O) 53,

annulled
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Award of costs against Receiver.

In the matter of awarding costs the ordinary rule should be observed that costs should follow the event, *Ghansyam v. Maroba*, 18 Bom 474. The discretion given to the Courts in the matter of awarding costs is one which should be exercised with reference to general principles. Where there has been no misconduct, omission or neglect which would induce the Court to refuse costs on the part of the one who comes into Court for enforcing a legal claim, the Court has no discretion but must grant him costs, *Kuppusami v. Zamindar*, 27 Mad 341. If the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the Court would make generally would be that he is to pay the respondent's costs, and he will have the right of indemnity given him by the previous order of the Court, or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceedings. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee when the respondent is not in any way in default for which he may be partially mulcted in costs, *Re Suresh Chandra Gooyee*, 23 C W N 431.

Where during the pendency of a suit the plaintiff becomes an insolvent and the Official Assignee continues the action knowing that it is wholly unsustainable, or where in the conduct of the action he is guilty of any conduct, which a prudent man would not be a party to, it would be open to the Court to direct the Official Assignee to pay the costs of the action personally. But where there is a *bona fide* dispute and the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Court made to pay the costs personally.

Rahiman v. Shau Wallace & Co, 92 Assignee or a Receiver brings or defends a suit he is as between himself and the other parties to the suit like an ordinary litigant. When a decree provided "that the appellant (the Official Receiver) do pay respondent's costs" the question arose whether the Official Receiver was personally liable. It was held that there being no indication to the contrary the Official Receiver was personally liable and that his remedy was to solvent's estate, *Balakrishna Menon*.

114 IC 825 1929 AIR (M) 105

The Receiver's appeal directing him to pay the costs of the respondent without stating that the costs should be paid out of the insolvent's estate, the costs were executable personally against the Receiver, though he had ceased to hold the office at the time of execution. If he wanted to safeguard his personal interest he should have obtained an immunity from the creditor or other persons in whose interest he was litigant was, however, open to the Receiver or his successors in

apply to the Insolvency Court for an order that he may be reimbursed out of the insolvent's estate *Lachman Das v. Lakshmi Narain* 1932 A L J 226 1932 A I R (All) 288

77. All Courts having jurisdiction in insolvency and Courts to be auxiliary to each other the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions

Review

This is section 50 of Act III of 1907 and is based upon sec 122 of the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926 and section 126 of the Presidency Towns Insolvency Act III of 1909. Under this section all Courts having insolvency jurisdiction under the Act have been empowered to enforce the orders of other Courts which have like jurisdiction — *Statement of Objects and Reasons to Act III of 1907*. This section should be read with section 76 *supra*.

Insolvency Courts to act in aid of each other

Every British Court having insolvency jurisdiction is bound to act in aid of and be auxiliary to each other in insolvency matters. *In Re Nooraji Talat* 33 Bom 462 *Re Manekji* 10 Bom LR 84. Only Courts with bankruptcy jurisdiction can act as auxiliary to each other. *Callender Sykes v. Colonial Secretary* (1891) A C 460. A Court which has no jurisdiction cannot act as auxiliary to a Court which has jurisdiction. In other words to make the provisions of sec 50 (now sec 77) applicable the Court in which the proceedings have been initiated as well as the Court which is invited to assist it must both have jurisdiction in insolvency matters. *Lalji Sahai v. Abdul Ganj* 15 C W N 253. In *Habbitt v Dutcher* 216 US 102 the Supreme Court of the United States affirms the same principle which is now well recognised both in England and in India. It has been ruled that where a Corporation or an individual has been adjudicated a bankrupt in a District Court a District Court in another district has power to compel the delivery of property within its jurisdiction belonging to the bankrupt to the trustee in bankruptcy because the Courts are bound to act in aid of the proceedings in the original Court. It follows therefore that when the original Court of bankruptcy can act summarily another Court

of bankruptcy, sitting in another district can do so in aid of the Court of original jurisdiction, See *In re Elkuns*, 216 US 125, *In re Wood*, 210 US 264. "This provision is in wide terms and under it the assignee of an insolvent's estate in India would have facilities for collecting assets in any place in the British dominions sufficient for all practical purposes"—*Report of the Select Committee to Act III of 1909*, dated 5th February 1909

In *Re Issac Sharager*, 33 Cal 1062, some of the partners of a firm filed their petition in insolvency in Calcutta and others had been adjudicated bankrupts in England. In the insolvency proceedings in Calcutta an order was made aid of and be auxiliary to the
In *Re Jitandas Jhauar*, 40 Cal an adjudication order under Act III of 1909 the property of the insolvent had been sold and sale proceeds were brought into the Delhi Court under sec 50 of Act III of 1907 (now sec. 77 of Act V of 1920) the latter Court will have to aid the Presidency Court as the assets of the insolvent in any part of British India vest in the Official Assignee under Act III of 1909. In a suit for dissolution of partnership and for a partnership accounts in the Calcutta High Court B was appointed Receiver of the partnership assets by the said Court. Subsequently X brought a suit in the Court of the Subordinate Judge at Dharnbad in Behar, against the partner to enforce a mortgage executed by one of them in respect of certain partnership assets, and with the permission of the Calcutta High Court made the Receiver also a defendant in the suit. The plaintiff in the latter suit procured the appointment of the aforesaid B as receiver of the partnership assets by the Subordinate Judge. The parties were not reconcilable with the High Court. It was held, setting aside the order of the Subordinate Judge, that where concurrent proceedings for similar relief are taken in two different and independent Courts no order should be passed which may lead to friction or conflict of jurisdiction, *Sridhar Choudhury v. Magneeram Banger*, 3 Pat 357 78 Ind Cas 620

78. (1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12 a decision under section 4 shall be deemed to be a decree

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in

of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication to the date of the order of annulment shall be excluded

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act

Review.

This section is new, and its introduction is explained in the *Select Committee Report*, dated, 24th September 1919 thus "We have adopted the suggestion that where a creditor's right to sue is barred by the provision of the Act the period between the making of an order of adjudication and the annulment of such an order shall be excluded from the period of limitation applicable to the suit. These provisions however will not apply to suits in respect of debts which are provable but not proved under the Act"

Sub-sec. (1) ; Application of sections 5 and 12 of the Limitation Act to appeals and applications under this Act.

In Act III of 1907 there was no provision as to whether the Act would be governed by the general provisions of the Limitation Act and therefore there arose a conflict of decisions in the different High Courts as to whether in the absence of a special provision in the Act in that behalf the general provisions of the Limitation Act as stated in sections 5 and 12 would govern these cases

In Madras it was held that an appeal under section 46 (3) [now sec 75 (4)] beyond the period fixed therein was barred by limitation as the time requisite for taking copies of the order appealed against could not be deducted under the Act or under section 12 (2) or 29 of the Limitation Act, 1908, *Sivaramiah v Bhujanga*, 39 Mad 593. The Provincial Insolvency Act is not a self contained enactment nevertheless the general provisions of the Limitation Act should not be introduced into the construction of section 46 (4) [now sec 75 (4)] Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petition and appeals presented after the time prescribed under the Provincial Insolvency Act, *Lingayya v Chinna Narayana*, 41 Mad 169 (FB) 33 M.L.J. 566 44 I.C. 805. In computing the period of limitation for appeals under the Act the principles of sections 5, 9 and 10 of the General Clauses Act (X of 1897) were held to be applicable, i.e., the date on which the act appealed against was done and the last day if *dies non* were excluded, *Ramaswami Pillai v. Venkateswara Aiyar*, 42 Mad 13 48 I.C. 952

On the other hand it was held in Allahabad and in the Punjab that Act III of 1907 was a special law within the meaning of section 29 of the Limitation Act. But inasmuch as it was not a complete Code in itself there was nothing to prevent the application thereto of the general provisions of the Indian Limitation Act. *Dropadi v Hiratal* 34 All 496 (FB) overruling *Jugal Kishore v Gur Narain* 33 All 738 8 A L J 833 *Thakur Prasad v Pinno Lall* 35 All 410 11 A L J 603 20 I C 673 *Waryam v Wadhwa* 8 P W R 1918 46 I C 588. Section 5 of the Indian Limitation Act applies to cases under the Provincial Insolvency Act *Ram Kissen v Umrao Bibi* 80 P W R 1916 33 I C 730.

To set at rest the above conflict of decisions new section 78 was enacted by which sections 9 and 12 of the Indian Limitation Act have been made expressly applicable to appeals and applications under the Provincial Insolvency Act. The effect of the new enactment has been to extend the period of limitation for filing appeals and applications on sufficient cause being shown and deduct from computation the period taken in obtaining copies of the decree or order appealed against. Where an appeal is filed without obtaining leave to appeal but subsequently leave is obtained after the period of limitation limitation may be reckoned upto the date on which memorandum of appeal is presented or in any case the delay in filing the appeal can be excused under sec 78. *Ramaswamy v Pauer* 151 I C 625 1934 A I R (R) 107.

Sections 5 and 12 of the Limitation Act do not apply to creditor's petition for adjudication

Under the English law of Bankruptcy and the Indian law of Insolvency as in force in the Presidency Towns the Court has no power to extend the period within which a creditor's petition for insolvency of a debtor may be presented. The law under the Provincial Insolvency Act 1907 repealed by the present Act was the same. It is said that section 78 of the present Act which is new makes a definite departure from the law in force elsewhere and empowers the Court to enlarge the time. A somewhat similar point was raised in *Anjaparaju v Venkatakrishna* 1923 M W N 195 (1923) A I R (M) 462 and was disallowed. As said in that case by Spencer J the object with which section 78 was introduced appears to have been for the purpose of removing the doubts and difficulties that had been experienced in admitting appeals against orders of the Insolvency Courts and that it was not intended to affect the period within which a creditor may present a petition of insolvency against his debtor. It has however been suggested that section 78 goes much further than what the Legislature may have intended to do. The Act refers to the proceeding instituted by a creditor or by a debtor for the purpose of getting an adjudication passed against him as a petition and not as

cation and if it was intended to apply section 5 of the Limitation Act to such petitions there was nothing easier for the Legislature than to state in clear and unambiguous terms that the terms of section 5 of the Limitation Act shall apply not only to appeals and application under the Act but also to petitions. Therefore delay in presenting petitions by creditors beyond three month will not be excused in any case *Buloral Varomil v Samarkhan* (1928) AIR (S) 177

Certain creditors of a debtor filed a petition under the Provincial Insolvency Act to have the debtor adjudicated and insolvent on the ground that he had executed a mortgage in favour of some creditor alleging that the mortgage constituted a fraudulent preference under section 54 of the Act but as the date mentioned in the mortgage deed was beyond three months from the date of the petition the petitioners applied to have the delay excused under section 5 of the Limitation Act read with section 78 of the Provincial Insolvency Act. It was held that the Legislature has in the Provincial Insolvency Act used the expressions petitions and applications for different purposes and with different legal significations and that the power to excuse the delay in respect of applications given under section 78 of the Act by reference to section 5 of the Limitation Act is not applicable to excuse the delay in filing a creditor's insolvency petition *Gangjee Premjee & Co v O L K K N Firm Colombo* 62 MLJ 152 35 LW 544 1932 AIR (M) 352. An insolvency petition by a creditor or debtor is not an application. A reference to section 5 of the Limitation Act leaves no doubt upon the question its language shows that the applications intended are applications of the description in schedule I Div 3 Limitation Act which may arise in the course of or out of proceedings in insolvency. It is not competent to a Court under the Insolvency Act or the incorporated provisions of the Civil Procedure Code and the Limitation Act to allow an insolvency petition to be amended by the addition of a creditor who was not a party from the beginning when three months have expired since the act of insolvency *Vaithanatha Aiyar v Vaithanatha Aiyar* 61 MLJ 544 1932 MW N 164 1932 AIR (M) 112

Section 78 of Act V of 1920 did not create for the first time or take away any substantial right but that it merely regulated the procedure under the Provincial Insolvency Act. The provisions have been instituted under the Provincial Insolvency Act. *R M M Raman* 80 IC 376 (1924). A creditor presented a petition for adjudicating his debtor an insolvent under sec 6 (4) of Act III of 1907. The petition having been presented in a wrong Court was returned and re-presented to the District Court which was the proper Court on 1st October 1919. The act of insolvency

on which the petition was based was an alleged fraudulent transfer by the debtor of his property on 31st March 1919 and the insolvency petition was presented to the District Court more than three months after that date. On 21st February 1921 the District Court purporting to act under sec 78 of Act V of 1920 excused the delay in the presentation of the petition and ordered an enquiry into the merits. It was held by the High Court that the petition had become barred while Act III of 1907 was in force, and that the District Court had no power under sec 78 of Act V of 1920, to excuse the delay so as to revive a barred right. Spencer, J., in delivering the judgment held that sec 6 (4) of Act III of 1907 makes the occurrence of an act of insolvency within three months of the date of the presentation of a creditor's petition a condition precedent to the lawful presentation and this provision is quite independent of the statute of limitation, *Aryaparaju v Venkata Krishnayya* 44 M L J 303 1923 M W N 195 72 Ind Cas 488.

Section 6 clause (g) of the Provincial Insolvency Act lays down that the debtor must give notice that he has suspended payment. Mere service of notice by the Insolvency Court informing the creditor of the date on which the insolvency petition is to be heard cannot amount to giving notice by the debtor to his creditor that he has suspended payment within the meaning of section 6 cl (g) of the Pro. Ins. Act to enable him to file a petition as a petitioning creditor within the purview of section 9 cl (c) of the Act. A petition by a petitioning creditor is not maintainable when the act of insolvency complained of is committed beyond three months of the date of presentation. In disposing of the contention of the Government pleader in *Muradan Sardar v The Secretary of State for India in Council*, 69 C L J 84 1939 A I R (C) 313 the Court was pleased to hold 'The learned senior Government Pleader contends that the clause (viz Sec 9 (c)) lays down the period of limitation within which a petition for insolvency should be filed and he argues that if this is so, the provisions of section 5 would be attracted by virtue of the provisions of section 78 of the Provincial Insolvency Act. As I read section 9, I do not think it lays down the period of limitation within which a creditor should bring his petition for adjudication. It merely lays down the conditions precedent which must exist before a creditor may petition for the adjudication of a debtor, one of these conditions is that the act of insolvency must have occurred within three months of the presentation of the petition. If the Legislature intended to lay down a period of limitation it could have done so in express terms by saying that the petition could be presented within a certain time.'

Application of other sections of the Limitation Act to appeals and applications under this Act.

Since the Indian Limitation (Amendment) Act, X of 1922 passed the question as to whether the provisions of

sections enumerated in section 29 of the Limitation Act namely sections 4 9—18 and 22 in addition to sections 5 and 12 above referred to will be applicable to appeals and applications under the Insolvency Act depends upon whether the Provincial Insolvency Act is a special law or not and whether it expressly excludes such application. The Provincial Insolvency Act has been held to be a special Act in all High Courts *Dropadi v Hira Lal* 34 All 496 *Thakur Prasad v Panno Lal* 35 All 410 *Lingayya v Chinnu Narayana* 41 Mad 169 (FB) *Waryan v Wadhwa* 8 P W R 1918 46 I C 588. Its provisions do not exclude the applicability of the general provisions of the Limitation Act as by section 3 of the Indian Limitation (Amendment) Act X of 1922 the provisions contained in sections 4 9—18 and 22 have been declared to apply only in so far as and to the extent to which they are not expressly

In *Ma Than May v Bailiff of Rang* 150 134 I C 223 1931

that by reason of there being no provision expressly excluding the applicability of section 4 to applications under sec 68 and by reason of the express terms of sec 29 (2) (a) [Introduced by Act X of 1922] section 4 of the Limitation Act does apply to an application under section 68 of the Provincial Insolvency Act

Application of Sec 78(2)

Section 78 (2) applies only to a suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-sec (2) of sec 28 which might have been brought or made but for the making of an order of adjudication). Sec 78 (2) is not intended to extend the period of limitation for a suit or application brought by the

for the benefit of creditors
inst him by the order of
Bhikamchand Premchand
1936 AIR (N) 117. The
Provincial Insolvency Act is not
d by the Limitation Act

but extends to other statutes including the CP Code. The language of S 78 (2) is quite general clear and definite and comprehensive enough to affect and control the computation of the period of time limited whether by S 48 CP Code the Limitation Act or any other statute. The period of 12 years fixed by S 48 CP Code is a period of limitation within Sec 78 (2) of the Act and therefore in computing the period of 12 years limited by Sec 48 CP Code time during which the insolvency of the judgment debtor was pending must be excluded. *Kahana Sundaram Pillai v Vathlinga Vannar* 48 L W 881 1938 M W N 1255

Sub-section (2) ; Suspension of limitation during pendency of insolvency proceedings

It is now the settled law that a debt does not become barred by lapse of time, if it was not barred at the commencement of the bankruptcy. The bar of time ceases to run (or to further run) after adjudication, as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed, *Baranoshi Koer v. Bhabader Chatterjee*, 34 C.L.J. 167. In *Silasubramania Pillai v. Theetheappa Pillai* 45 M.L.J. 166 1923 M.W.N. 895 it was observed *Ex parte Ross*, 2 Gl & Jameson's Bankruptcy cases 46 & 330, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view is taken in *Ex parte Lancaster Banking Corporation*, *In Re Westby*, (1878) 10 Ch D 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C.J. in that case. 'When a bankruptcy ensues there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statute of Limitation has no application at all to such a case or to the principles by which it is governed'. The authority of these decisions has not been in the slightest degree shaken by *Benson*, *In Re Bower*, (1914) 2 Ch 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitation carefully distinguished *Ex parte Ross* and other cases similar to it as being cases where the proof was in the bankruptcy itself.

Where the permission to sue the insolvent and execute the decree against his estate is granted to a creditor of the insolvent under sec 28 (2) subject to the condition that the proceeds were to be deposited with the Receiver was not only not acted upon by reason of the creditor having proved his debt in insolvency and he, having been entered in the schedule and received the dividends, but on which it was impossible to act it was held that such permission was ineffectual to exclude the unfettered operation of section 78 and that the period between the adjudication and the annulment should be deducted from the period allowed for limitation. *Mulchand v. Rajdhar* 88 I.C. 544 (1925) A.I.R. (All) 735. The benefit of the section can only be invoked by a party who wants to proceed against an insolvent after the adjudication has been annulled. It does not say anything about the proceedings during the pendency of the insolvency proceedings so long as insolvency proceedings are pending the period of 'suspended' provided that the claim was not barred on the day

the adjudication and if the order of adjudication is annulled the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property *Machenjeeri Ahmed v Gobindaprabhu* 51 Mad 862 55 M L J 661 114 IC 227 *Sudhraj Bhojraj v Ali Haji* 47 Bom 244 25 Bom L R 509 57 IC 575 The period of limitation is suspended so long as the insolvency proceedings are pending provided the claim is not barred at the date of adjudication and if an order of adjudication is annulled the right to proceed against the insolvent revives and the period during which the insolvency proceedings are pending will be excluded if the person wishes to proceed against the insolvent or his property Section 78 (2) has been enacted to save an application which would ordinarily be barred if the period of insolvency is not excluded from the bar of limitation *Nak Ched Shah v Kashmir Bank Ltd* 134 IC 878 1932 AIR (O) 69 Limitation for proving debts ceases to run during insolvency proceedings Where therefore a creditor sues after ordinary period of limitation is over but before annulment of adjudication order the proper course is not to dismiss the suit but to permit him to withdraw suit with liberty to sue again after annulment of adjudication *Bandeally Jaffer v Peer Mohamed* 146 IC 124 1933 AIR (R) 75

The wording of the section makes it clear that it applies to cases where creditors of an insolvent propose to institute suits or file applications for the execution of the decree against insolvents The reason is clear in the case of creditors of an insolvent who were prohibited by sec 28 (2) from proceeding with their remedies during the insolvency of the debtor it is only just and proper that the period during which their hands were so to speak tied should be excluded when after the annulment of the adjudication they are left free to take proceedings against the debtor But the case is quite different when the creditor is the insolvent himself The insolvency of such creditor does not prevent the usual proceedings being taken to realise the debt due to the creditor (insolvent) Before adjudication the creditor could take necessary proceedings Interim Receiver may be appointed under sec 20 who could take the necessary proceedings after adjudication the rights of the creditor (insolvent) become vested in the Court or in the Receiver appointed by the Court Under sec 59 the Receiver is bound with all convenient speed to realise the property of the insolvent In these circumstances there seems to be no real obstacle to the realisation of debts due to the insolvent and there being no sort of prohibition in taking proceedings to realise such debts there is no reason for excluding any period on this ground *Rama Pillai v Kasamuthu Nadar* 1929 M W N 369 121 IC 485 1929 AIR (M) 715 Section 78 has no application to a case in which the

decree holder and not the judgment debtor is the insolvent *Muttayya Chettiar v Periatambi Tevari* 1931 M W N 1014 1931 A I R (M) 784

Under section 28 (2) of the Provincial Insolvency Act a decree holder is debarred from instituting any legal proceeding against the judgment debtor except with the leave of the Court. Therefore limitation does not begin to run until leave is granted by the Court for instituting legal proceedings against the judgment debtor when the disability ceases to exist *Hir Nayayan v Brij Nandan Singh* 10 Pat 422 1931 A I R (Pat) 357. No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under section 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where however the application for execution is directed against the person of the judgment debtor and not against his property movable or immovable the decree holder will if he applies promptly after the cessation of the protection order be entitled to the exclusion of the period during which the protection order was in force *Sita Ram v Kishan Lal* 1931 A L J 39 126 I C 16 1930 A I R (All) 580

Period to be excluded from computation on annulment

The statute of limitation for the maintenance of an action at law once it has commenced to run will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made the operation of the statute of limitation is suspended till the date of annulment and if the adjudication is annulled the period between the date of adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made the insolvency does not save the claim from being barred by limitation. So a prudent creditor in order to keep his debt alive will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. Thus a plaintiff who sues after annulment of insolvency on a promissory note executed before the petition in insolvency is filed is entitled to deduct, for limitation, only the period from the order of adjudication to the order of annulment and not from the date of the presentation of the petition *Nagarur Sambayya v Nagarur Pedda Subbayya* I L R (1938) M 439 46 L W 559 1937 2 M L J 703 1937 M W N 929 1938 A I R (M) 19. A person is not entitled to rely on sec 28 (7) and to exclude the whole of the period between the presentation of the petition and annulment of the adjudication on the legal fiction that "the period between the presentation of the petition and annulment of the adjudication shall be deemed to be a period during which the petition was pending". 1936 M W N 49 43 L W

Retrospective effect of section 78 (2)

Every statute which takes away or impairs vested rights

under the existing law or creates a new obligation or attaches a new disability in respect of transactions already passed must be presumed to be intended not to have a retrospective effect. The provisions of the new Act have no retrospective effect. Consequently where a debtor files his insolvency petition under the old Act (III of 1907) and secures an order of adjudication in his favour the order confers certain rights upon him which cannot be divested by the new Act. The old Act applies to such a case and the creditors cannot obtain the annulment of the order of adjudication under the new Act nor can they claim exemption under section 78 (2) *Gurmukh Das Ranimal v Hussomal Tharumal* 1932 AIR (S) 71

Extension of limitation by acknowledgment

An application for execution of a decree was not time barred though made more than 3 years after a previous application where it appeared that the judgment debtor had in the meanwhile filed a petition of insolvency which contained a sufficient acknowledgment of the judgment debt which acknowledgment kept the debt alive under sec 19 of the Limitation Act *Rampal Sing v Nandolal Marwari* 16 CWN 346 following *Maniram v Sett Rupchand* 33 Cal 1047 10 CWN 874. An entry of a debt in the schedule and the signing of it by the insolvent amounts to a valid acknowledgment within the provisions of section 19 of the Limitation Act *A K R M M C T Chettyar Firm v S E Munnee* 6 Rang 433 117 IC 570 1928 AIR (Rang) 326 *Tong Hoc v Eng Ho Seng* 1928 AIR (R) 327. Where an insolvent has written down a debt in schedule as owing that debt to a named person and has signed the schedule that is a sufficient acknowledgment under section 19 of the Indian Limitation Act to extend the period of limitation *Chobey Shrigopal Chiranjilal v Dhanalal Ghasiram* 35 Bom 393. Under sec 19 Limitation Act the acknowledgment must be in writing and signed by the debtor. A deposition of the debtor which does not bear his signature though signed by the clerk and the Judge does not save it from being barred *U P Yin v U Ba Chit* 12 R 610

Suspension of limitation pre supposes —

(1) Adjudication. A person i.e. a creditor is not entitled to claim exclusion of the period spent by him in an Insolvency Court under section 28 (2) or 78 (2) unless there is a legal order of adjudication passed in the insolvency proceedings. There can be no such order if the application of the creditor is dismissed under section 25 (1) of the Provincial Insolvency Act. The aid of sec 14 of the Limitation Act cannot be invoked by the plaintiff in order to bring his claim within time when the previous proceedings have failed not for want of jurisdiction or other cause of the nature but on account of the plaintiff's negligence in not effecting service of notice on the defendant according to law. An order of adjudication is

a pre-requisite for the applicability of either of the said sections, *Baliram v Supadasa*, 121 IC 55

(2) **Annulment of adjudication** As has been observed in *Kamerreddi Timappa v Devasi Harpal* 56 MLJ 458 115 IC 815 (1929) AIR (M) 157, adjudication is annulled under section 43 as a punishment because the debtor has not prosecuted his application for discharge. Sec 43 (2) clearly implies that the debtor's protection has been taken away, that he is again put in the *status quo ante* the insolvency proceedings and he is again at the mercy of creditors. The words "annulled under the Act" in sec 78 (2) are not limited to annulment under the chapter "Annulment of adjudication" beginning from sec 35, they include the case where the order of adjudication is discharged or "set aside" by the Court of appeal and the period between the adjudication and the final dismissal of application should be omitted in computing the period of limitation, *Amar Singh v Imperial Bank of India, Jullundur*, 14 L 426 34 PLR 812 146 IC 686 (1933) AIR (L) 768, followed in *Charu Chandra Mukherjee v Ramesh Chandra Sil*, 11 LR (1937) IC 628 171 IC 280 1937 AJR (C) 158

(3) **Proof of debt**: The proof of debt referred to in the proviso to sec 78 (2) refers to proof under sec 33. A mere statement of a debt due on a bond under sec 13 (d) in an insolvency petition even though not denied by a creditor will not amount to proof under the Act. Whether the method of proving a debt allowed by sec 49 is followed or not, there must be some proof of a debt after the order

v Ran sec 33, *Mannasao Kalesar Ban*
It has been held in *Sh Fazal*
Azim 1937 OWN 1143 171 IC

609 1938 AIR (O) 8, dissenting from *Krishna Chandra Das v Jotindra Nath Porail*, 48 CLJ 574 114 IC 415 1929 AIR (C) 159, that the provisions of sec 33 (1) make proof of debts obligatory, after the passing of an order of adjudication, upon creditors who desire to have their claims considered. The modes of proof mentioned in section 49 are of course not exhaustive, but the fact remains that some form of proof must be supplied by a creditor who wishes to have his debt considered. A mere admission of the debt by the debtor in his petition for adjudication would not amount to proof under the Insolvency Act and therefore would not save limitation under section 78 (2) of the Act. The views expressed in *Krishna Chandra Das v Jotindra Nath Porail*, supra, have also been dissented from in *Velagaleti Veerayya v Kandepu Narasimharao*, 1937-2, MLJ 883 1938 AIR (M) 142. In that case all that was done with regard to the suit debt was that it was included by the insolvent in his schedule and nothing more. Relying on a Calcutta decision (*Krishna Chandra v Jotindra Nath* supra) and over-looking the decision in 57 Mad 767, (*Lakshmi Bai v Rukmani Rao*, Supra) the Court held "the question still remains as to whether or

not the debt has been proved under the Act. The debt is not proved under the Act by its mere inclusion in the schedule of the insolvent and it is quite clear that such a debt as this is at the most debt provable in the insolvency and not a debt proved and the suit was dismissed as being barred by limitation.

Section 49 of the Act does not exclude any other mode of proof. The debt to the decree holder is proved in the insolvency proceedings according to the statement of the insolvent that he had obtained a decree against the insolvent *Krishna Chandra Das v. Jotindra Nath Porail* 48 C L J 574 114 I C 415 (1929) A I R (C) 159 and he is therefore entitled to exclude the period during which the insolvency proceedings were pending notwithstanding the fact that he had not proved his debt and his petition for execution had been struck off. Where subsequent to the adjudication of a person as insolvent a decree is obtained not only against the insolvent but also against the Official Receiver who was impleaded as a party to the suit the debt must be taken to have been proved within the meaning of the proviso to sec 78 of the Act although the formal method of proving the debt as provided by the Act was not adopted and consequently the proviso was held not to apply to such a case. *Ramalinga Ayyar v. Rajalu Ayyar* 53 M 243 1930 M W N 408 58 M L J 170. In *Lakshmi Bai v. Rukman Rao* 57 Mad 767 40 L W 199 1934 M W N 934 67 M L J 45 151 I C 284 1934 A I R (Mad) 465 it has been held that a person who has lodged a proof and fulfilled all the requirements of sec 49 has proved his debt within the meaning of proviso to sec 78 (2) and is entitled to the benefit of sec 78 (2). Where a creditor has done all that was necessary to prove his debt it must be assumed in the absence of a decision by the Receiver refusing to admit the debt that the debt was proved though the Official Receiver by inadvertence omitted to mention the debt in the schedule. So the decree holder is for the purpose of execution against the judgment debtor entitled to deduct the time between the date of the adjudication order passed against the judgment debtor and the annulment thereof. *Rati Ram v. Sant Ram Ganpat Rai* 142 I C 644 (1933) A I R (L) 101.

A judgment in insolvency declaring that the creditor's debt is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved in the manner of *P. C. Venkataswami Patulu* 1931 A I R (M) 441. In the absence of a formal order proving debts or at any rate of some proceedings on the record which by necessary implication are tantamount to such an order the debts cannot be said to be proved and therefore such a creditor of the insolvent cannot claim exemption of the period between the order of adjudication and the order of annulment. *Walati Ram v. Pratap Singh* 33 P L R 1905 1933 A I R (L) 173. In computing the period of limitation for suits instituted against

a person after an order of adjudication has been annulled, section 15 of the Limitation Act does not permit the deduction of time during which the order was in force, *Ramaswami Pillai v Goindaswami*, 42 Mad 319. An application made by a decree holder to the Insolvency Court for leave to execute his decree against the defendants under sec 28 (2) is not an application made to the "proper Court" within the meaning of Article 182 of the Limitation Act and is not therefore available to save limitation *Chathangali Ranchan v Purvamparambau Kunhamu* 57 Mad 808.

79. (1) The High Court may, with the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide—

- (a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers, and the costs of such audit
- (b) for meetings of creditors,
- (c) for the procedure to be followed where the debtor is a firm,
- (d) for the procedure to be followed in the case of estates to be administered in a summary manner, and
- (e) for any matter which is to be or may be prescribed

(3) All rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall on such publication have effect as if enacted in this Act

Review

This is section 51 of Act III of 1907. 'The section empowers the High Courts to make rules for carrying into effect the provisions of the Act. These powers were subject to the same sanction as required in the case of rules made under the Indian High Courts Act 1868, and under the Code of Civil Procedure'

of *Objects and Reasons* to Act III of 1907. Where no new rules have been framed under the Provincial Insolvency Act, V of 1920, rules framed under the old Act, III of 1907 will hold good when they are not inconsistent with the later Act, *S R Darrah v Fazal Ahmed*, 93 IC 903

Amendments.

The addition of clause (c) in sub section (2) of section 79 in Act V of 1920 has been thus explained by the *Select Committee Report*, dated 24th September, 1919: "We have a new clause provided that rules may be made regarding the procedure to be followed in cases where the debtor is a firm as in section 112 (2) of the Presidency Towns Insolvency Act, III of 1909" The section has further been amended by sec 6 of Act XXXIX of 1226 in the following terms, viz, "in subsection (2) of sec 79 of the said Act, the words 'and' at the end of the clause (c) shall be omitted, and after clause (d) the following clause shall be added, viz, "and (e) for any matter which is to be or may be prescribed"

Adjudication of a firm

It is clear from sec 79 (2) of Act V of 1920, that the Legislature contemplated orders of adjudication being passed against firms. The decisions of the Calcutta High Court in *Kali Charan Saha v Hari Mohan Basack*, 31 CLJ 206 24 CWN 461 was under the old Act III of 1907, and not under Act V of 1920. There was some doubt under the old Act but the matter has now been put beyond all doubt in the Act V of 1920, *Muhammad Umar v Official Receiver, Rawalpindi*, 119 IC 735 (1929) AIR (L) 447. "At the time of making an order of adjudication against the partners of a firm the Court need not order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estate of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings, *Debendra Chandra Sikdar v Purusottam Das*, 55 Ind Cas 186

It has been pointed out by Addison, J in *Honda Ram v Chiman Lal*, 100 IC 112, a firm is not a separate legal entity, nor is it a distinct person. It is merely a short hand form for collectively designating all the partners in a firm and an adjudication order passed against the firm is an order against individual partners of the firm who constitute it, *Official Receiver v Naramdas Lota Ram*, 89 IC 492. An order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm. It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in insolvency proceedings and it would be unfair to an insolvent whose property has vested in the Official Receiver for the benefit of his creditors to be harassed again by one of such creditors merely

and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because for the sake of convenience the Court passes an order against the firm and does not pass a specific order against each individual partner in such firm. The fact that a private creditor could not prove his debt on account of the failure of the Court to frame rules under section 79 cannot override the provisions of the law which exempt an insolvent from liability of his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code apply to insolvency proceedings in view of section 5, *Sadler v Whitman*, (1910) 1 K B 686 *Heerji Jivraj v Firm of Valabram Mulji*, 25 SLR 422 1932 A 1 R (S) 39.

As regards the incidents that follow on the adjudication of a firm or of the partners thereof, *vide secs 34, 41 and 42 of the Indian Partnership Act IX of 1932*. For Rules framed for the adjudication of a firm *vide Rules 19-27 of the Calcutta High Court, Rules 22-30 of the Allahabad High Court, Rule 28 of the Bombay High Court, and Rule 28 of the Madras High Court*.

80. (1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely —

Delegation of powers to Official Receivers

- (b) to frame schedules and to admit or reject proofs of creditors,
- (c) to make interim orders in any case of urgency and
- (f) to hear and determine any unopposed or *ex parte* application

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.

Review.

This is section 52 of Act III of 1907, and corresponds to section 102 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926 and to section 6 of the Presidency Towns Insolvency Act.

Amendments.

By sec 7 of Act XXXIX of 1926 the section has been amended

in the following manner, viz., "in sub section (1) of section 80 of the Act, clause (a), (c) and (d) shall be omitted" Again by the schedule under sec 2 of Act XII of 1927, the above sec 7 of Act XXXIX of 1926 was repealed which has not the effect of reviving the said omitted clauses (a), (c) and (d) [vide sec 6, General Clauses Act, X of 1897] Again by sec 3 of Act XVIII of 1928, Act XII of 1927 was repealed but the said omitted clauses (a) (c) and (d) still remained unrevived. The result is that clauses (a), (c) and (d) of sec 80 of Act V of 1920 are omitted but the remaining clauses (b) (e) and (f) are not re-numbered afresh. The repealed clauses (a), (c) and (d) as they stood ran as follows —

- (a) to hear insolvency petitions, to examine the debtor and to make orders of adjudication
- (c) to grant orders of discharge,
- (d) to approve compositions or schemes of arrangement

Object of the amendment.

The object of the amendment was to "restrict the sphere of jurisdiction of the Official Receiver to hear insolvency petitions, to examine the debtor, to make orders of adjudication, to grant orders of discharge and to approve compositions or schemes of arrangement"—*Statement of Objects and Reasons*, published in the Gazette of India, Part V, p 137, dated the 21st August 1926. The amendments were carried out on the recommendation of the Civil Justice Committee in the following terms. "We feel bound to express the opinion that the person who is likely to become trustee of the debtor's estate is not a suitable person to exercise such powers as are mentioned in clauses (a), (c) or (d) of section 80. In his capacity as receiver he has interests adverse to the debtor and should not be allowed to preside over the debtor's examination, still less does it seem proper in a contested case that he should decide as to acts of insolvency"—*Report*, dated 1924-25, page 238.

Delegation of powers to Official Receiver.

An Official Receiver appointed under sec 57 exercise such judicial or quasi-judicial powers as may be conferred upon him by rules framed by the High Court under sec 80. But in the case of an ordinary Receiver his duties and powers are defined by sec 59 and they are executive in their character and not judicial. The Official Receiver is an officer of the Court and there is no provision in law which makes it obligatory on the District Court to have the Official Receiver made a formal party in the proceedings under the Act and the fact that he is not impleaded does not vitiate any order passed therein, *Kumaraswami Nadar v Venkataswami*, 46 M L J 242 78 Ind Cas 857 1924 A I R (M) 830. An Official Receiver in insolvency has no power to make any order on a claim petition

filed before him as it is not a power which has been delegated to him under sec 80 of the Act. If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent he should apply to the District Judge direct to take action under section 4 of the Act *Vellayappa Chettiar v Ramanathan* 47 Mad 446 78 Ind Cas 1017 46 MLJ 80 Under sec 80 the power to make the vesting order is not delegated to the Official Receiver and the Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order *Kavali Sankara Rao v Tirulapati Ramakrishnayya* 46 MLJ 185 78 Ind Cas 294 1924 AIR (M) 461

Appeals from orders of the Official Receiver.

When empowered by the High Court under this section an Official Receiver has the same powers as the District Court and these powers are mentioned in clause (1). But as regards appeals from orders of the Official Receiver so empowered these appeals will lie to the District Court and not to the High Court *Chidambaram v Nagappa* 24 MLJ 73 16 Ind Cas 820

81. Any Local Government may, by notification
Power of Local Government to bar application of certain provisions to certain Courts in the local Official Gazette declare that any of the provisions of this Act specified in Schedule II shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Local Government

Review

This is section 54 of Act III of 1907. The reasons for the barring of certain provisions of the Act to certain Courts are best explained in the *Proceedings of the Viceregal Council to Act III of 1907*. It is very difficult to frame any one satisfactory law which is equally suited to different parts of the country. A law adapted for the towns is too complicated for the country districts and a law suited for the country district is altogether insufficient for the great centres of trade. This is no new difficulty. The Select Committee has given careful consideration to this question. They feel that legal reform cannot be postponed until the requirements of the whole country become uniform and they feel that trading centres cannot be left without an adequate system of insolvency merely because other parts of the country are yet less developed. On the other hand they feel that it is desirable to avoid forcing on backward districts a law which is too complicated for their requirements. In the result they suggest that a power should be inserted corresponding to sec 1 of the Transfer of Property Act 1882 to enable

(XVII of 1879) "—*Proceedings of the Viceregal Council*, dated 15th March, 1907

Amendment.

By the schedule under section 3 of the Repealing and Amending Act VIII of 1930 the words and figures "or section 8 of the Lower Burma Courts Act, 1900" which occurred in clause (a) between the figure "1909" and the word "or" have been omitted. This was found necessary on account of the repeal of the whole of the Lower Burma Courts Act VI of 1900 by the Repealing and Amending Act XI of 1923.

83.

Repeals

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

Amendments.

By the schedule under section 2 of the Repealing Act XII of 1927 sub-section (1) of sec 83 which stood as follows "(1) The enactments mentioned in Sch III are hereby repealed to the extent specified in the fourth column thereof," was repealed. Again by the schedule II under section 3 of Act XVIII of 1928 the said Act XII of 1927 was repealed. The result was that sub-section (1) was not revised and sub-section (2) was not re-numbered (vide sec 6 of the General clauses Act X of 1897).

SCHEDULE 1.

[See Section 75 (2)]

*Decision and Orders from which an appeal lies to the High Court
under section 75 (2)*

Sections	Nature of decision or order
4	Decision of questions of title priority etc, arising in insolvency
25	Order dismissing a petition
26	Order awarding compensation
27	Order of adjudication
33	Orders regarding entries in the schedule
35	Order annulling adjudication
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication
41	Order on application for discharge
50	Order disallowing or reducing entries in the schedule
53	Order annulling a voluntary transfer
54	Decision that transfer of property is a preference in favour of a creditor

Amendments.

By the Schedule under sec 2 of the Repealing Act XII of 1927, the entry relating to sec 69 in Schedule I which ran as follows '69 Conviction and sentence of debtor for an offence under this section' was omitted. Again Act XII of 1927 was repealed by Schedule II under section 3 of Act XVIII of 1928. But the latter repeal did not revive the entry relating to section 69.

SCHEDULE II.

[See section 81]

Provisions of the Act application of which may be barred by Local Governments

Provisions of the Act

Subject

Section

26		Award of compensation
28, sub sec (3)		Reputed property of an insolvent
34		Debts provable under the Act.
38		
39		Compositions and schemes of arrangement
40		
42, sub sections (1) and (2)		Obligation to refuse absolute discharge
45		
46		
47		
48		Method of proof of debts
49		
50		
51		
52		
53		Effect of insolvency on antecedent transactions
54		
55		
61 [except cl (a) of sub section (1) and sub section (4)]		Priority of debts
62		
63		Dividends
64		
65		
66		Management by and allowance to insolvent
72		Penalty for obtaining of credit by undischarged insolvent

SCHEDULE III.

Repealed by sec 2 of the Repealing Act, XII of 1927

Note By the schedule under section 2 of the Repealing Act, XII of 1927, Schedule III was omitted. The said Act XII of 1927 was again repealed by Schedule II under section 3 of the Repealing Act XVIII of 1928, but the said repealed Schedule III was not revived.

The Schedule III as it stood before the repeal was as follows —

SCHEDULE III

ENACTMENTS REPEALED

[See section 83]

Year	No	Short title	Extent of repeal
1907	III	The Provincial Insolvency Act, 1907	So much as has not been repealed
1914	IV	The Decentralization Act, 1914	In Schedule I, Part I, the entry relating to Act III of 1907
1914	X	The Repealing and Amending Act 1914	In Schedule I, the entries relating to Act III of 1907

THE PROVINCIAL INSOLVENCY RULES

Under Act V of 1920.

CALCUTTA HIGH COURT.

Published in the Calcutta Gazette, dated 8th June 1921

- 1 The following rules may be cited as "The Provincial Insolvency Rules" The forms prescribed by these rules, with such variations as circumstances may require, shall be used for the matters to which they severally relate
- Framed under Section 79, Act V of 1920

(The forms are produced as Civil Process Forms No 137 to 150 in Volume II)

- 2 Every insolvency petition shall be entered in the Register of Insolvency Jurisdiction and shall be given a serial number in that Register, and all subsequent proceedings in the same matter shall bear the same number

- 3 All insolvency proceedings may be inspected at such times, and subject to such restrictions as the District Judge may prescribe, by the Receiver, the debtor, and any creditor who proved, or any legal representative on their behalf

Notices.

- 4 Whenever publication of any notice or other matter is required by the Act or these Rules to be made in an official Gazette, a memorandum referring to and giving the date on which such advertisement appeared shall be filed with the record and noted in the order sheet

- 5 Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition The same procedure shall be followed in respect of notice of the date for the consideration of proposal for composition or scheme of arrangement under sec 38 (1)

- 6 Notice of an order of adjudication under section 30 may, in addition to the publication in the local official Gazette required by the Act be published in such newspapers as the Court may

When the debtor is a Government servant a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under section 37 (2)

7 The notice to be given by the Court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter

8 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to the creditors have been notified but not proved shall be sent through the post by registered letter

9 Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official Gazette and in such newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not

10 A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed

11 In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct for instance by affixing copies in the Court house or by beat of drum in the village in which the insolvent resides

Receivers

12 Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor and forwarded to the person appointed

13 (1) A Court when fixing the remuneration of a Receiver should as a rule
centage of which
after deducting ar
ceeds of their securities on the other part on the amount distributed
in dividends

(2) When a Receiver realizes the security of a secured creditor the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

14 The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by

such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

15. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's Accounts (or any part thereof) relating to the estate, as shown by the cash-book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies

16. In any case in which a meeting of creditors is necessary and in any case the debtor proposes a composition or scheme under section 38, the Receiver shall give seven day's notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post

Proof of debts.

17. A creditor's proofs should be in Civil Process Form No. 146, in Volume II, with such variations, as circumstances may require.

18. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other persons on behalf of all such creditors. Such proof shall be in Civil Process Form No 147 in Volume II.

Procedure where the debtor is a firm.

19. Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e g, "Brown & Co by James Green, a partner in the said firm "

20. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there

21. The provision of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

22. Where a petition is filed by a firm, the petition shall be accompanied by an affidavit made by the partner who signs the petition, showing that all the partners concur in the filing of the same

23. An adjudication order made against a firm shall operate

if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

24. In cases of partnership the debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs

25. The joint creditors, and each set of separate creditors, may severally accept compositions or scheme, of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

26. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors, and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

27. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Sale of Immovable property of insolvent.

28. If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the insolvent, the deed of sale of the said property shall be prepared by the purchaser at his own cost, and shall be signed by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser

Dividends.

29. The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post.

Summary Administration.

30. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and

Rules shall, subject to any special direction of the Court, be modified as follows, namely :—

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No 150 in Volume II.
- (iv) The Court shall examine debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor
- (v) The appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings

Costs.

31. All proceedings under this Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the reasonable costs of the petitioning creditor shall be payable out of the estate

32. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate, if the Court refuses to approve the composition or scheme

11.—Cancel Civil Process Forms Nos 137-150 at pages 417 to 426, Volume II, of the Court's General Rules and Circular Orders, Civil, and substitute thereof the following —

CIVIL PROCESS NO. 137.

Debtor's Petition.

[Section 13 of the Provincial Insolvency Act V of 1920]

District

In the Court of the District Judge at
Petitioner

I (a) ordinarily residing at (or "carrying on business at," "or personally working for gain at," or "in custody at") in consequence of the order (b) being

(a) Insert name and address and description of debtor. unable to pay my debts, hereby petition that I may be adjudged an insolvent.
(b) State name of Court and particulars of decree in respect of The total amount of all pecuniary claims against me is Rs

which the order of detention has been made or by which an order of attachment has been made against debtor's property.

(c) State whether, and how any of the debts are secured.

is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree

I have not on any previous occasion filed a petition to be adjudged an insolvent, or I set out in Schedule C particulars (d) relating to my previous ^{petition} ~~petition~~ to be adjudged an insolvent.

(d) The particulars required are

(i) Where a petition has been dismissed, reasons for such dismissal

(ii) Where a debtor has previously been adjudged an insolvent concise particulars of the insolvency including a statement whether any previous adjudication has been annulled, and if so, the grounds therefor.

Verification clause as in plaints

Signature

CIVIL PROCESS NO 138.

Notice to Creditors of the Date of Hearing of an Insolvency Petition

[Section 19 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency Application No

of 19 .

Whereas A B. has applied to this Court by a petition, dated of 19 , to be declared an insolvent under the Provincial Insolvency Act V of 1920, and your name appears in the list of

creditors filed by the aforesaid debtor this is to give you notice that the Court has fixed the day of for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by duly instructed pleader. The particulars of the debt alleged in the petition to be due to you are as follows

Judge

Form on the reverse as in C P Form No 1

CIVIL PROCESS No 139

Order of Adjudication

Section 27 of the Provincial Insolvency Act, V of 1920

In the Court of the District Judge at
Insolvency Application No of 19

Pursuant to a petition dated against [here insert name description and address of debtor] and on the application of [here insert the Official Receiver or the debtor himself or A B of a creditor] and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged insolvent

It is further ordered that the debtor do apply for his discharge within from this date

(Dated this day of 19 Judge

CIVIL PROCESS No 140

Notice of Application by unscheduled Creditor

[Section 33 (3) of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No of 19

To an Insolvent

Whereas an application has been made to this Court by
who claims to be a creditor of

whose application to be declared an insolvent was filed in this Court on the day of 19 for permission to produce evidence of the amount and particulars of his pecuniary claims against the insolvent and for an order directing his name to be entered in the shedule as a creditor for the debts which the said application of 19 when you desire to object

to it

Given under my hand and the seal of the Court, this the
day of 19

District Judge

Form on the reverse as in C P. Form No 1.

CIVIL PROCESS No. 141.

Order Annulling Adjudication.

[Section 35 of the Provincial Insolvency Act V of 1920.]

In the Court of the District Judge at
Insolvency Application No

of 19

Applicant

On the application of R. S., of , and on reading
and hearing , it is ordered that the order of adjudica-
tion, dated against A B of , be and the same is
hereby annulled

Dated this

day of

19

CIVIL PROCESS No. 142.

Notice to Creditors of the Date of Consideration of a Composition or Scheme of Arrangement.

[Section 38 (1) of the Provincial Insolvency Act V of 1920.]

In the Court of the District Judge at
Insolvency Application No

of 19

Applicant

Take notice that the Court has fixed the day of
19 , for the consideration of a composition (or scheme of arrange-
ment) submitted by A. B., the debtor in the above insolvency
petition. No creditor who has not proved his debt before the
vote on the consideration of the
represented at abovementioned
in person or by duly instructed

pleader with your proofs.

Judge

CIVIL PROCESS No. 144.

—————Notice to creditors of application for discharge. —————
 [Section 41 (1) of the Provincial Insolvency Act V of 1920.]

In the Court of the District Judge at
 Insolvency Application No _____ of 19 _____ Applicant

Take notice that the abovementioned insolvent has applied at
 the Court for his discharge, and that the Court has fixed the
 day of _____ 19 _____ at _____ o'clock for
 hearing the application

Dated this _____ day of _____ 19 _____

Note — On the back of this notice the provision of section 42
 (1), Act V of 1920, should be printed

Form on the reverse as in C P Form No 1

CIVIL PROCESS No. 145.

Order of discharge subject to condition as to earnings,

_____ after-acquired property and income. _____

[Section 41 (2) (a) (b) or (c) of the Provincial Insolvency Act,
 _____ V of 1920.]

In the Court of the District Judge at
 Insolvency Application No _____ of 19 _____ Applicant

On the application of _____, adjudged insolvent on the
 day of _____ 19 _____, and upon taking into consideration the
 report of the Official Receiver (or Receiver) as to the insolvent's
 conduct and affairs, and hearing A B and C D creditors —

It is ordered that the insolvent (a) be discharged forthwith or
 (b) be discharged on the _____ or (c) be discharged
 subject to the following conditions as to his future earnings, after
 acquired property, and income —

After setting aside out of the insolvent's earning, after acquired
 property, and income, the yearly sum of Rs _____ for the
 support of himself and his family, the insolvent shall pay the surp-
 lus, if any (or such portion of such surplus as the Court may
 determine) of such earnings, _____
 the Court or Official Receiver
 the creditors in the insolvency
 of January in every year, or _____
 in these proceedings by the _____
 his receipts from earnings, after acquired property, and income

during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account.

Dated this day of 19 .

CIVIL PROCESS NO. 146.

Proof of Debt : General Form.

[Section 49 of the Provincial Insolvency Act V of 1920.]

In the Court of the District Judge at
Insolvency Application No of 19

(a) Here insert In the matter of No (a) of 19 .
number given in I, of (b), make oath and say (or
the notice. solemnly and sincerely affirm and declare)

(b) Address in full.

1. That the said ^{was}
 ^{were} at the date of the petition, viz, the
day of 19 and still ^{is}
 ^{are} justly and truly indebted
to me on the sum of Rs a p for (c) as shown by
(c) State considera the account endorsed hereon (or the follow-
tion and specify the ing account), viz, for which such or any patt
vouchers (if any) thereof I say that I have not, nor hath
in support of the or any person by order to my
claim. knowledge or belief for
(b) Here details of use had or received any manner of satisfac-
securities bills or tion security whatsoever save and except the
the like. following (d)

Admitted to vote for Rs		Sworn at		Deponent's
Judge of Official Receiver		this day of		Signature
		before me		Commissioner

CIVIL PROCESS NO. 147.

Proof of debt of Workmen.

[Section 49 of the Provincial Insolvency Act V of 1920.]

In the Court of the District Judge at
Insolvency Application No of 19 .

APK

I (1) or (b) make oath and say —(or solemnly and sincerely affirm and declare)

(a) Fill in full name, address and occupation of deponent.

(b) The abovenamed debtor or the foreman of the abovenamed debtor or on behalf of the workmen and others employed by the abovenamed debtor

(c) "I" or "the said,"

(d) "My employ" or "the employ of the abovenamed debtor"

(e) "Me" or "the abovenamed debtor,"

I That (c) ^{was} at the date of the adjudication in the _____ day of _____ 19____ and still ^{am} justly and truly indebted to the several persons whose names addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or other in (d) _____ in respect of services rendered by them respectively to (c) _____ during such periods before the date of the receiving order as are set out against their respective name in the fifth column of such schedule for which said sums or any part thereof I say that they have not nor hath any of them had or received in any manner of satisfaction or security whatsoever

Admitted to vote for Rs
Judge or Official Receiver

}

Sworn at
this _____ day of _____
before me

{ Deponent's
Signature
Commissioner

CIVIL PROCESS No 148

Order appointing a Receiver

[Section 56 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
In the matter of

No _____ of 19____

an Insolvent

Whereas A B _____ was adjudicated an insolvent by order of this Court dated _____ and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary —It is ordered that a receiving order be made against the insolvent and a receiving order hereby made against the insolvent and A B _____ of _____ [or the Official Receiver] is hereby constituted Receiver of the property of the said insolvent And it is further ordered that the said Receiver (not being the Official Receiver) do give security to the extent of _____ and that his remuneration be fixed at _____

Dated _____

Judge

CIVIL PROCESS No 149

Notice to persons claiming to be creditors of intention to
declare final dividend

[Section 64 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No _____ of 19
In the matter of _____ Applicant

Take notice that final dividend is intended to be declared in the
above matter and that if you do not establish your claim to the
satisfaction of the Court on or before the _____ day of
19 _____ or such later day as the Court may fix your claim will be
expunged and I shall proceed to make a final dividend without
regard to such claim Dated this _____ day of
19 _____

To X Y Receiver [Address]
Form on the reverse as in C P Form No 1

CIVIL PROCESS No 150

Summary administration notice to creditors,

[Section 74 of the Provincial Insolvency Act V of 1920]

In the Court of the District Judge at
Insolvency Application No _____ of 19 _____

Take notice that on the _____ day of _____ 19 _____ the
abovenamed debtor presented a petition to this Court praying to be
adjudicated an insolvent and that on the _____ day of
19 _____ the Court being satisfied that the property of the debtor is
not likely to exceed Rs 500 directed that the debtors estate be
administered in a summary manner and appointed the
day of _____ 19 _____ for the further hearing of the said petition
and examination of the debtor

Also take notice that the Court may on the aforesaid date then
and there proceed to adjudication and distribution of the assets of
the aforesaid debtor It will be open to you to appear and give
evidence on the date Proof of any claim you desire to make must
be lodged in Court on or before that date

Given under my hand and the seal of the Court this the
day of _____ 19 _____

Judge

6 Notice of an order of adjudication under section 30 which is required by the Act to be published in the local Official Gazette shall also be published in such local newspaper or newspapers as the Court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the Head of the Office in which he is employed.

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2).

7 The notice to be given by the Court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter.

8 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified but not proved, shall be sent through the post by registered letter.

9 Notice of the date of hearing of applications for discharge under section 41 (1) shall be published in the local Official Gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not.

10 A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the post office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11 In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct for instance by affixing copies in the court house or by beat of drum in the village in which the insolvent resides.

Receivers

12 Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed.

13 (a) A Court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized after deducting any sums paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividends.

(b) When a Receiver realizes the security of a secured creditor the Court may direct additional remuneration to be paid to him with reference to the amount of work done by him and the results therefrom to the creditors.

14 The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

15 The Receiver shall ordinarily deposit the money realized by him in the Government Treasury or whenever for any particular reason any money in any case is placed in a bank approved by the Court in fixed deposit bearing interest, the amount of interest shall be credited to the estate.

16 The Receiver shall submit to the Court each quarter not later than the 10th day of the month next succeeding the quarter to which it relates an account showing all the receipts and disbursements in the case or cases in which he is Receiver.

17 Whenever there are no funds in the estate and the Receiver receives financial help from any creditor he should show in the accounts of the estate the amount so received.

18 Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's accounts (or any part thereof) relating to the estate, as shown by the cash book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies. No court fee will be required for such copies.

19 In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give at least 14 days' notice to the debtor and to every creditor of the time and place appointed for each meeting. Such notices shall be served by registered post.

Proof of debts

20 A creditor's proof may be in form No 143 in the Appendix with such variation as circumstances may require.

21 In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No 144 in the Appendix.

Procedure where the debtor is a Firm

22 Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his

own signature e.g. Brown & Co by James Green a partner in the said firm

23 Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court upon partners or upon any person having at the time of service the control or management of the partnership business there

24 The provisions of the last preceding rule shall so far as the nature of the case will admit apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own

25 Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

26 An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm

27 In cases of partnership the debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs

28 The joint creditors and each set of separate creditors may severally accept compositions or schemes of arrangements So far as circumstances will allow a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

29 Where proposal for compositions or schemes are made by a firm and by the partners therein individually the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors Such proposal may vary in character and amount Where a composition or scheme is approved the adjudication order shall be annulled only so far as it relates to the estate the creditors of which have confirmed the composition or scheme

30 If any two or more of the members of a partnership constitute a separate and independent firm the creditors of such last mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm And when any surplus shall upon the administration of the assets of such separate or

dent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein

Applications and notices

31 (a) Every application to the Court either by the Receiver or by any creditor, or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular and without prejudice to the generality of this rule, for an order deciding any question under secs 4, 51, 52, 53, 54 and 55 or any one of them shall (unless otherwise provided by these rules, or unless the Court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant

(b) Every such application shall state in substance the nature of the order or relief, applied for, the section of the Act under which such application is made, the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely

(d) Where such application is made by an applicant other than the Receiver a copy of such application and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely or volume notice of the same shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely, at least before the hearing

made by the Receiver, the affidavit, any statement of the debtor on the file or in the Receiver's possession and on which the Receiver intends to rely

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit

(g) A copy of every application mentioned in sub-section (a) hereof, and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him

Sale of immovable property of insolvent.

32 If no Receiver is appointed and the Court, in exercise of

its powers under section 58 of the Act, sells any immovable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the Court. The cost of registration [if any] will also be borne by the purchaser.

Dividends

33 The amount of the dividend may at the request and risk of the creditor be transmitted to him by post.

Summary Administration

34 When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely —

- (i) There shall be no advertisement of any proceeding in the Official Gazette or a local paper.
- (ii) The petition and all subsequent proceedings shall be endorsed "summary case".
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 151 in the Appendix.
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will often not be necessary and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

35 All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same but when an order of adjudication has been made the costs of the petitioning creditor shall be taxed and be payable out of the estate.

36 No costs incurred by a debtor or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the Court refused to approve the composition or scheme.

37 Where an order of adjudication is made on a debtor's petition, and the Court is satisfied that the debtor is unable to pay the cost of publication in the local Official Gazette, of the notice required by section 30 of the Act, the Court shall direct that such cost be met from the sale proceeds of the property of the insolvent. If the insolvent has no property, or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof shall be remitted.

MADRAS HIGH COURT

[Notification published in the 'Fort St George Gazette' of the
25th April, 1922]

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling and with the previous sanction of His Excellency the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act

I These Rules may be called The Madras Provincial Insolvency Rules, 1922' and shall apply to all Title and application proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May 1922 and shall apply to all proceedings thereafter instituted and, as far as may be to all proceedings then pending

II The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with Forms such variations as circumstances may require

III (1) In these Rules, unless there is anything repugnant in the subject or context, 'the Act' means Definition the Provincial Insolvency Act 1920, "the Court" includes a Receiver when exercising the power of the Court in accordance with section 80 of the Act

'Receiver' means a Receiver appointed by the Court under section 56 (1) of the Act,

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act,

"proved debt" means the claim of a creditor so far as it has been admitted by the Court

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act

IV (1) Every petition, application, affidavit or order in any Cause title and proceeding under the Act or under these number rules shall be headed by a cause title in Form No 1

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to

the petition and all subsequent proceedings on the petition shall bear that number

V (1) When an insolvency petition presented by a creditor is admitted, the creditor shall within seven days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial Officer of the Court shall sign the copy or copies if on examination he finds them to be correct

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served

Particulars in debtor's petition VI The particulars to be given under section 13 (1) of the Act shall be in Form No 2

VII If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons

VIII (1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No 3 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence

(2) The affidavit may be made by the creditor or by some person authorized by him provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order

IX As soon as the schedule of creditors has been framed a copy thereof shall, if a Receiver or interim Receiver has been appointed, be supplied to him, and all subsequent entries and alterations therein shall be communicated to the Receiver or interim Receiver

X (1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved

Consideration of compositions and schemes of arrangement.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court

XI (1) Every appointment of a Receiver or interim Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed

Appointment of, and security from, Receiver and Interim Receiver

(2) Every Receiver or Interim Receiver other than an Official Receiver shall be required to give such security as the Court thinks fit

(3) The Court shall not require an Official Receiver to give security

(4) In cases where the Official Receiver is empowered to make orders of adjudication, he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending and may apply that he may be appointed Receiver for the property of the insolvent

(5) The Court may thereupon appoint the Official Receiver to be Receiver for the property of the insolvent and unless it sees fit to do so, it shall not be necessary to give notice of the application to any person

Provided that any party to the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place

XII (1) The Court may remove or discharge any Receiver or Interim Receiver other than an Official Receiver, and any Receiver or Interim Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct

Removal or discharge of Receiver or Interim Receiver.

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the

debtor in his hands and any book accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct

Receiver or Interim Receiver an officer of the Court

XIII Every Receiver or Interim Receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court

Applications by Receiver or Interim Receiver

XIV (1) Every application to the Court made by a Receiver or an Interim Receiver shall be in writing

(2) The Court may order the notice of the any application by the Receiver or Interim Receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved

Remuneration of Receiver XV (1) The remuneration of Receivers or Interim Receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct provided that it does not exceed five per centum of the amount of the dividends

(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 38 (7) of the Act the remuneration to be paid to the Receiver shall be fixed by the Court and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof

Receiver's report XVI (1) Unless the Court otherwise directs the Receiver or Interim Receiver shall as soon as may be after his appointment and any case before the hearing of the debtor's application for discharge draw up a report upon the cause of the debtor's insolvency the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured liabilities and if so whether that fact is due to circumstances for which the debtor cannot justly be held responsible (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency (c) whether the debtor has continued to trade after knowing himself to be insolvent, (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it,

whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities, (f) whether the debtor has brought on, or contributed to, his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs, (g) whether the debtor has within three months preceding the date of the presentation of the petition debts as they became due given an account to his creditors, (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors, and (i) whether the debtor has concealed or removed his property or any part of it or has been guilty of any other fraud or fraudulent breach of trust.

(2) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

XVII Unless the Court otherwise directs, the debtor shall furnish the Receiver or Interim Receiver or, if a Receiver or Interim Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or Interim Receiver or, if a Receiver or Interim Receiver has not been appointed the Court may direct, provided that the Receiver or Interim Receiver shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XVIII. (1) The Receiver or Interim Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The account of Official Receivers shall be audited annually by the Accountant General.

(3) The costs of such audit, calculated at 12 annas per Rupee one hundred on the amount realized since the last audit of the estate concerned, shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place, shall be reserved for such payment from the amount otherwise available for distribution.

Distribution of dividends

XIX (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court

(2) Notice in Form No 8 or Form No 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and if the amount does not exceed Rs 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made

Application for discharge

XX (1) An application for discharge shall not be heard until after the schedule of creditors has been framed

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than seven days before the date fixed for the hearing, a notice stating the grounds of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs be permitted to oppose the discharge of the debtor, and a creditor who has served the prescribed notices shall not be permitted unless the Court otherwise directs to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor, in person or by pleader, who has served the prescribed notice

XXI (1) The notices to be given under sections 19 (2), 30, 37 (2), 38 (1) and 41 of the Act shall be published in the Fort St George Gazette in English, in the District Gazette in English and in the language of the Court and in such

manner, if any, as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court.

(2) The notices to be given under sections 19 (2), 35 (1), and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal, or the hearing of the application for discharge as the case may be.

(3) Notice of the date fixed for the hearing of an insolvent petition under section 19 (1) of the Act shall be sent by the Court by Registered post, if the petition is by the debtor, to all creditors mentioned in the petition and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date.

(4) The notice to be given under section 35 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs, be served on any or all such creditors by registered post.

(5) Notice of the date fixed for the consideration of a proposal under section 35 (1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than fourteen days before the said date.

(6) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date.

(7) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been proved but not proved not less than one calendar month before the limit of time fixed for proving claims.

(8) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that claims as soon as possible and that claims may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No. 3.

XXII. (1) All proceeding under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them; but when an order of adjudication has been made, the costs of the

petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the petitioning creditors is required to pay shall be taxed and be payable out of the estate

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the cost of sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay

(3) The cost of the publication in the Gazette of—

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor be paid by the creditor, and when the petition is by debtor be paid out of the sum deposited in Court by the debtor under rule XXII (2)

(b) Notice of a proposal for a composition under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor

(4) The publication in the Gazette of—

(a) Notice of adjudication under section 30

(b) Notice to creditors whose claims have been notified but not proved under section 64

(c) Notice of an order annulling an adjudication under section 31 shall be free of charge

(5) No costs incurred by a debtor or incidental to an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate the Receiver or Interim Receiver or Official Receiver as the case may be, may call upon the creditors or any of them to advance the necessary funds or to indemnify him against the cost of such proceedings. Any assets realised by such proceedings shall be applied, in the first place, towards the repayment of such advances, with interest thereon at 6 per cent per annum

Summary administration

XXXIII If the court makes an order under section 74 of the Act that the debtor's estate be administered in a summary manner—

(a) the petition and all subsequent proceedings shall be endorsed "Summary Case",

(b) the Receiver or Interim Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act,

institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f) nor mortgage nor pledge any part of the property of the debtor under clause (g)

XXIV All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or Interim Receiver, the debtor, any creditor who has proved or any legal representative on their behalf

XXV. All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received, (2) insolvency petitions disposed of, and (3) proceedings in insolvency subsequent to orders of adjudication in the Forms Nos 4, 5, and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No 7

XXVI In addition to the registers prescribed in rule XXV, Official Receivers shall maintain (1) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos 10, 11 and 12, appended to these rules

XXVII Expenditure incurred by an Official Receiver and his staff on journeys undertaken for the purpose of administration will be recoverable by the Official Receiver from the assets of the estate or estates concerned in accordance with the rules made by the High Court from time to time on that behalf

XXVIII (1) When any petition, notice or other document is signed by a firm of creditors or debtors in the firm's name, the partner signed for the firm shall add also his signature in the following manner, "B and Co, by A B, a partner in the said firm"

(2) Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the partnership business there

(3) When a firm of debtors files an insolvency petition, the same shall contain the names in full of the individual partners, and unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same

(4) When a creditor files an insolvency petition against a firm,

the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners

(5) An order of adjudication shall be made against the partners individually.

(6) The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs

BOMBAY HIGH COURT.

No 5730 —By virtue of the provisions of section 79 of the Provincial Insolvency Act (V of 1920), and of all other powers thereunto enabling, the High Court of Judicature at Bombay, has with the previous sanction of His Excellency the Governor in Council, and in supersession of the Bombay Provincial Insolvency Rules, 1909, made the following rules for carrying into effect the provisions of the said Act —

I.—The rules may be called "The Bombay Provincial Insolvency Rules, 1924," and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court Subordinate to the High Court of Judicature at Bombay. They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far may be, to all proceedings then pending.

II.—The forms mentioned in these rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III —(1) In these rules unless there is anything repugnant in the subject or context—

"the Act" means the Provincial Insolvency Act, V of 1920 ;

"the Court" includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act ,

"receiver" means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver ,

"interim receiver" means receiver appointed by the Court under section 20 of the Act ,

"proved debt" means the claim of a creditor so far as it has been admitted by the Court

(2) Save as otherwise provided, all words and expression used in these rules shall have the same meaning as those assigned to them in the Act.

Petitions.

IV —(1) Every insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in Form No 7 in all Courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

(2) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

V—(1) When an Insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or if there are more debtors than one, as many copies as there are debtors, and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court, require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine

VI—A debtor's petition shall be in Form No 2 and a creditor's petition shall be in Form No 3

VII—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that the notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons

Proof of Debts.

VIII—(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No 7 in the manner provided in section 49 of the Act provided that before admitting any claim the Court may call for further evidence

(2) The affidavit may be made by the creditor or by some person authorised by him provided that if the deponent is not the creditor the affidavit shall state the deponent's authority and means of knowledge

(3) As soon as may be after proof of any debt is tendered the Court shall by order in writing admit the creditor's claim in whole or in part or reject it provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection

(4) A copy of every order rejecting a claim, or admitting it in part only shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order

IX—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by other person on behalf of all such creditors. Such proof shall be in Form No 8

Schedule of Creditors

X—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80

Scheme

XI—(1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal, and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court

Receivers

XII—(1) Every receiver or interim receiver other than the Official Receiver shall be required to give such security as the Court thinks fit, provided that a Nazir, or Deputy Nazir, or other Government Officer who is appointed a receiver or interim receiver *ex officio*, and who has already under the Public Accountant's Default Act, XII of 1850, or otherwise, given security, that is still valid, for the due account of all moneys which shall come into his possession or control by reason of his office shall not be required to give such security unless, owing to the extent of the assets likely to be realised, or for other special reasons the Court thinks it desirable to do so

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2), but he shall, previous to his admission, or within such further time as the Court may allow, give general security by entering into a recognisance with one or more sufficient sureties in Form No 16 or by depositing Government Securities, in such time as the High Court may fix in this behalf

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall, when the debtor is the petitioner, and may, when a creditor is the petitioner, at the same time appoint him an interim receiver under section 20, and confer on him all the powers conferable on a receiver under Order XL, rule (1) (d) of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing him Receiver for the property of the insolvent under sections

56 and 57 The Official Receiver should at the same time submit a draft order in Form No 6, with the necessary modifications, for signature and sealing

XIII—(1) The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or interim receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct

XIV—Every receiver or interim receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court

XV—(1) Every application to the Court made by a receiver or an interim receiver shall be in writing

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved

XVI—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct provided that it does not exceed five per centum of the amount of the dividends

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors

(3) If a receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof

XVII—The Receiver in making his report shall state whether in his opinion any of the facts mentioned in section 42, sub-clause (1), of the Act exists, and if the debtor makes a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of creditors and shall state the reasons for his opinion

XVIII—If the Court directs the debtor shall furnish the Receiver or, if a Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or, if a Receiver has not been appointed the Court may direct, provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XIX—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate

(2) Any creditor who has proved his debt or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor

XX—The Receiver shall deposit all valuable securities for safe custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India, and whenever a sum exceeding Rs 500 shall stand to the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates

Dividends

XI—No dividend shall be distributed by a Receiver without the previous sanction of the Court

XXII—The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post

Discharge.

XXIII—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver if he is in a position to make it and has already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the

hearing a notice stating the ground of his opposition to the discharge

(3) A creditor who has not served the prescribed notices shall not unless the Court otherwise directs be permitted to oppose the discharge of the debtor and a creditor who has served the prescribed notices shall not be permitted unless the Court otherwise directs to oppose the discharge on any ground not specified in the notice

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices or by the Receiver and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor if necessary for the purpose of explaining any evidence tendered and may hear the Receiver the debtor in person or by Pleader who was served the prescribed notice

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for orders under section 43. If the Court has omitted to specify a period under section 27 (1) and the debtor has not already applied for discharge the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor and if on its expiry the debtor has not applied accordingly the case shall be brought up for order under section 43

Notices

XXIV —(1) The notices to be given under section 30 and 37 (2) of the Act shall be published in the Bombay Government Gazette in English and if the Court so directs in any suitable English and Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court

(2) The notice to be given under section 19 (2) 38 (1) and 41 (1) of the Act shall be published in any suitable English or Vernacular newspaper and if the Court so directs in the Bombay Government Gazette and copies of the notice in English and in the language of the Court shall be affixed to the notice board of the Court

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post if the petition is by the debtor to all creditors mentioned in the petition and if the petition is by a creditor, to the debtor not less than 14 days before the said date

(4) Notice of the date fixed for the condition of a proposal under section 38 (1) of the Act shall be sent by the Court by

XVIII—If the Court directs the debtor shall furnish the Court with a statement of his assets and liabilities and securities by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or if a Receiver has not been appointed the Court may direct provided that the Receiver shall not without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition

XIX—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate

(2) Any creditor who has proved his debt or the debtor shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor

XX—The Receiver shall deposit all valuable securities for safe custody with the Naib or if so ordered by the Court in the Imperial Bank of India and whenever a sum exceeding Rs 500 shall stand to the credit of any one estate the Receiver shall give notice thereof to the Court and unless it shall appear that a dividend is about to be immediately declared he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates

Dividends

XXI—No dividend shall be distributed by a Receiver without the previous sanction of the Court

XXII—The amount of the dividend may at the request and risk of the creditor be transmitted to him by post

Discharge

XXIII—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver if he is in a position to make it and has already done so shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the

hearing a notice stating the grounds of an opposition to the discharge.

(3) A creditor who has not served the prescribed notice shall not unless the Court otherwise directs be permitted to oppose the discharge of the debtor and a creditor who has served the prescribed notice shall not be permitted unless the Court otherwise directs to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices or by the Receiver and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary for the purpose of explaining any evidence tendered and may hear the Receiver the debtor in person or by Pleader who was served the prescribed notice.

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for orders under section 43. If the Court has omitted to specify a period under section 27 (1) and the debtor has not already applied for discharge the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor and if on its expiry the debtor has not applied accordingly the case shall be brought up for order under section 43.

Notices

XXIV—(1) The notices to be given under section 30 and 37 (2) of the Act shall be published in the Bombay Government Gazette, in English and if the Court so directs in any suitable English and Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notice to be given under section 19 (2) 38 (1) and 41 (1) of the Act shall be published in any suitable English or Vernacular newspaper and if the Court so directs in the Bombay Government Gazette and copies of the notice in English and in the language of the Court shall be affixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post if the petition is by the debtor to all creditors mentioned in the petition and if the petition is by a creditor to the debtor not less than 14 days before the said date.

(4) Notice of the date fixed for the condition of a petition under section 38 (1) of the Act shall be sent by the Court

registered post, to all creditors who have tendered proof of their debts not less than 14 days before the said date

(5) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the Schedule of creditors not less than 14 days before the said date

(6) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims

(7) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may, if the Court so directs, be served on any or all such creditors by registered post.

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons

(9) In addition to the prescribed methods of publication any notice may be published otherwise, in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the debtor resides

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal adjourned

Summary Administration

XXV—When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provision of the Act and rules shall, subject to any special direction of the Court and in addition to the modifications contained in section 74, be modified as follows, namely,

- (i) There shall be no advertisement of any proceedings in a local paper
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case"
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No 15
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross examine the debtor
- (v) The appointment of a Receiver will generally not be

necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings

Sale of immovable property of debtor.

XXVI.—If no Receiver is appointed and the Court, in exercise of its powers under section 58 of the Act, sells any immovable property of the debtor, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court.

Costs.

XXVII —(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them; but, when an order of adjudication has been made, the costs of the petitioning creditors shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate, if the Court refuses to approve the composition or scheme

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs 150 to cover expenses. Such deposits shall be paid out of the first available assets realised

Procedure where the Debtor is a Firm.

XXVIII —(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co, by James Green, a partner in the said firm"

(2) Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

(3) The provisions of the last preceding rule so far
the nature of the case will admit, apply in the case
carrying on business within the jurisdiction in a
than his own.

APPENDIX.

Form Nn 1.

General Title.

In the Court of

Insolvency Petition No

of 19

In the matter of

Exparte (here insert "the debtor" or "A B a creditor" or "the Official Receiver or the Receiver")

Form No. 2

Debtor's Petition

(Title)

I (a) ordinarily residing at, (or "carrying on business at," or "personally working for gain at" or "in custody at") in consequence of the order of (b)

(a) Insert name and address and description of debtor.

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property.

(c) State whether, and how any of the debts are secured

being unable to pay my debts, hereby petition that I may be adjudged an insolvent The total amount of all pecuniary claims against me is Re (c)

as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by me The amount and particulars of all my property and debts due to me are set out in Schedule B annexed hereunto together with specification of all my property, not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far

as it includes such particulars (nor being my books of account) as are exempted by law from attachment and sale in execution of a decree

(d) I filed a petition to be adjudged an insolvent in the Court of on or about

and on such petition was adjudged an insolvent in respect of debts total approximately Rs

(d) Strike out the whole of this clause if the debtor has not

which assets were realised to the

filed a previous petition to be adjudged an insolvent and substitute a statement to that effect.

of approximately Rs _____ and
dividend (or "dividends") of _____
in the rupee was (or "were) declared
I was granted an absolute order of discharge (or "I was refused an absolute
order of discharge and my discharge was
suspended for _____ "and or" I

was granted an order of discharge subject to the following conditions _____") on or about _____

This adjudication has been annulled on the following grounds
(or "has not been annulled" _____) (or for the
above form substitute "and on such petition")

and such petition was dismissed for the following reasons—
(Signature)

(Verification clause as in plaints)

Schedule A referred to in Form No. 2.
Form of list of creditors to be annexed to the debtor's petition
CREDITORS.

No.	Names and residences of creditors and claimants.	Nature and consideration of debt or claim and securities (if any), also, if the debt is disputed, the reason	When contracted	Amount of claim	Payments	Interest due at date of presenting petition or filing Schedule with rate	Balance due	Admitted or disputed

N.B. Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, party must be entered both as a creditor and debtor and the word 'Set-off' must be written under the
it.

Schedule B referred to in Form No 2

Form of List of debtors to be annexed to the debtor's petition

DEBTORS

No	Names and residences of debtors	Nature and consideration of the debt and the securities (if any) for the same	When contracted	Amount	Good bad or doubtful	Witnesses with their residences and other evidence by which the debt may be proved

NB Where there have been mutual dealings and it is alleged that a claim by any party has been set off such party must be entered both as a creditor and debtor and the word 'Set off' must be written under the amount

Form No. 3.
Creditor's Petition.
(Title)

I C D, of (or We, C. D., of
& E F of) hereby petition the Court that A B (a)
ordinarily residing at
(a) Insert name, ad- (or 'carrying on business at "dress and description or "personally working for gain at
,") may be adjudged an insolvent
and say —

1 That the said A B is justly and truly indebted to me (or us in the aggregate) in the sum of Rs (set out amount of debt or debts, and the consideration).

2 That I (or we) do not, nor does any person on my (or our) behalf hold any security on the said debtor's estate, or any part thereof, for the payment of the said sum,

Or,

That I hold security for the payment of (or part of) the said sum (but that I will give up such security for the benefit of the creditors of the said A B in the event of his being adjudged insolvent) (or and I estimate the value of such security at the sum of Rs)

Or,

That I, C D, one of your petitioners, hold security for the payment of, etc

That I, E F, another of your petitioners, hold security for the payment of, etc

3 That the said A B within 3 months before the date of the presentation of his petition has committed the following act (or acts) of insolvency, namely, (here set out the nature and date or dates of the act or acts of insolvency relied on)

(Signature)

(Verification clause as in plants)

Form No. 4.

Notice to creditors of the date of hearing of an
insolvency petition—section 19.

(Title)

Whereas A B has applied to this Court, by a petition, dated of 19 to be declared an insolvent under the Provincial Insolvency Act (V of 1920), and your name appears in the list of creditors filed by the aforesaid debtor, this is to give notice that the Court has fixed the day of 19

for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by a duly instructed pleader. The particulars of the debt alleged in the petition to be due to you are as follows —

Dated this day of 19 Judge

Form No. 5

Order of Adjudication—section 27 (Title)

Pursuant to a petition dated (here insert name description and address of debtor) and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged insolvent

Dated this day of 19 Judge

Form No. 6

Order appointing a Receiver—section 56 (Title)

Whereas A B was adjudicated an insolvent by order of this Court dated and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and R S of (or the Official Receiver) is hereby constituted receiver of the property of the said insolvent

And it is further ordered that the said receiver (not being the Official Receiver) do give security to the extent of— and that his remuneration be fixed at If the receiver is a Govt. Officer who has given security that is still valid of the kind mentioned in the proviso to Rule XII (1), strike out this paragraph unless the Court specially directs him to give such security

Dated this day of 19 Judge

Form No. 7.

Proof of Debts.

General Form—section 49

(Title)

No. (a) of 19
 (a) Here insert number given in the notice. I, of (b) make oath and say or solemnly and sincerely affirm and declare —
 (b) Address in full.

That the said , at the date of the petition, viz, the day of 19 , and still justly and truly indebted to me in the sum of Rs as p, for (c) as shown by the (c) State consideration and specify account endorsed hereon (or the following the vouchers (if any) in support of the claim.

For which sum or any part thereof I say that I have not, nor hath any person by (d) order to my knowledge or belief for (d) use (d) Here insert words had or received any manner of satisfaction or security whatsoever save and except the following (e) "my" or "our" or "their" or "his," as the case may be.

(e) Here details of securities, bills or the like.

Admitted to vote for Rs } Sworn at } Deponent's
 Judge or Official Receiver } this day } Signature
 before me }
 (Signed) X Y
 Designation

Form No. 8.

Proof of debts of workmen.

(Title)

1 (a) of (b)
 (a) Fill in full name, address and occupation of deponent. make oath and say (or solemnly and sincerely affirm and declare) —That (c) at the date of the adjudication, viz, the day of 19 , and still justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due
 (b) The above named debtor or the foreman of the abovenamed debtor or on behalf

of the workmen and others employed by the above named debtor

(c) "I or "the said "

(d) "My employ" or "the employ of the abovenamed debtor."

(e) "Me" or "the abovenamed debtor."

them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule for which said sums, or any part thereof I say that they have not, nor hath any of them had or received, any manner of satisfaction or security whatsoever

Admitted to vote for Rs	}	Sworn at	}	Deponent's
Judge or Official Receiver		this day		Signature
		before me		Commissioner

Form No. 9.

Notice to creditors of the date of consideration of a composition or scheme of arrangement—Section 38 (1).

(Title)

Take notice that the Court has fixed the day of 19 for the consideration of a composition (or scheme of arrangement) submitted by A B, the debtor in the above insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by a duly instructed pleader with your proofs.

Dated this day of 19 Judge

Form No. 12.

Order annulling Adjudication under section 37.
(Title.)

On the application of R. S., of _____ and on reading
and hearing _____ it is ordered that the order of adjudication dated _____ against A. B., of _____ be
annulled and the same is hereby annulled
Dated this _____ day of _____ 19 ____ Judge

Form No. 13.

Notice to Creditors of Application for discharge—
Section 41 (1)
(Title)

Take notice that the abovementioned insolvent has applied to the Court for his discharge and that the Court has fixed the day of _____ 19 ____ at o'clock for hearing the application
Dated this _____ day of _____ 19 ____ Judge

Note.—On the back of this notice the provisions of section 42 (1), Act V of 1920 should be printed

Form No. 14.

Order of Discharge subject to conditions as to earnings, after-acquired property and income
Section 41 (2) (a), (b) or (c)
(Title)

On the application of _____, adjudged insolvent on the _____ day of _____ 19 ____, and upon taking into consideration the report of the Official Receiver (or receiver) as to the insolvent's conduct and affairs and hearing A. B. and C. D. creditors :

It is ordered that the insolvent—

(a) be discharged forthwith ; or

(b) be discharged on the _____, or

(c) be discharged subject to the following conditions as to his future earnings, after-acquired property and income —

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs. _____ for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court may determine), of such earnings, after-acquired property, and income to the Court or Official Receiver, (or receiver) for distribution

among the creditors in the insolvency. An account shall, on the 1st day of January in every year or within 14 days thereafter, be filed in these proceedings, by the insolvent setting forth a statement of his receipts from earnings, after-acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or receiver) within 14 days of the filing of the said account.

Dated this day of 19 Judge

Form No. 15.

Summary Administration—Section 74.

(Title)

Take notice that on the day of 19 , the above named debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs 500, directed that the debtor's estate be administered in a summary manner and appointed the day of 19 , for the further hearing of the said petition and the examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there, proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on the date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of the Court this day of 19 Judge

Form No. 16.

Recognizance of the Official Receiver and sureties.

(Rule XIV)

The Judge of the District Court has approved of and allowed this recognizance

R P H of, etc, W B of, etc, and T P of, etc, in the District Court of personally appearing, do acknowledge themselves, and every of them doth acknowledge himself to owe the respective sums of money set opposite to their respective names in the schedule hereto to be paid to Esquire, Judge of the said District Court of his in Office or assigns, and in default of payment of the said sums, the said R P H, W B, and T P are willing agree each for himself, his heirs, executors and

these presents, that the said sums shall be levied, recovered and received of and from them and every of them, and of and from all and singular the manors, messuages, lands, tenements and hereditaments, and goods and chattels of them and every one of them wheresoever the same shall be found Witness the day of 19
Whereas the Government of Bombay have by an order No dated the day of 19 appointed the said R P H Official Receiver under Section 57 of the Provincial Insolvency Act (V of 1920) and he has thereby become liable to give security to be approved by the said District Court And whereas the said Judge has approved of the said W B and T P to be sureties for the said R P H in the amounts set opposite to their respective names in the schedule hereto and has also approved of the above written recognizance, with the underwritten condition as a proper security to be entered into by the said R P H W B and T P and in testimony of such approbation Esquire, the Judge of the said Court hath signed his name in the margin hereof Now the condition of the above written recognizance is such that if the said R P H, his executors or administrators or any of them do and shall duly account for what the said R P H, shall receive or get under his control or become liable to pay as Official Receiver at such periods and in such manner as the said Courts shall appoint and pay the same as the said Court direct then the above recognizance to be void, otherwise to remain in full force and virtue

The Schedule above referred to.

R P H	thousand rupees
W B	thousand rupees
T P	thousand rupees

Taken and acknowledged by the abovenamed R P H, etc etc

Form No. 17.

Register of Insolvency Petitions.

No & date of petition	Names of (a) petitioners and (b) opponents	Nature of petition etc	(a) Total amount of alleged debts	(b) Total amount of proved debts	(a) Total amount of alleged assets	(b) Description & total amount of assets realized	Name or designation of Receiver, fees paid to him and dates of payment	Brief note of interim orders passed by the Court and dates thereof, e.g., re dismissal of petition, adjunction, appointment of Receiver, annulment, framing of schedule of creditors, scheme or composition, declaration of dividends, etc.	Summary of final order and date thereof, e.g., re discharge, annulment, enforcement of penal provisions, etc.
1	2	3	4	5	6	7	8		

Bombay 31st October 1924.

(Sd) N D Gharda

Registrar

(Published in Bombay Government Gazette for 1924 Part I, pages 2698 to 2713)

LAHORE HIGH COURT

Rules made by the High Court with the sanction of the Local Government under the powers conferred by section 79 of the Provincial Insolvency Act, 1920 for carrying into effect the provisions of the Act

1 These rules may be cited as The Punjab Provincial Insolvency Rules and shall apply to all proceedings under the Provincial Insolvency Act 1920

2 The forms annexed to these rules (printed at the end) with such variations as circumstances may require shall be used for the matters to which they severally relate

3 (i) In these rules unless there is anything repugnant in the subject or context—

The Act means the Provincial Insolvency Act 1920

Receiver means a Receiver appointed by the Court under Section 56 (1) of the Act

Interim Receiver means a Receiver appointed by the Court under section 20 of the Act

Proved debt means the claim of a creditor so far as it has been admitted by the Court or by the Official Receiver empowered under Section 80 (1) (b) of the Act

(ii) Unless there is anything repugnant in the context words and expressions used in these rules shall have the same meanings as those assigned to them in the Act and references to sections shall be taken to be references to sections of the Act

4 (a) Every insolvency petition shall on institution be entered in Civil Register of Miscellaneous Cases (Register No II) in all courts exercising insolvency jurisdiction and shall be given a serial number in that register. If the petition results in adjudication the case should be entered in the Register of persons
Form No 15 attached
proceedings subsequent

(b) Miscellaneous applications under sections 4 53 54 and 69 of the Provincial Insolvency Act should be entered in Civil Register No VI (Register of Miscellaneous Petitions) which is the proper register for entering such applications. A separate register should be maintained in this form for insolvency cases

5 All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has proved, or any legal representative on their behalf at such times and subject to the same rules as other Court records (Vide Volume IV, Chapter 16—Records) provided that no fee shall be charged for inspection made by the Receiver

Notices.

6 Whenever publication of any notice or other matter is required by the Act to be made in an official gazette, a memorandum referring to, and giving the date of, such advertisement shall be filed with the record and noted in the order sheet

7 (i) Notice of order fixing the date of the hearing of petition under section 19 (2) may, in addition to the publication thereof in the local official gazette, be also advertised in such newspaper or newspapers as the court may direct. A copy of the notice shall also be forwarded by registered post to each creditor, to the address given in the petition, or served on the creditor in the manner prescribed for the service of summonses, as the Court thinks fit. The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under section 38 (1)

(ii) Where the petition is by a creditor a notice shall be served on the debtor in the manner prescribed for the service of summonses

8 Notices of order of adjudication under section 30 shall be published in the local official gazette and may also be published in such newspaper or newspapers as the Court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed

The same procedure shall be followed in regard to notice of orders annulling adjudication under section 37 (ii)

9 The notices to be given under section 33 (3) of the Act shall be served only on the Receiver and on the creditors who have proved their debts and may, if the Court so direct, be served on any or all such creditors by registered post

10 The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter

11 The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter

12 (i) When the creditors appear in Court in answer to the notices issued under section 19 (2) of the Act or appear to their debts, they shall be required to give their addresses for service by post

(ii) Whenever an order of adjudication is made the Court should at the same time, fix a date on or before which the insolvent should apply for discharge

(iii) When an application for discharge is made, the Court should fix a date for hearing it and issue notices (ordinarily by registered post) to the creditors at the addresses furnished by them

13 Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and may also be published in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not or served on them in the manner prescribed for service of summons, as the Court thinks fit

14 A certificate of an officer of the Court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rule has been duly posted, accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed

15 In addition to the methods or publication prescribed in these rules, the notice issued thereunder may be served in the discretion of the Court in such other manner as the Court may direct, for instance, by affixing copies on the Court house or by beat of drum in the village where the insolvent resides

16 Every notice issued under rules 7, 8, 11 and 12 shall be published or issued at least 14 days before the doing of the act of which warning is given in such notice

Note —Whenever notice is permitted by these rules to be sent by registered post it should be with acknowledgment due

Receivers and Interim Receivers.

17 Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order, sealed with the seal of the Court, shall be served on the debtor, and forwarded to the person appointed

18 Every Receiver or Interim Receiver, other than an Official Receiver, shall be required to give such security as the Court thinks fit (As regards security to be taken from Official Receivers see Chapter 5 of this Volume)

19 As soon as the Schedule of creditors has been framed, a copy as the Interim Receiver makes and alterations made therein, shall be communicated to the Receiver or the Interim Receiver

20 (i) A Court when fixing the remuneration of Receiver should, as a rule, direct it to be in the nature of a commission of percentage not exceeding $7\frac{1}{2}$ per cent of the amount of the dividends, of which one part should be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities and the other part on the amount distributed in dividends

This commission is intended to cover all office expenditure, including cost of establishment, if any, to be maintained by the Receiver for the discharge of his duties, and contingencies such as purchase of account books and forms and issue of notices, etc., incurred by the Receiver in connection with the administration of the Insolvents' Estates

(ii) Where a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of the work which he has done and the benefit resulting to the creditors

(iii) If a Receiver has been appointed in an insolvency proceeding in which the Court makes an order approving a proposal under section 39, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for payment of the remuneration and shall be subject to the payment thereof

21 If a person is specially appointed an Interim Receiver and is afterwards appointed Receiver in the case his realizations in both the capacities can be treated alike and the ordinary commission charged. Other cases in which an Interim Receiver does work but there is no adjudication or substantive receivership are few, but in them if any real work is done beyond the taking charge of such insignificant movables as the debtor produces voluntarily, it will probably have to be done quickly and be of a definite character and if any remuneration has to be fixed separately in those cases, it should be such sum as the Insolvency Judge may decide on the Receiver's appointment, subject to a maximum of one per cent on the estimated value of the property

22 The Receiver shall keep a Cash Book, a Dividend Register and such other books as may be required to give a correct view of his administration of the Estate, and shall submit his accounts at such times and in such form as the Court may direct. In the absence of any such directions, the Receiver shall submit to the Court for each quarter, not later than the 10th day of the month next following, an account, showing all the receipts and disbursements in cases in which he is a Receiver. The Receiver's account shall be audited by the Local Audit Department of the Accountant General, Punjab. The cost of the audit shall be paid out of the estate at the rate of $1\frac{1}{4}$ per cent of the total realizations.

23 Receivers should not amalgamate their transactions relating to interim proceedings with those of Insolvent Estates

24 The cash which is realized or collected by an Interim Receiver should be deposited in the Imperial Bank or some other approved Bank, and not mixed up with the Insolvent Estates Fund of which an account is kept in the treasury

25 An Interim Receiver shall be required to maintain only the following books and forms —

- (i) A Cash Book in Form No 15 of Official Receivers
- (ii) A Receipt Book in Form No 9 of Official Receivers
- (iii) A Property Register in Form No 16 given at the end of these rules

26 A separate audit of interim accounts is unnecessary because if the interim appointment leads to full receivership after adjudication the Interim Accounts will be incorporated in the receiver's accounts which will then be audited as such in the usual way. If, however, the petition for insolvency is dismissed, no audit is required because the debtor would, under the circumstances himself take back the estate from the Interim Receiver

27 Any creditor who has proved his debt may apply to the Court for a copy of the receiver's accounts or any part thereof relating to the Estate, as shown by the Cash Book up to date and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies

28 The Receiver shall deposit all valuable securities and cash for safe custody with the Nazir (who shall enter the same in the Malkhana Register to be maintained in form 23 and paste a label thereon in form 24 as prescribed for Official Receivers in Chapter 5—B, Rules and Orders, Vol II) or in the Imperial Bank of India or any other approved Bank, as the Court may direct, and whenever a sum exceeding Rs 500/- shall stand to the credit of any one Estate, the Receiver shall give notice thereof to the Court, and unless it shall appear that a dividend is about to be shortly declared, he shall obtain the Court's orders as to investment of the same in a suitable manner, e g., in securities or as a fixed deposit with a Bank, etc

29 (i) The Court may remove or discharge any Receiver or Interim Receiver, and any Receiver or Interim Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books accounts or other documents, relating to the debtor's property which are in his possession or under his control, to such person as the Court may direct

(ii) If an order of adjudication is annulled, the Receiver, if any, shall, unless the Court otherwise directs, deliver up any assets of

the debtor in his hands and any books, accounts or other documents, relating to the debtor's property, which are in his possession or under his control, to the debtor or to such other person as the Court may direct

30 (i) Unless the Court otherwise directs, the Receiver or Interim Receiver shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge, draw up a report upon the cause of the debtor's insolvency, the conduct of debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with such proceedings, and in particular such report shall state specifically whether any of the facts mentioned in each of the clauses of or sub section (1) of section 42 exist or do not exist.

(ii) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

31 Every Receiver or Interim Receiver shall be deemed for the purposes of the Act and of these Rules to be an officer of the Court.

Proof of debts.

32 (i) A creditor's proof may be by an affidavit in Form No 6 with such variations as circumstances may require.

33 In any case in which it appears from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No 7.

Dividends

34 (i) A dividend should be declared in each estate ordinarily every six months, i. e., on the 1st July and the 1st January each year.

(ii) If sufficient funds are not available for a particular dividend in any particular estate a report to this effect should be made to the Court for orders on these dates.

(iii) No dividend shall be distributed by a Receiver without the previous sanction of the Court

dividend has been sanctioned and there is no Receiver, by whom a debt, by registered post within one month from the date of the order sanctioning the distribution.

(v) An order shall not be made under section 65 of the

without giving the Receiver an opportunity to show cause why the order should not be made

(vi) The amount of the dividend may, at the request, expense and risk of the creditor, be transmitted to him by post

But if the amount is under Rupees twenty, the Official Receiver may, after due notice, remit the sum by post to the creditors concerned at their expense and risk even when no formal request has been made by them

(vii) Where the assets in the hands of the Official Receiver are too small for distribution as dividend e.g., a rupee or so these sums may be treated with the permission of the Court in each case, as "unclaimed" by creditors and eventually lapsed to Government

Procedure where the debtor is a firm.

35 Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co by James Green, a partner in the said firm"

36 Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners or upon any person having at the time of service the control or management of the partnership business there

37. The provision of the last preceding rule shall, so far as the nature of the case will admit, apply, in the case of any person carrying on business within the jurisdiction in a name or style other than his own

38 Where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same

39 An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order are partners in that firm

40 In cases of partnership, the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs

41. The joint creditor and each set of separate creditors, may severally accept composition or schemes of arrangement So far as circumstances will allow, a proposal accepted by joint

creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted

42 Where proposals for composition or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint-creditors shall be considered and voted upon by them ap
eac
sur

proposals may vary in character and amount Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme

43. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of each last mentioned firm shall be deemed to be a separate set of creditors and to be on the same footing as the separate creditors of any individual member of the firm And when any surplus shall arise upon the administration of the assets of such separate or independent firm the same shall be carried over to the separate estates of the partner in such separate and independent firm according to their respective rights therein

Summary Administration.

44 When an estate is ordered to be administered in a summary manner under section 74 of the Act the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely —

(i) there shall be no advertisement of any proceedings in the local official gazette or any newspaper,

(ii) the petition and all subsequent proceedings shall be endorsed 'Summary Case',

(iii) the notice of the hearing of the petition to the creditors shall be in Form No 14,

(iv) the Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor,

(v) the appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings The administration charges, however, shall be levied at the same rates as in ordinary cases These charges should be credited into the treasury under Head XXI Administration of Justice-Misc. Fees and Fines—Insolvency Court Receipts,

(vi) the ordinary Nazarat staff should be employed for conducting sales;

(vii) the only registers which need be kept are the Cash Book, the Dividend Register, the Register of Property and such other Registers as may be required to give a correct view of the administration of the estate.

Prosecutions.

45. Before passing an order for making a complaint of any offence referred to in section 69, the Court shall issue a notice to the debtor calling upon him to show cause why such an order should not be passed against him

Discharge.

46. An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report, (vide Rule 30) The Receiver, if he is in a position to make it and has not already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application

47. Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge

48. At the hearing the Court shall hear the evidence which may be tendered by the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor in person or by pleader

49. Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under section 27 shall be brought up for orders under section 43. If the Court has omitted to specify a period under section 27 (1), and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry the debtor has not applied accordingly, the case shall be brought up for orders under section 43.

Sale of immovable property.

50. If no Receiver is appointed and the Court, in exercise of its powers under section 43, orders the sale of any immovable property of the insolvent, the debt shall be paid to the purchaser by the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser.

51. As a rule property should be sold by public auction, sales in any other manner should only be made with the sanction of the Court.

Costs.

52. All proceedings under the Act, down to and including the making of an order of adjudication, shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made on the petition of a creditor the cost of the petitioning creditor including the costs of the publication of all notices required by the Act or Rules shall be taxed and be payable out of the Estate.

Note —All expenses including the expenses of any travelling done by an Interim Receiver with the permission of the Court granted after hearing the applicant have to be met by the party prosecuting the application according to this rule, and if these expenses are not furnished the application for insolvency should be filed

53 A person applying to be adjudicated an insolvent shall deposit a fee of at least Rs 20 or such further sums, if any, as the Court may, from time to time, direct to cover the cost of the issue of the prescribed notices, of their publication in the Government Gazette and of all other proceedings under the Act, down to and including the making of an order of adjudication. Each such deposit shall be treated in Chapter 10 of this volume

Note No 1—This deposit does not cover process fees, which shall be realized as usual, in Court fee stamps according to the rules

Note No 2—This deposit is meant not only for paying the expenses of publication of certain notices in Government Gazette but also to cover the cost of issue of the prescribed notices and all other proceedings under the Act down to a certain stage. The postage for notices should not, therefore, be recovered from the parties concerned until the deposit made under this rule has been exhausted and there is an express order of the Court for the purpose

Note No 3—The amounts of undisbursed balance of the deposits should be transferred to the insolvent's assets after adjudication. All expenses incurred after the order of adjudication can be met out of these assets

54 No cost incurred by a debtor in connection with an application to approve of a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme

55 If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or Interim Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied, in the first place, towards the payment of such advances with thereon at 6 per cent. per annum.

Forms in Insolvency Proceedings

Form No 1

General Title

In the Court of

Insolvency petition No

of 19

In the matter of

Ex parte (here insert "the Debtor" or "A B or creditor" or "the Official Receiver" or "the Receiver")

Form No. 2.

Debtor's Petition (Section 13)

In the Court of the

Insolvency Petition No

of 19

(a) Insert name and address and description of debtor

(b) State name of Court and Particulars of decree, in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property

(c) State whether and how many of the debts are secured

as they are known to, or can be ascertained by me. The amount and particulars of all my property are set out in Schedule B annexed hereunto together with a specification of all my property not consisting of money and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree

I have not on any previous occasion filed a petition to be adjudged an insolvent or, I set out in Schedule C particulars relating to my previous petition to be adjudged an insolvent

petitions

I (a) ordinarily residing at (or 'carrying on business at' or 'personally working for gain at' or "in custody at") in consequence of the order of (b) being unable to pay my debts, hereby petition that I may be adjudged as insolvent

The total amount of all pecuniary claims against me is Rs (c) as set out in detail in Schedule A annexed hereunto which contains the names and residences of all my creditors so far

Signature

(Verification clauses as in Plaints)

Schedule A. (Debts).

Name of creditor.	Residence of creditor.	Amount of debt.	Nature of debt.	Security.		Remarks.
				Nature	Amount	
1	2	3	4	5	6	7

Column 4—In this column enter whether the debt is a judgment-debt, amount due on promissory note, mortgage debt, verbal loan, balance for goods, security for another, etc. In the case of judgment-debt state the name of the Court and the number of the case.

Column 5—In this column state the nature of property whether land, house, gold, etc., and the nature of the security, whether deposit, pledge without possession, pledge with possession, mortgage deposit of little deeds, etc

Schedule B. (Assets).
(1) Movable and immovable property.

Description of property.	Place where situated.	In whose possession.	In the case of land.		Value of property.	If mortgaged state.		Remarks
			Name of estate and holding No.	Area.		Name and residence of mortgagee.	Amount of mortgage.	
1	2	3	4	5	6	7	8	9
					Rs. A. P.		Rs. A. P.	

Column 9--In the remarks column state if petitioner is only part owner of the property, and, if so, who the other owners are, and what his share in the property is.

(2)—Debts owing to petitioner.

Name of debtor.	Residence of debtor.	Nature of debt.	Amount of debt.	When contracted.	Good, bad or doubtful.	Security		Remarks.
						Nature	Amount.	
1	2	3	4	5	6	7	8	9
			Rs A. P.				Rs. A. P.	

Column 3—In this column enter particulars as in column 4 of Schedule A.

Schedule C.

Former petitions for insolvency by the petitioner.

Serial No.	Date of petition	Date of Ad- judication, if any	Date and des- cription of final order on the former petition	(a) Remarks

(a) If the petition was dismissed state the reasons for dismissal. If debtor has previously been adjudged an insolvent, give concise particulars of his insolvency, including a statement, whether any previous adjudication has been annulled, and if so, the grounds therefor.

Form No. 3.

Notice to Creditors of the Date of hearing of an
Insolvency Petition.

Section 19

Insolvency Petition No. _____ of 19 ____.

In the Court of _____

Whereas A B. has applied to this Court by a petition, dated _____ of 19 ____, to be declared an insolvent under the Provincial Insolvency Act, 1920, and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the _____ day of _____ 19 ____, for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter, you should attend in person or by duly instructed pleader. The particulars of the debt in the petition to be due to you are as follows. —

Judge

Form No. 4

Order of Adjudication, Section 27.

In the Court of _____

Insolvency Petition No. _____ of 19 ____.

Pursuant to a petition, dated _____, against (here insert name, description and address of debtor) and on the application of (here insert "the Official Receiver" or "the debtor himself" or "A B of _____ a creditor") and on reading _____ and hearing _____ it is ordered that the debtor be and the said debtor is hereby, adjudged insolvent.

It is further ordered that the debtor do apply for his discharge within (a)
on or before _____

Dated this _____ day of _____ 19 ____.

Judge.

(a) Here state the period or the date on or before which the insolvent must apply for his discharge.

Form No 5

Order Appointing Receiver

Section 56

In the Court of
Insolvency Petition No _____ of 19____

Whereas A B _____ was adjudicated an insolvent by order of the Court dated _____ and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and A B _____ of (or the Official Receiver) is hereby constituted Receiver of the property of the said insolvent And it is further ordered that the said Receiver (not being the Official Receiver) do give security to the extent of _____ and that his remuneration be fixed at _____

Dated _____

Judge _____

Form No 6

Proof of Debts

General Form Section 40

(Title)

(a) Here insert number given in the notice _____ In the matter of _____ No (a) of 19____

(b) Address in full _____ I _____ of (b) _____ make oath and say (or solemnly and sincerely affirm and declare) _____

1 That the said _____ ^{was}_{were} at the date of the petition viz the day of _____

19 and still ^{is}_{are} justly and truly indebted to me in the sum of Rs _____ as p _____ for (c) by the account endorsed hereon (or the (c) state consideration and specify vouchers (if any) in support of the claim following account) viz for which sum or any part thereof I say that I have not nor hath _____ or any person by _____

(d) Here enter details of securities bills or the like _____ order to my knowledge or belief for use had or received any manner of satisfaction or security whatsoever save and except the following (d) _____

Admitted to vote for Rs _____ } Sworn at _____ } Deponent's
Judge or Official Receiver } this _____ day of _____ } Signature
19 _____ before me } Commissioner

Form No. 7.

Proof of Debt of Workmen.

(Title.)

I (a) of (b) make oath and say (or solemnly and sincerely affirm and declare):—

(1) That (c) ^{was} at the date of adjudication, viz, ^{were} the day of 19 , and still ^{is} justly and truly indebted to the ^{are} several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or other in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against this respective names in the fifth column of such schedule for which said sums or any part there of, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever

Admitted to vote for Rs } Sworn at this day of
Judge or Official Receiver } before me
Deponent's Signature
Commissioner

Form No. 8.

Notice to Creditors of the date of consideration of composition or Scheme of Arrangement

Section 38

(Title)

Take notice that the Court has fixed the date of 19 for the consideration of a composition (or scheme of arrangement), submitted by A B the debtor in the above insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by duly instructed pleader with your proof.

Form No 9

Form under section 38

List of creditors for use at meeting held for consideration
of composition or scheme

(Title)

Meeting held at _____ this _____ day of _____ 19____

No	Name of all creditors whose proofs have been admitted	Here state as to each creditor whether he voted and if so whether personally or by pleader	Amount of assets	Amount of admitted proof
		Total		

Required number of majority

Rs

Required value

Form No 10

Form of Notice under section 64

Notice to persons claiming to be creditors of intention to declare
final dividend

(Title)

Take notice that a final dividend intended to be declared in the above matter and that if you do not establish your claim to the satisfaction of the Court on or before the _____ day of 19____ or such later date as the Court may fix your claim will be expunged and I shall proceed to make final dividend without regard to such claim

Dated this _____ day of _____ 19____

G H

Receiver
(Address)

To X Y

Form No. 11.

Order Annuling Adjudication under section 35.

(Title.)

On the application of R. S of _____ and on reading
and on hearing _____ it is ordered that the order of adjudica-
tion, dated _____ against A. B of _____ be, and the same is
hereby, annulled.
Dated this _____ day of _____ 19 .

Judge.

Form No. 12.

Notice to Creditors of Application for Discharge.

(Section 41.)

(Title.)

Take notice that the above-named insolvent has applied to the
Court for his discharge and that the Court has fixed the _____ day
of _____ 19 . at _____ o'clock for hearing of the application.
Dated this _____ day of _____ 19 .

Judge.

Note—On the back of this notice the provisions of section
42 (2) of the Insolvency Act, V of 1920, should be printed.

Form No. 13

Order of Discharge subject to Conditions as to Earnings,
After-Acquired Property and Income.

Section 41 (c)

(Title)

On the application of _____, adjudged insolvent
on the _____ day of _____ 19 , and upon taking into consi-
deration the report of the Official Receiver (or Receiver) as to the
insolvent's conduct and affairs and hearing A B and C D., creditors

It is ordered that the insolvent (a) be discharged forthwith or

(b) be discharged on the _____ or

(c) be discharged subject to the following conditions as to his
future earnings, after-acquired property and income —

After setting aside out of the insolvent's earnings, after
property and income, the yearly sum of Rs. _____ for the

of himself and his family the insolvent shall pay the surplus, if any, (or such portion of such surplus as the Court may determine), of such earnings, after acquired property and income to the Court or the Official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall on the first day of January in every year or within fourteen days thereafter be filed in these proceedings by the insolvent setting forth a statement of his receipts from earnings, after-acquired property and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or Receiver) within fourteen days of the filing of the said account

Dated this day of 19

Judge

Form No 14

Summary Administration.

Section 74.

(Title)

Notice to creditors

Take notice that on the day of 19 the above-named debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 the Court being satisfied that the property of the debtor is not likely to exceed Rs 500 in value directed that the debtor's estate be administered in a summary manner and appointed the day of 19 for the further hearing of the said petition and the examination of the said debtor

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on the said date. Proof of any claim you desire to make must be lodged in the Court on or before that date

Given under my hand and the seal of the Court the day of 19

Judge

Form No. 15.

Register of persons adjudicated insolvents

Serial No	Name of insolvent	Date of Adjudication	Date or period fixed for application for discharge	Name of Receiver	Security taken from the Receiver (if any)	Assets with estimated value	Liabilities with estimated value (secured or unsecured debts to be shown separately)	Remarks

Abstract Receiver's reports showing progress of realisations of assets and distribution of dividends and abstract of all important orders of the Court after adjudication

Date	Receiver's Report (give brief purport)	Orders of the Court or Receiver's Report	Other important order passed by the Court after adjudication with dates thereof

MODEL PETITIONS AND PLEADINGS UNDER
ACT V OF 1920.

Form. No 1

Creditor's petition under section 9 (1) and 13 (2) of Act V
of 1920, for adjudication of a debtor insolvent

In the Court of the District Judge of
Insolvency case No 19 .

The humble petition of A B of

Respectfully sheweth

1 That your petitioner resides (or carries on the business of—
or personally works for gain) at

2 That your petitioner had dealings with C D who resides (or
carries on business or personally works for gain) at in the
District of within the jurisdiction of this Court

3 That the said C D is indebted to your petitioner in the
liquidated sum of Rs payable on a (here mention on what the
claim is founded) dated

4 That the due date for the payment of the sum due on the
said by the said C D was the day of 19

5 That the said C D has committed
within the last three months the following acts of insolvency, viz ,

- (a) he has executed on the day 19 transfers of
his property with a view to defeat and delay his creditors ,
- (b) he has suspended payment of his debts and on the
day of 19 has given notice thereof to his creditors ,
- (c) he has already during the last 4 days removed his stock in
trade and is now removing his stock in trade at
with a view to secrete the same and prevent his creditors
availing thereof in satisfaction of their claims ,
- (d) he is about to conceal and remove the documents and
books of account relating to his business

In the circumstances set forth above your petitioner prays —

- (a) that an order for the appointment of an *interim* receiver of
the property of the said C D might be passed ,
- (b) that an order of attachment by actual seizure of the whole
of the properties in possession or in control of the said
debtor might be passed ,
- (c) that an order filing a true inventory of his joint and
separate properties including those that were "

within 2 years from the date of the presentation of this petition be passed upon the said debtor ,

(d) that an order of adjudication might be passed under Act V of 1920

(e) that an order for the immediate production of books of accounts of the said business of C D might be passed

And your petitioner, as in duty bound shall ever pray

Verification

I A B do hereby declare that what is stated herein in paras _____ are true to my knowledge and those in paras _____ are true to my information which I believe to be true

I sign the verification to-day this _____ day of 19 _____ at _____ A M at _____

Form No 2

Debtor's petition under section 10 (1) & sec 13 (1) of Act V of 1920 for his adjudication

In the Court of the District Judge of _____

Insolvency case No _____ 19 _____

The humble petition of A B of _____

Respectfully sheweth

1 That your petitioner resides (or carries on business of or personally works for gain) at _____ within the jurisdiction of this Court.

2 That your petitioner has suffered loss and incurred liabilities to the extent of Rs _____

3 That the amount and particulars of all pecuniary claims against your petitioner, together with the names and residences so far as they are known to or can by the exercise of reasonable care and diligence be ascertained by him are set forth in Schedule A annexed hereto

4 That your petitioner is unable to pay his debts

5 That your petitioner has been arrested (or imprisoned or an order has been made for the attachment of your petitioner's property in Execution Case No _____ of 19 _____ in the Court of the _____ at _____ in the District of _____) in execution of the decree for the payment of money in Suit No _____ of 19 _____ in the Court of the _____ at _____ in the District of _____

6 That the property which your petitioner is possessed of together with the amount and particulars and a specification of the value of such property not consisting of money and the place or

places at which any such property is to be found are truly set forth in Schedule B annexed herewith

7 That your petitioner is willing to place at the disposal of the Court all such property save in so far as it includes such items as are exempted by the Code of Civil Procedure, 1908

8 That your petitioner has not on any previous occasion filed any petition to be adjudged an insolvent

Or,

That your petitioner had on the day of 19 filed a petition in the Court of to be adjudged an insolvent in Insolvency Case No of 19 , and the said petition was dismissed for default

Or,

That your petitioner was adjudged an insolvent by the Court on the day of in Insolvency Case No of 19 and that his adjudication was annulled for failure to apply for discharge within the time specified in the order of adjudication

In the circumstances set forth above your petitioner humbly prays that he may be adjudged insolvent under the provisions of Act V of 1920, and such other orders may be passed as the Court deems fit and proper

And your petitioner, as in duty bound, shall ever pray

Verification as in Form 1

Form No 3.

Debtor's petition for adjudication where the debtor is a firm.

(Under sec 7 and New Rules Nos 19 27 of the Calcutta High Court and Rule 28 of the Madras High Court and Rules 22 30 of the Allahabad High Court)

In the Court of the District Judge of

Insolvency case No

19

The humble petition of Brown & Co, a firm carrying on business of in co partnership with A B C & D as partners at under the name and style of Brown & Co

Respectfully sheweth

1 That your petitioners carry on (or used to carry on) business of and their principal place of business was at within the jurisdiction of this Court

2 That your petitioners' firm Brown & Co, consists of following partners, viz

A {
 B { (Here insert names in full and addresses of all the individual
 C { partners as required by the Calcutta High Court Rule 22)
 D {

3 That the fact that your petitioners the said Brown & Co, have suffered loss in the carrying on of their business to the extent of Rs has arisen from circumstances for which they cannot justly be held responsible viz

4 That the amount and particulars of all pecuniary claims against your petitioners together with the names and residences so far as they are known to or can by the exercise of reasonable care and diligence be ascertained by them are set forth in Schedule A annexed hereto

5 That your petitioners, the said firm of Brown & Co, are unable to pay their debts

6 That an order of attachment has been made by the Court of in Execution Case No in execution of a decree for Rs in Suit No of 19 of the Court at

7 That your petitioners submit herewith a true and correct statement of the partnership properties and affairs of Brown & Co in Schedule B hereto annexed as also a true and correct statement of the separate and individual properties of each partner in Schedule C D E and F and particulars and specifications of their value and the place or places where such properties are to be found

8 That your petitioners are willing to place at the disposal of the Court all such properties both partnership and personal as are set forth in the Schedules B C D E and F above mentioned save only those which are exempted by the Code of Civil Procedure 1908

9 That your petitioners beg leave to file herewith the books of account of the firm of Brown & Co, truly and regularly kept in the course of the business, as also the account books of the individual partners

10 That your petitioners have not on any previous occasion filed any petition to be adjudged insolvents

In the circumstances set forth above your petitioners humbly pray that the said firm of Brown & Co, as also each partner of the said firm, may be adjudged insolvent under the provisions of Act V of 1920, and such other orders may be passed as the Court may think fit and proper

And your petitioners, as in duty bound, shall ever pray

Verification

We, Brown & Co, do hereby declare
 (as in Form I)

Signature of Partner	A
" "	B
" "	C
" "	D

N B—If the petition is signed by one partner only it will require an affidavit made by the partner showing that all the partners concur in filing the petition and the petition should be signed— Brown & Co, by A, a partner in the said firm'

Form No 4.

Creditor's petition under sec. 21 for *ad interim* receiver.

In the Court of the District Judge of

Insolvency case No 19 ,

The humble petition of A B of

Respectfully sheweth

1 That your petitioner is a creditor of one C D of and that on the day of 19 , a petition has been presented by your petitioner for adjudging the said C D an insolvent

2 That the said debtor C D has executed transfers of his property set forth in Schedule A annexed hereto with a view to defeat and delay his creditors

3 That your petitioner apprehends that the said debtor is attempting to execute further deeds of transfer in respect of all (or some) of the remainder of his property with a view to defeat and delay the claims of his creditors

4 That the said C D (a) is attempting to leave the jurisdiction of the Court, (b) has during the last four days already removed his stock in trade and is removing the rest of his stock in trade to defeat the claims of his creditors (c) has been concealing his books of accounts and tampering with the same

Your petitioner, therefore, prays that an order may be passed (a) for the appointment of an *interim Receiver* to take charge of the property of the said debtor at once, (b) for the attachment by actual seizure of the properties of the said debtor, (c) calling upon the said debtor to furnish at once a true inventory of his joint and separate properties including those that were transferred by the said debtor within two years before the date of the presentation of the petition, (d) for the immediate production of his books of account in Court

And your petitioner, etc.

N B—The application is

4 by

Form No 5.

Debtor's petition under sec. 23 for release.

In the Court of the District Judge of

Insolvency case No 19

The humble petition of A. B of

Respectfully sheweth

1 That one C D of brought a suit against your petitioner in the Court of being Suit No of 19 for payment of money

2 That on the day of 19, the said C D obtained a decree in the said suit against your petitioner for the sum of Rs with interest and costs

3 That your petitioner has filed an application in this Court for being declared an insolvent and has placed all his property at the disposal of the Court The said creditor is creditor No in the schedule of creditors annexed to his petition

4 That no order of adjudication has as yet been passed on the said petition

5 That your petitioner has not committed any act of bad faith or concealed any property with a view to defeat or delay the claims of his creditors

6 That he is unable to pay his creditors is due to the loss in his trade or business for which he cannot justly be held responsible

7 That the said C D applied to the Court of for execution of the said decree in Suit No of 19, in the Court of in Execution Case No of 19, of the said Court, and in execution of the said decree your petitioner has been arrested (or imprisoned)

8 That the application of the said C D is not *bona fide* but made solely to put pressure upon your petitioner and thereby to extort money from him

9 That in case your petitioner is detained in person he will be greatly prejudiced in the prosecution of his petition for adjudication and the interests of the general body of creditors will suffer for want of realisation of assets due to your petitioner

Your petitioner therefore humbly prays that your Honour will be pleased to order release of your petitioner from arrest, (or imprisonment) in the above Execution Case No of in the Court of And your petitioner, as in duty bound, shall ever pray

N B—This petition is to be supported by affidavit

Form No. 6.

Security bond under secs. 21 and 23

In the Court of the District Judge of
Insolvency case No 19

In the matter of A B an insolvent

Know all men by these presents that I, A B (debtor), son of
of am held and firmly bound to
Esq, the District Judge of in the sum of Rs
to be paid to the said or his successor in office, and
We, (name of surety) son of of and (name of surcty)
son of of are jointly and severally held and firmly bound to
the said Esq, District Judge, in the sum of Rs to be
paid to the said or to his successor in office for the payment
of which sum of Rs to be faithfully and truly made, I, the
above bounden debtor bind myself, my heirs, executors, administra-
tors, and representatives, and for the payment of the said sum of
Rs we, the above bounden and sureties bind ourselves
and each of us jointly and severally, and our and each of our heirs,
executors, administrators and representatives firmly by these presents,
Signed by ourselves and sealed with our respective seals the day
of 19

Whereas by an order of the Court of the District Judge of
made on the day of 19 in Insolvency Case No
of 19, under sec 21 (or 23) of Act V of 1920 the abovenamed
A B has been ordered to be released subject to his entering into a
bond in Rs in the case with (one or two) sureties in the same
sum (or sum of Rs and Rs) for his appearance until
final orders are made, And Whereas the said and have
agreed to enter into the above written bond as sureties for the
said A B Now the condition of the above written bond is such
that if the said A B do and shall appear in Court whenever he may
be called upon to do so and do and shall carefully observe,
perform, and keep all orders and directions of the said Court of
the District Judge of and in all things conduct himself
properly, then the above written bond or obligation shall be void
and of no effect, otherwise the same shall remain in full force
and value

Signed and sealed by the above-
named debtor
surety
surety

in the presence of

Form No. 7.

Insolvent's application under sec. 31 for protection
after adjudication.

In the Court of the District Judge of

Insolvency case No 19

In the matter of an insolvent

The humble petition of A B of

Respectfully sheweth

1 That your petitioner has been adjudged insolvent by an order of the Court, dated in the above case, and all the property that your petitioner has and was possessed of, vested in the Receiver appointed by the Court

2 That the inability of your petitioner to pay the creditors was due to his losses in trade or business and for reasons for which he cannot justly be held responsible

3 That your petitioner has filed his books of accounts which will sufficiently disclose his business transactions and financial position within three years immediately preceeding his adjudication

4 That your petitioner's creditor No (or creditors Nos and) is / are threatening to take action against your petitioner for his arrest imprisonment

5 That your petitioner has been aiding to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors

6 That your petitioner's other creditors will be seriously prejudiced in case your petitioner is arrested or imprisoned as by reason thereof most of his debts and other assets will remain unrealised

Your petitioner therefore humbly prays that the Court may be pleased to issue a general order of protection in favour of your petitioner against his arrest or imprisonment by creditor No or by any of his creditors mentioned in the schedule of creditors annexed to his petition

And your petitioner, etc

Form No 8

Creditor's or Receiver's application under sec 32 for
insolvent's arrest after adjudication

In the Court of the District Judge of

Insolvency case No 19

In the matter of A B an insolvent

The humble petition of C D of

Respectfully sheweth

1 That A B of _____ has been adjudicated insolvent by the Court in the above case by an order dated the _____ day of _____

2 That the said A B has not produced all his books of accounts in Court and has not given a true list of his creditors and debtors and of the debts due to and from them nor did he submit to such examination in respect of the property as was required of him by the Receiver

3 That with intent to avoid any obligation that has been or might be imposed on him the said insolvent A B has absconded (or departed) from the local limits of (or is about to abscond or depart from the local limit of) the jurisdiction of the Court

Your petitioner, therefore, humbly prays (a) that an order for the arrest of the said insolvent A B may forthwith be passed (b) that a warrant be issued for the arrest of the said insolvent A B

And your petitioner, as in duty bound, shall ever pray

N B—The application in the case of a creditor, is required to be supported by affidavit In the case of the Receiver a report to the Court by the Receiver is considered sufficient

Form No. 9.

Affidavit of proof under secs. 33 and 49 in respect of debts provable under the Act.

In the Court of _____ of _____ at _____
Insolvency case No _____ 19 ____

In matter of _____, an insolvent

I, _____ of _____ make oath and say (or solemnly and sincerely affirm and declare)—

1 That the said insolvent _____ at the date of the petition, viz the _____ day of _____ 19 __, and still is justly and truly indebted to me in the sum of Rs _____ as _____ p _____ for securities, bills or the like as shown by the account endorsed herein (or the following account) viz, _____ for which sum or any part thereof I say that I have not nor hath any body received for me or any person by my order or to my knowledge or belief hath for my use had or received any manner of satisfaction or security whatsoever save and except the following

Admitted to vote for Rs _____	Sworn at _____	Deponent's
this day _____		Signature
Judge or Official Receiver	before me _____	
this _____ day of _____	Commissioner	

Vide Civil Process No 146, Cal H Court, *supra*

Form No. 10.

Proof of debts of workmen under sec. 61.

In the Court of of at .
 Insolvency Case No of 19 .

I (a) of (b) In the matter of , an insolvent
 and sincerely affirm and declare)~ make oath and say (or solemnly

- 1 That (c) I was at the date of the adjudication, viz, the
 day of and still am justly and truly indebted
 to the several persons whose names, addresses and descriptions appear in the schedule for wages due to them
 respectively as workmen or others in (d) in
 respect of services rendered by them respectively to
 (e) during such periods before the date of the
 receiving order as are set out against their respective
 names in the fifth column of such schedule, for which
 said sums, or any part thereof I say that they have not
 not hath any of them had or received any manner of
 satisfaction or security whatsoever

Admitted to vote for Rs Sworn at Deponent's
 this day of Signature
 Judge or Official Receiver before me Commissioner

N B—(a) Fill in full name, address and occupation of deponent
 (b) The above named debtor or the foreman of the above
 named debtor or on behalf of the workmen and others employed
 by the abovenamed debtor

(c) "I" or "the said debtor"

(d) "My employ" or "the employ of the abovenamed debtor"

(e) "Me" or "the abovenamed debtor"

(Vide Civil Process No 147 of the Calcutta High Court Rules), *supra*

Form No. 11.

Petition under sec. 35 for annulment of adjudication

In the Court of the District Judge of

Insolvency Case No of 19

In the matter of C D an insolvent

The humble petition of A B of

Respectfully sheweth

1 That your petitioner is a creditor of the said C D to the
 extent of the liquidated sum of Rs

2 That C D has been adjudged insolvent by an order dated
 of in the above case

3. That no notice of his application was served upon your petitioner.

4. That the said C. D. is in a solvent condition and able to pay his debts

5. That the application of the said C. D. to be declared an insolvent is an abuse of the process of the Court and he ought not to have been adjudged insolvent.

6. That the debts of the said insolvent do not amount to Rs. 500 and that he has not been arrested or imprisoned in execution of a decree for payment of money or that no order for attachment of his property has been made or is subsisting

7. That the debtor does not reside, carry on business, or personally work for gain within the local limits of the jurisdiction of the Court.

Your petitioner, therefore, humbly prays that your Honour may be pleased to annul the order of adjudication passed upon the said C. D. in the above case.

And your petitioner, as in duty bound, shall ever pray.

Form No 12.

Application under sec. 38 submitting a proposal for composition or a scheme of arrangement.

In the Court of the District Judge of

Insolvency Case No _____ of 19 _____

The humble petition of A B of _____

Respectfully sheweth :

1. That your petitioner has been adjudged insolvent in the above case by an order dated the _____ day of _____.

2. That your petitioner has suffered loss in his trade or business and is not in a position to pay his creditors in full

3. That your petitioner applied to his creditors and proposed to them to accept four annas in the rupee and that most of his creditors have expressed their willingness to accept the term proposed and have signified their intention to discharge your petitioner from all liabilities to them.

4. That your petitioner is not able to pay the said four annas in the rupee in one instalment but proposed to pay the same in four equal instalments at the interval of every three months, the first instalment being payable within three months from the day of the approval by the Court

5. That regard being had to the affairs of your petitioner the aforesaid terms of composition are fair and reasonable and calculated to benefit the general body of creditors

6 That due provision has been made for the payment in priority to other debts all debts directed to be so paid in the distribution of the property of your petitioner

Your petitioner, therefore, humbly prays that your Honour may be pleased to approve the proposal of composition and annul the order of adjudication

And your petitioner, etc

Form No. 13.

Petition under sec. 41 for absolute discharge.

In the Court of of at
Insolvency Case No of 19

The humble petition of A B of

Respectfully sheweth

1 That your petitioner was adjudged insolvent by the Court in the above case by an order dated the day of and it was provided by the said order that your petitioner was to apply for discharge within the day of

2 That the receiver appointed in the case has realised the whole (or part) of the assets of your petitioner and he has declared a dividend of annas in the rupee and a dividend of annas in the rupee is likely to be shortly declared

(In case of no assets the following paragraph should be substituted)

2 That your petitioner had no assets and no dividend could therefore be declared to his creditors

3 That your petitioner's assets are not of a value equal to eight annas in the rupee on the amount of your petitioner's unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible

4 That your petitioner had kept such books of account as were usual and proper in the business carried on by him and as sufficient to disclose his business transactions and financial position within three years immediately preceding his insolvency

5 That your petitioner has not committed any act of bad faith or did not continue to trade after knowing himself to be insolvent or did not contract the debts mentioned in the schedule annexed to his petition without having any reasonable or probable ground of expectation that he would be able to pay the same and your petitioner has not failed to account satisfactorily for the loss of assets, and the deficiency of assets to meet his liabilities.

6 That your petitioner has not brought about or contributed to his insolvency by rash and hazardous speculation or by unjustifiable extravagance in living or gambling or by culpable neglect of his business affairs

7 That within three months before the presentation of the petition for insolvency he has not executed any transfer of his property by way of fraudulent preference

8 That your petitioner has not concealed or removed his property or any part thereof or has not been guilty of any other fraud or fraudulent breach of trust

Your petitioner, therefore, humbly prays that the Court may be pleased to pass an order of absolute discharge in favour of your petitioner

And for which your petitioner, as in duty bound shall ever pray

Form No. 14.

Petition under sec 42 objecting to the grant of an order
of absolute discharge.

In the Court of of at
Insolvency Case No of 19

The humble petition of C D of
a creditor to the insolvent A B

Respectfully sheweth

1 That A B the insolvent in the above case has applied for an absolute order for discharge under sec 41 of Act V of 1920

2 That your petitioner begs leave to object to the grant of an order of absolute discharge on the following among other ground —

- (a) That the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities and that has not arisen from circumstances for which he cannot justly be held responsible ,
- (b) that the insolvent omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his insolvency ;
- (c) that the insolvent continued to trade after knowing himself to be insolvent ,
- (d) that the insolvent contracted debts provable under the contracting them any exception that he would
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ,
- (f) that the insolvent has brought on or contributed to insolvency by rash and hazardous speculation or

Form No 16.

Application under sec. 54 for avoidance of
fraudulent preference.

In the Court of

Insolvency Case No _____ of 19 _____

In the matter of A B an Insolvent

The humble petition of C D the
receiver appointed in the above case

Respectfully sheweth

I That A B of _____ has been adjudged insolvent on the
day of _____ on a petition presented on the

(or made payments &c vide sec 54) particularly set forth in
schedule A

2 That the said insolvent A B has executed the following
transfers herewith annexed on dates and in favour of persons parti-
cularly mentioned therein

3 That the person in whose favour the said deeds are executed
(or payments made) are creditors of the said insolvent and the said
insolvent being unable to pay his debts to the said creditors as they
became due from his own money has executed the said deeds of
transfer (or made payments &c) with a view to giving those credi-
tors undue preference over the other creditors

4 That the said transfers (for payments &c) having been made
within three months from the date of the presentation of the peti-
tion are fraudulent and void as against your petitioner

Your petitioner therefore humbly prays that the Court may be
pleased to annul the same under the provisions of sec 54 of Act V
of 1920

And your petitioner etc

N B—Schedule A should specifically state all the items required
to be stated in Form 15

Form No 17.

Application for prosecution under sec 69

In the Court of

Insolvency Case No _____ of 19 _____

In the matter of A B, an Insolvent

The humble petition of C D the receiver
appointed in the above case

Respectfully sheweth

1 That after the appointment of your petitioner as

your petitioner called upon A B the said insolvent to produce before him all books of account and furnish him with correct inventories of his property and list of his creditors and to attend before him for examination in respect of his property or creditors

2 That the said insolvent A B wilfully failed to perform the duties imposed upon him as stated above and failed to deliver up possession of the property mentioned in schedule A hereto annexed which is divisible amongst his creditors and which is for the time being in his possession or under his control to your petitioner as receiver

3 That the said insolvent A B fraudulently with intent to conceal the state of his affairs and to prevent equal distribution of his property amongst the general body of his creditors,

- (i) has destroyed or otherwise wilfully prevented or purposely withheld the production of his day books, ledgers, cash books order registers, diaries &c (or any other documents) relating to his estate which are subject to investigation under the Act
- (ii) has kept or caused to be kept false books of accounts
- (iii) has made false entries in or withheld entries or wilfully altered or falsified his books of account relating to his business

4 That the said insolvent with intent to diminish the sum to be divided amongst his creditors or to give preference among his creditors,

- (i) has discharged or concealed the following debts to or from him,
- (ii) has charged, mortgaged or concealed property mentioned in schedule B annexed herewith

Your petitioner therefore, humbly prays that A B the said insolvent may be dealt with under sec 69 of Act V of 1920

And your petitioner, etc

Form No 18.

Memorandum of appeal under sec 75 against order annulling a voluntary transfer under sec 53

In the Court of the District Judge of

Insolvency Appeal No

A B of

C D of

of

Appellant

versus

Receiver Respondent

1 by the order of the
passed in its
of

begs to prefer this appeal from the said order on the following amongst other grounds —

GROUND

1 For that the learned Judge has erred in law in throwing the onus of proof upon the appellant that the appellant is a purchaser in good faith and for valuable consideration

2 For that the learned Judge should have held that it was upon the Receiver to prove want of *bona fides* and valuable consideration before he could succeed on his petition for annulment of the transfers in favour of the appellant which were voidable and not void

3 For that the learned Judge should have held on the evidence placed before him that the appellant was a purchaser in good faith and for valuable consideration

4 For that the learned Judge is wrong in his conclusion that the appellant is not a *bona fide* purchaser for valuable consideration

5 For that upon the facts and circumstances of the case the learned Judge should not have annulled the transfer

I certify that I have carefully examined the records of the case and in my opinion there are good grounds of appeal as set forth above and having prepared them I undertake to appear and support the appeal before the appellate Court at the time of hearing

Pleader

Form No. 19.

Petition for leave to appeal under sec. 75 (3).

In the Court of the District Judge of

Insolvency Case No _____ of 19 ____

The humble petition of A B the insolvent in the above case

Respectfully sheweth

1 That your petitioner applied for annulment of the order of adjudication passed upon your petitioner by this Court on the ground that the debts of your petitioner have been paid in full

2 That the Court by its order dated _____ has dismissed the application of your petitioner on the ground that the payment of annas four in the rupee in full satisfaction of the debts of all his creditors is not payment in full

3 That your petitioner is seriously aggrieved by the said order and intends to prefer an appeal to the Hon'ble High Court against the said order

4. That your petitioner is advised and submits that the matter involves a question of law and is a fit case for appeal.

In the above case the petitioner humbly prays that the
afor to appeal against the

And for this your petitioner, etc.

SUBJECT INDEX

A

- Abandonment,
property, of, vested, 284
- Abatement,
appeal, of, 737.
debts payable in priority, of,
650.
proceedings, of, on death of
debtor, 190.
suit, of, on adjudication of
plaintiff, 636
- Ability to pay debts, dismis-
sal for, 235.
- Abroad,
adjudication, 11.
" in India and its
effect, 12
vesting of property, 13, 262.
- Abseond,
warrant for arrest of debtors
after adjudication if, 349,
350.
warrant for arrest of debtors
before adjudication if, 200,
201.
- Absence,
British India, from, an act of
insolvency, 83
day for hearing the application
of insolvency, 83, 102.
notice, of, of the date of hear-
ing, effect of, 193.
notice, of, of the date of hear-
ing immaterial, 297.

Absence—contd

- place of business, from, an act
of insolvency, 83, 102.
verification, of, in petition, 168.
- Absolute,
debutter does not vest, 281.
discharge, 417.
" grant of, 417, 422.
" grounds for refusal
of, 434
" refusal of, 417, 422
right of secured creditor to
realise security is, 319.
- Abuse of process,
adjudication when is, 374
" when is not, 375
annulment of adjudication for,
374.
Court not to enquire, on a
debtor's petition, 224
dismissal for, 240.
inherent power of dismissal
for, 72.
- Acceptance,
composition, of, 395.
" of, by creditors,
condition precedent,
395, 399.
consideration, of, by receiver,
for sale of any property of
insolvent, 623
refusal by Court of, of compo-
sition, 395
- Account,
attachment of books of, 204
" and sale of recei-
ver's property for
failure to
599.

Account—*contd*

- books of, not exempt from attachment, 169.
 - books, production of, by debtor on admission of petition, 206
 - books, vest in receiver, 253
 - court's discretion to call for, 208.
 - date of, for set off, 476
 - dismissal of petition for failure to keep, 239
 - duty of debtor to produce books of, on admission of petition, 206
 - failure to keep, dismissal of petition for, 239
 - failure to produce books of, 209.
 - failure to submit by receiver, 599
 - liability of receiver to render, 599, 606.
 - mutual dealings, taking of, in, 475.
 - penalty for keeping false books of, 691.
 - production of books of, 209.
 - refusal of discharge for omission to keep books of, 432, 437.
 - refusal of discharge for failure to, for loss or deficiency of assets, 433, 440.
 - security from receiver for giving, 599.
 - set off of, 470
 - statement of, by creditor in proof of debt by affidavit, 490.
- Acknowledgment,
extension of limitation by, 752.
- Act,
Agra Tenancy (II of 1901), 156, 273.
Agra Tenancy, (III of 1926), 273, 312

Act—*contd.*

- Bengal, N. W. P. and Assam Civil Courts, (XII of 1887), 19, 32.
- Bengal Tenancy, (IV of 1928), 274.
- Bundelkhand Land Alienation, (III of 1903), 313
- Central Provinces Tenancy Act (I of 1920), 312.
- Civil Procedure Code, (V of 1908), 3, 14, 31, 69, 71, 72, 73, 169, 190, 195, 204, 311, 760
- Contempt of Courts, (XII of 1926), 614
- Criminal Procedure Code, (V of 1898), 215, 243, 702.
- Dekkhan Agriculturists Relief, (XVII of 1879), 314, 760
- Devolution, (XXXVII of 1920), 760
- General Clauses, (X of 1897), 19, 689, 738, 761.
- Indian Companies, (VII of 1913), 24, 130
- Indian Contract, (IX of 1872), 24, 264
- Indian Limitation (IX of 1908), 143, 541, 578, 689, 744, 745, 747
- Indian Limitation Amendment, (X of 1922), 747.
- Indian Partnership. (IX of 1932), 113, 264.
- Insolvency Amendment, (IX of 1926), 5
- Insolvency Amendment, (XI of 1927), 5.
- Insolvency Law Amendment, (X of 1930), 5.
- Lower Burma Courts, (VI of 1900), 761
- Lower Burma Land and Revenue, 761.
- Married Women's Property, (III of 1874), 121.
- Pensions, (XXIII of 1871), 314

Act—contd.

- Presidency Towns Insolvency, (III of 1909), 75, 760.
- Provident Funds, (XIX of 1925), 315.
- Provincial Insolvency, (III of 1907), 3.
- Provincial Insolvency, (V of 1920), 1, 4.
- Provincial Insolvency Amendment, 5.
- Punjab Alienation of Land, (XI of 1900), 313.
- Punjab Tenancy Act, 313.
- Repealing, (XII of 1927), 5.
- Repealing and Amending, (XI of 1923), 761.
- Repealing and Amending, (XVIII of 1928), 5.
- Repealing and Amendment, (X of 1927), 5.
- Repealing and Amending, (VIII of 1930), 5.
- Sale of Goods, (III of 1930), 24, 84.
- Sind Courts Supplementary, (XXXIV of 1926), 5.
- Transfer of Property, (IV of 1882), 22, 145.
- III of 1907, 3.
- V of 1920, 4.
- „ a complete Code 5
- „ application of, 6.
- „ date of operation of, 7.
- „ interpretation of, 6.
- „ nature and scope of, 5.
- „ retrospective effect of, 8.
- decision, or, of receiver liable to appeal, 679.
- „ appeal against, by creditor, 683.
- „ appeal by insolvent against, of receiver, 682.
- „ appeal by any other person against, of receiver, 683.

Act—contd.

- election of remedies against, of receiver, 683.
- estoppel of person appealing against, of receiver, 685.
- jurisdiction of Court is subject to provisions of the, 44.
- leave for civil suit against, of receiver, 686.
- order in appeal against, or decision of receiver *res Judicata*, 684.
- petition for adjudication must be subject to the provision of the, 117, 118.
- revesting subject to, done, 386
- Act of Insolvency,
 - adjudication follows, 86.
 - agent, of, is that of principal, 84, 112.
 - agreement as to, 111.
 - allegation of, in creditor's petition, 134, 142, 174.
 - assignment for past debt is, 96.
 - attachment of property is, not, 104.
 - cases of, 83.
 - classification of, 85.
 - court need not enquire, on a debtor's petition, 222.
 - date of, 170, 175.
 - definition of, 84.
 - departure from British India is, 83.
 - departure from dwelling house is, 83.
 - departure from usual place of business is, 83.
 - dismissal for failure to prove, 235.
 - effect of, 116.
 - enumeration of, 83.
 - estoppel by agreement as to, 111.
 - firm of, 113.
 - Hindu joint family 115.

Act of insolvency—contd

imprisonment of the debtor in execution is, 84, 112

karta or manager of joint Hindu family, of, 116

notice of suspension of payment is, 84, 107.

„ by court of the date of hearing of petition is not, 747

occurrence of, within three months, 134, 143

petition by creditor to state, 117, 169.

petition by debtor to be adjudged is an, 84, 106, 129

petition must allege, 117, 118

presentation of petition by debtor an, 84, 117, 169, 170

proceedings from, to discharge 83

proof of, 217, 220

„ of, fraudulent intention in, 97.

„ of, not required in debtor's petition, 222

relinquishment or surrender in fraud of creditors an, 95

sale of property in execution is, 84, 104.

seclusion to avoid communication is, 84, 103

service of notice by court of date of hearing of petition for adjudication is not, 747.

transfer for benefit of creditors is, 83, 89

transfer of all or substantially all property with intent to defeat or delay is, 83, 88, 94.

transfer of property or any part thereof is, 83, 91

transfer by way of fraudulent preference is, 83

transfer when not, 91, 98

Action,
receiver to take, under s 4, 52.
right of, vests 274

Action—contd.

who can take, under s 4, 52

Actionable claim,

property includes, 21.

vesting of, in receiver or Court, 274.

Actual seizure,

court's power to order attachment by, 200, 203

Additional Dist. Judge,

Court of, jurisdiction of, 32

Adjournment,

date of hearing, of, 218, 233

Adjudication,

abatement of suits on, 636.

abuse, when, 374

abuse, when not, 375

act of insolvency follows, 86

aliens, of, 123

annulment of, 370

„ „ automatic, not, 449

„ „ obtained without leave, 378

„ „ for failure to deposit costs, 378

„ „ leave for fresh petition on, 151, 159.

„ „ on failure to apply for discharge, 446

„ „ removes disqualification of an insolvent, 713

appeal against order of, 252

application for discharge after, 417.

appointment of receiver at the time of order or, at any

time after, 599, 601

arrest after, 345

Adjudication—*contd.*

- arrest before, 200.
- attachment before, vesting of joint family property on, 270.
-
-
-
- composition after, 395, 396
- concurrent petition for, 127.
- conditions of creditor's petition for, 134, 136
- conditions of debtor's petition for, 157.
- consequences of refusal or neglect to comply with duties before, 209.
- consolidation of petitions for, 180.
- contents of petition for, 168.
- continuing proceedings after, 335.
- convict, of, 124.
- costs of publication of order of, 341.
- court to which petition for, shall be presented, 161.
- court's power of annulment of schedule after, 496.
- date of, relates back, 252, 327.
- death after, 188.
- " before, 187.
- debtors liable to, 122
- difference in effect bet. order of, and order of admission of petition, 331.
- dismissal of creditor's petition for, 233, 234.
- dismissal of debtor's petition for, 233, 238.
- doctrine of relation back of the order of, 327.
- duty of debtor after, 252, 254.
- " before, 206, 207.
- effect of order of, 252, 255.

Adjudication—*contd.*

- effect of, annulment of, 378.
- " " in India, by foreign court, 11.
- " " outside India, in India, 11.
- " " on fresh petition without leave, 160, 370
- " " on payments, 330.
- " " allowing proceedings to continue after, 335.
- " " foreign, on execution proceedings in India, 513.
- " " on suits or legal proceedings instituted before, without leave, 330.
- " " on transfer, 329.
- failure to perform duties after, 255.
- failure to perform duties before, 209.
- firm, of, 124, 248.
- follows acts of insolvency, 86.
- foreign, effect of, on execution proceedings in India, 513.
- foreigners, of, 123.
- forfeiture of tenancy on, 271.
- fresh petition for, 126.
- fresh petition on, without leave, 160.
- general rule as to interest payable to creditors on, 486.
- " to debtors on, 487.
- hearing of petition for, procedure at, 217.
- Hindu joint family firm not liable to, 132.
- incorporated company not liable to, 130.
- insolvent's right to continue proceedings after, 284.
- interest, general rule as to, after, 485, 486, 487.
- interest prior to, 488.
- " subsequent to, 488.
- joint pension for, 124.
- jurisdiction to avoid transfers after annulment of, 537.

Adjudication—contd.

jurisdiction to annul preferences ceases on annulment of, 561.
 karta, of, vesting of Hindu joint family property on, 267.
 leave for commencement of suit or other legal proceedings against insolvent after, 292
 leave for suits filed before, not required, 31.
 limitation for suits and applications on annulment of, 743
 lunatic, of, 123.
 married woman, of, 124
 minor, of, 123.
 minor member of family, of, 133
 minor member of firm, of, 133.
 notice to insolvent before annulment of, 450.
 object of publication of order of, 340
 objection to, 370, 371
 obligation incurred before date of, 359, 365
 obtained by fraud, 373
 offences by debtor either before or after, 691, 693.
 order of, 117, 128, 244, 245
 " effect of, 252.
 " must be unconditional, 246
 " publication of, 340
 order for appointment of receiver on, essential, 600.
 payment by insolvent before, protected, 592, 594.
 " to insolvent before, protected, 592, 594.
 payment of interest subsequent to, 664.
 petitions for, 117, 136.

Adjudication—contd.

petition for, an act of insolvency, 84, 106.
 " " must be subject to the provisions of the Act, 117, 118
 " " secs 5 and 12 Limitation Act do not apply to, 145.
 " " by a creditor on commission of an act of insolvency, 117.
 " " by a creditor must be made within three months from the date of act of insolvency, 134.
 " " by a debtor, condition of, 151.
 " " by a debtor on annulment of, 151.
 plaintiff, of, procedure in suits or proceedings on, 336.
 position and power of Court before and after, 201.
 power to arrest after, 349, 350
 power to cancel concurrent orders of, 379.
 previous, refusal of discharge for, 433
 proceedings consequent on order of, 341.
 procedure for admission of petition for, 190
 procedure in suits or proceedings on, of plaintiff 336
 " of defendant 337.
 proof of debts after, 350
 prosecution lies for offences both before and after, 691, 693
 prosecution lies only on, 693
 protection of debtor after, 341.
 protection of debtor before, 210.
 publication of order of, 340.

Adjudication—contd

- receiver, appointment of, after, 599
- " " and interim receiver, difference bet, 199, 617
- refusal of, for false debts and assets, 222
- refusal of discharge for previous, 433, 442
- relation back of the order of, 253, 327
- release of debtor after, 341
- release of debtor before, 210
- remedy of creditor on, 252, 286
- remedy of creditor in respect of debt provable under the Act, on, 286
- remedy on annulment of, 151, 159
- removal of disqualification on annulment of, under s 35, 713
- revesting of property on annulment of, 453
- right of secured creditor not affected by, 253, 319
- sale after, effect of, 512
- simultaneous order of and annulment of transfer, 247
- statement of inability to pay debts must be in petition for, 168
- statutory right, 152
- stay of pending proceedings on, 330
- stay of suit after, 330
- suit after, 252
- suit before, stay of, 330
- suspension of limitation presupposes 743, 752
- time for discharge to be specified in order of, 244, 247
- transactions after, protected, 597
- transactions before, protected, 597

Adjudication—contd

- unconditional order of, 246
- unincorporated companies liable to, 130
- vesting of property in court or receiver on, 252, 283
- withdrawal of petition for, 176
- " of petition after, 177
- " " before, 176

Administration

- costs of, priority of, 658
- creditor's right to prove in summary, 669
- expenses of, priority of, 650
- insolvency, in, 135
- letters of, grant of, to a creditor 135
- property of 469
- summary, 716

Admission

- consolidation of petitions after, 181
- date of, what is, 191, 503
- date of hearing to be fixed by Court on, of petition, 191
- difference in effect bet order of adjudication and order of, of petition 331
- delegation of power by Court to receiver for, or rejection of proofs, 494
- duties of debtor on, of petition 206
- effect of sale in execution after, of petition, 521
- machinery in England, for, or rejection of proofs, 493
- machinery in India, for, or rejection of proofs, 494
- notice to executing Court of, of petition, effect of, 513, 521
- " to creditor on, debtor's petition,
- " to debtor on, of debtor's petition,

Admission—contd

petition, of, benefit of execution to assets realised before, 497

procedure for, of petition, 190

on, of petition, 191.

proof of, debt of, 493

Advantages,

property with all, and burden, vest in receiver, 317.

Advocate,

lien of, 28,

Affair,

fraudulent concealment of, offence 691, 696

refusal of discharge for culpable neglect of business, 433, 441

Affidavit,

proof of debt by, 490

After-acquired property

assignment of, 307

discharge subject to condition with respect to, 417 426

effect of discharge on, 311

mortgage of, 305

right of suit of insolvent regarding, 307

right to, in trade 674

vesting of, 252, 271, 304

" " under Mahomedan law, 306,

Agent,

act of insolvency, of, is that of principal, 64, 112

commission goods held by vesting of, 260

Agra Tenancy Act

landlord not a creditor for rent or decree under, 16, 156

rent or decree under, not provable debt, 16, 156

vesting of agricultural holding under, 312

Agreement,

estoppel by, 111

right of unscheduled creditors in composition unaffected by, 414

Aggrieved person,

appeal by, against order or decision of court, 719, 724

appeal by, against act or decision of receiver, 679, 682

election of remedies by, 683

parties in appeal by, 725

Agricultural,

holdings, exempt from vesting 312

purposes, sale of land held or let for, 647

tribe, land belonging to a member of, does not vest 313, 314

Agriculturist,

house of, does not vest, 312

immovable property of an under Dekhan, Relief Act, does not vest, 314

Aid,

appointment of insolvent to, on terms, 673

Courts to act in, of each other, 742

insolvent to in realising and distributing assets, 252

Aum,

law of bankruptcy, of 1

Alien,

petition against, 123

petition by, 121

Alienation,

jurisdiction to set aside 40

jurisdiction to set aside, from transferees, 40

Aliens,

maybe petitioning creditor, 121

Alimony,

protection from arrest for failing to pay, 215
provable debt does not include, 215

Allowance,

management by and, to insolvent, 673
support of insolvent and his family, for, 673, 674

Amendment,

Act V of 1920, 5
appeal against, of Schedule, 496
creditor's petition, of, 147
definition, of, 14
law relating to insolvency in British India, of, 1
petition of, for adjudication, 175
proof of debt, of, 353
schedule, of, 356
" of, by insolvent, 496
" of, framed in composition, 413
" of, after annulment of adjudication, 496
terms of composition, of, 395, 401
value of, security, of, 483

Amount,

and particulars of all pecuniary claims against debtor, statement of, 169, 171
and particulars of property, schedule of, 169
and particulars of pecuniary claims in creditors petition, 170, 175

Annul,

Court's duty to, 587
exclusive jurisdiction of court to, transfer, 538
jurisdiction to, transfers more than 2 years old, 47, 554
" " to, transfer during insolvency, 537

Annul—contd

jurisdiction to, transfers after annulment of adjudication, 537
" to, on death of debtor, 538
" to, transfer from transferees, 545
" to, ceases on annulment of adjudication, 561.
" to, is unaffected by discharge, 562

Annulment,

abuse of process of Court, for, 374
acts done before, by Court or receiver, valid, 383
adjudication, of 370
" of, not automatic, 449
" of, leave for fresh petition on, 151, 159
" of obtained without leave, 370, 378
" of, for failure to apply for discharge, 446
appeal against order of, 457
application by creditor for, of transfer, 588
" for, of transfers and preferences, 587
approval of composition, on, 406
avoidance of transfer after, of adjudication, 537
collateral attack of, order of, 458
composition, of, 415, 417
conditions for, of adjudication, 372
conditions for, of transfers, 525
consent of creditor no ground for, 377
court's power of amending schedule after, of adjudication, 496

Annulment—*contd*

debtor ought not to have been adjudged insolvent, when, 370, 372
 debts have been paid in full, when, 370, 376
 delegation of jurisdiction for, of transfers, 540
 discretion to order, or stay proceedings 380
 disposition before, valid, 383
 duty of court for, of voluntary transfers and preferences, 587
 effect of, under s 35 378
 effect of, under s 36, 382
 " on composition, 408
 " of, of transfers, 556
 " of, of preferences, 586
 exclusive jurisdiction of insolvency Court for, of transfers 538
 failure, on, to appeal on the day fixed for hearing, of application for discharge, 446, 453
 failure to apply for discharge, for, 446
 failure to deposit costs, for, 378
 gift to wife, of, 526
 jurisdiction of Court for, during insolvency, 537
 jurisdiction of Court for, on death of debtor, 538
 jurisdiction of Court to go behind judgment in enquiry for, 51, 495, 539.
 jurisdiction of Court to avoid transfers after, of adjudication, 537
 jurisdiction to annul ceases on, of adjudication, 561
 leave of Court for fresh petition after, 151, 159
 limitation for, 379
 " for, application for, transfers, 541

Annulment—*contd*

limitation for suits and applications after, 743
 " for, of preferences 598
 " of right on, 394
 locus standi of creditor for, without leave, 591
 meaning of, 371
 mesne profits on, of preferences, award of, 585
 mesne profits on, of transfer, 556
 nature of proceedings for, 547
 notice to debtor before 372 450
 " to transferee before 548
 onus for, of preference, 580
 order of, 352
 payments made before, valid 383
 period to be excluded from computation on, 751
 petition by debtor on, of adjudication, 151
 power of appointee on, 393, 455
 power of Court on, 389
 " of receiver on, 392
 preference to creditor, of 558
 " to creditor, of, ceases on annulment of adjudication 561
 " to creditor, effect of 586
 " procedure for, of 580
 proceedings on, 37
 proceedings for, 530
 property vests in such person as the Court appoints, on 383
 property that does not vest on, 388
 publication of notice of, 384
 receiver to apply for, 589
 recommitment of debtor on, 446
 remedy on, 151, 159

Annulment—contd

- removal of disqualification on, 713
- revesting of property on, 383, 385, 453
 - " " on, subject to acts done, 383
 - " " on, subject to lis, 383
 - " " on, of composition, 407
- review of order of, 457
- right of, 372
- rights of creditors on, 393
- sales before, valid, 383
- scope of enquiry for, of transfer, 542
- security for costs for, 591
- setting aside of order of, 456
- simultaneous order of adjudication and, of transfers, 247
- subsequent transferees must be impleaded to be bound by, 547
- suspension of limitation presupposes, 753
- termination of proceedings on, 458
- transfer from a transferee, of, 543 545
- transfers more than two years old of, 554
- transfer, of, must be based on legal evidence and not on suspicion or surmises 555
- transfers, of, on death of debtor, 538
- transfers within two years, of, 522, 534
- validation of suits or other proceedings without leave on, 459
- vesting order need not be simultaneous with, 391

Annulment—contd

- vesting of property on, 383, 387
 - voluntary preference, of, 558
 - " transfer, of, 522
 - " transfer in consideration of marriage, of 522, 525
 - what is, 448
 - when creditor can apply for, 587
 - when adjudication is not abuse, 375
 - when adjudication is abuse, 374
 - when debts have been paid in full, 370
 - when debtor ought not to have been adjudged insolvent, 370
 - who can apply for, 449, 541
 - who can apply for, of preferences, 579
- Anticipation,**
- protection in, of arrest or imprisonment 213
- Appeal,**
- abatement of, 737
 - act or decision of receiver, against 680
 - adjudication order, against, 252
 - against order under s 4, 66
 - " " under s 53, 558
 - " " under s 54, 587
 - " " under s 54-A, 591
 - " " of Courts under s 68, 690
 - aggrieved person, by, 679, 719, 720
 - amendment of schedule, against, 496
 - annulment, against order of, 457
 - any other person aggrieved, 679, 719, 724
 - application of secs 4 a

Appeal—contd

Limitation Act to, under sec 68, 689
 application of secs 5 and 12 of Limitation Act to, 745
 beyond time, against act or decision of receiver, 689
 Court specially invested, from, 36, 719
 Court, to, against receiver, 679
 " " District from court subordinate, 36 719
 creditor, by, 683 719, 722
 debtor, by, 679, 682, 719, 721
 decisions and orders from which, lies to the High Court 762
 discretion of Court in, under sec 68, 686
 dismissal, from, of application for restoration, of 733
 District Court, from to High Court 719
 District Court's order in, final, 719, 728
 District Court's order in, is subject to revision by High Court, 719
 District Court from, to High Court without leave 719 732
 District Court, from to High Court with leave 719, 732
 High Court, to, 719
 insolvent, by, 682
 leave for, by High Court and District Court, 719, 732
 leave for, to, Privy Council 64 736
 legal representative, by, of debtor, 722
 limitation for, against act or decision of receiver, 680, 688
 limitation for, against Court, 719, 738
 nature of proceedings by way of, under s 68, 681

Appeal—contd

order of prosecution under, s 69, against, 700
 order of subordinate courts, from all, 719, 727
 order of adjudication, against, 252
 other persons, by, aggrieved 679, 683
 parties in, 719
 parties in, by creditor, 723
 " " by debtor, 721
 " " by any other person aggrieved, 725
 person aggrieved, by, 682, 719, 724
 power and procedure of Court of, 68, 737
 Privy Council, to, against order under s 4, 67, 736
 prosecution under sec 69, against, 700
 receiver, by, 637, 723
 remedy, not the only, 683
res judicata, against receiver, 684
 restoration, appeal against order of dismissal of appeal for, 933
 right of, to Privy Council, 82
 second 718, 732
 stay, against order of, 339
 subordinate Courts, from to District Court, 719, 726
 who can, against act or decision of receiver, 682
 who can, against an order of Court, 719, 720
 withdrawal of petition, against, 179
 Appealable,
 all orders of subordinate Courts are, 719, 727
 Appearance,
 annulment of adjudication for want of debtor's, 446
 security for, Court's power to order, of debtor, 200, 202

Appellate,

Courts, powers of, in interlocutory matters, 81
jurisdiction, powers of High Court in, 80

Application,

Act V of 1920, of, 6
annulment, for, 588
application of provisions of s 56 to interim receivers 599
application of s 4 and 5 Limitation Act to appeals under s 68 689
application of secs 5 and 12 Limitation Act to suit and 744
debtor, by, for compensation 243
executing Court, to, for delivery of possession, 513, 515
discharge, for, 417, 418
dismissal of, for restoration of appeal, appeal against order of, 733
fresh, on the same facts, 172
limitation for, for annulment, 541
nature of, to summon, 646
right by creditor to contest, by another creditor, 224
sec 4 of, 39

Appointee,

powers of, on annulment of adjudication 393, 455

Appointment,

charge by, of receiver, 28
committee of inspection, of, 678
discretion for, of interim receiver, 195
effect of, of interim receiver, 196
insolvent, of, for management of property, 673
" to carry on trade, 673
interim receiver, of, 194
" , discretionary, 195

Appointment—contd

object of, of interim receiver, 196
object of, of receiver, 600
official receiver, of, 618
order for, of receiver, on adjudication essential, 600
provisions for, of receiver apply to appointment of interim receiver, 599, 617
receiver, of, at the time of order of adjudication, 599
receiver, of, at any time after adjudication, 599
receiver, of, in a mortgage suit, 612
rules for, of receiver, 755
special receiver, of, 621

Approval,

composition, of, by Court, 395, 404
re adjudication when, obtained by fraud 415
refusal of, of composition 406, 408

Arbitration,

reference to, by receiver, 624

Arrangement,

composition and scheme of, 395
private, with creditors not payment in full 366 377
refusal of discharge for composition or, 433

Arrears of rent,

after adjudication are expenses of administration, 658
landlord is a secured creditor for, 657
priority in payment of, 657
provable debt if accrued before adjudication, 364

Arrest,

adjudication, after, 345
" before 200

Arrest—contd

- allegation of, in petition, 168, 171
- condition precedent to issue of warrant for, 205
- Court by whose order debtor is under, statement of, in debtor's petition, 168
- debtor, of, before adjudication, 200
- imprisonment or, a condition of debtor's petition, 151
- inherent power to grant protection from, 213
- interim, 200, 205
- petition may be presented to a Court where debtor is under, or imprisonment, 161
- power to, after adjudication 349
- protection from, 212
 - " in anticipation of, 213
 - " on, 212
- re-, of debtor, 210
- release of debtor from or imprisonment, 210
- statement of imprisonment or attachment in petition, 171
- warrant for, for absconding or departing from the local limit of jurisdiction of Court, 201

Assets,

- below eight annas in the rupee, refusal of discharge when, 432, 434
- benefit of execution to, realised before admission of petition, 497
- dismissal of petition when, exceed liabilities, 239
- distribution of partnership, 650, 658
- effect of misstatement or omission of, and liabilities in petition, 239

Assets—contd

- failure to retain, by receiver, 667
- Hindu family, of, 267
- " " firm, of, 265
- less than eight annas in the rupee, refusal of discharge when, 432, 434
- partnership, vesting of, 263
- realised before admission of petition, benefit of execution to, 497, 502
- refusal of discharge when, less than eight annas in the rupee, 432, 434
- refusal of discharge for failure to account for loss of deficiency of, 433, 434
- remuneration of receiver to come out of, of the insolvent, 599
- retention of, by receiver, to meet debts provable under the Act, 665
- " of, for debts not determined, 665
- " of, for disputed proof of claims, expenses of administration 665

Assignee,

- equitable, a secured creditor 478
- may be petitioning creditor, 121

Assignment,

- after acquired property, of, by insolvent, 307
- benefit of creditors, for, act of insolvency, 83, 89
- debts, of, payable in future, 304
- equitable, charge by, 30
- fraud of creditors in act of insolvency, 94
- past debts, for an act of insolvency 96

Association or Company,
 exemption of registered, from
 insolvency, 129.
 petition by incorporated, 120.
 proceeding by or against unincorporated, 130.

Attaching creditor,
 lien of, 28.

Attachment,
 actual seizure, by, Courts
 power to order, 200, 203.
 before adjudication vesting of
 Hindu joint family property
 under, 270.
 before judgment, confers no
 right, 505.
 before judgment, of joint
 family property does not
 vest son's share in Court or
 receiver, 270.
 books of account, of, 204.
 charge by, 28
 condition of debtor's petition,
 151.
 condition precedent to issue of
 205,
 confers no right 504.
 execution, in, nor an act of
 insolvency, 104.
 " in, confers no
 right, 504.
 nature of, by Insolvency Court
 204.
 not a condition of creditor's
 petition, 151, 156.
 per se confers no right, 504.
 prohibition and injunction,
 by, 204.
 property exempted from, 204.
 property exempt from, does
 not vest in receiver or Court,
 253, 311.
 receiver's property, of, and
 sale, 599.
 statement of, in petition, 168,
 171.
 subsisting, must be, 157.

Attack,
 order of annulment, of, collaterally, 458.

Auction,
 delivery of possession by
 Court to purchaser in, 77,
 630.
 purchaser in, when acquires
 good title against receiver,
 497, 501
 sale by receiver by private
 treaty or by, 626

Auction-purchaser,
 when decree-holder, 512.

Audit,
 account, of, of receiver, rules
 as to, 755

Authority,
 debts due to local, priority of,
 650, 654
 disqualification from sitting or
 voting as member of local,
 713.

Automatic,
 annulment of adjudication
 449.
 discharge on termination of
 suspension, 426
 interim protection under English law, 211.
 interim protection, under
 Indian law not, 212.
 protection under the old Act,
 342.
 protection under the New
 Act, 343.
 termination of suspension of
 discharge, 426.
 vesting on adjudication, 256.

Auxiliary,
 Courts to be, to each other, 742.

Avoid,
 jurisdiction to, transfers from
 transferees of the insolvent,
 49.

Avoid—contd

- „ jurisdiction to, transfers during insolvency 537,
- „ jurisdiction to, transfers after annulment of adjudication, 537

Avoidance,

- conditions for, of transfer, 525
- effect of of transfers, 556
- exclusive jurisdiction for, of transfers, 538
- issues to be proved for, of transfers, 548
- jurisdiction for, is not affected by discharge, 562
- limitation for application for, 541
- nature of proceedings for, of transfers, 547
- notice to transferee before, of transfers, 548
- petition for, of transfer by whom to be made, 537
- preferences of, 558
- scope of enquiry for, of transfer under s 53 542
- transfers, of, after annulment
 - „ of adjudication, 537
 - „ of, during insolvency 537
 - „ of, by transferees, „ of 503
 - „ of, by transferees from transferees, 544
 - „ of, more than two years old, 47
 - „ of, on death of debtor, 538
- voluntary transfers, of, 522

Award,

- compensation, of, to debtor, on dismissal of creditor's petition, 242
- costs, of, against receiver, 741
- debtor under, not liable to adjudication, 18

Award—contd

- mesne profits, of, in case of annulment of transfers, 556

B

Back,

- doctrine of relation, of the order of adjudication, 253, 327

Bad faith,

- drawing up the schedule in enquiry into, at the time of discharge, 421.
- ground for refusal of adjudication, no, 239
- not to be enquired at hearing of debtor's petition 223

Bail,

- issue of warrant for arrest of debtor with or without, 200

Bailee,

- lien of, 24

Bailment,

- goods, of 29
- property under, vesting of 261

Balance,

- failure to pay, by receiver, 559
- proof for the, by a secured creditor, 476, 480

Banian,

- lien of, 25

Bankrupt,

- petitioning creditor, may be, 121

Bankruptcy,

- aliens liable to, 123
- companies when liable to, 124
- convicts are liable to, 124
- debtors liable to, 122.
- England, in, how begun, 117
- England, in, its effect in India, 10
- firm, of, 124
- Indian, is based on English Bankruptcy Act, 6.

Bankruptcy—contd.

- law of, its policy and object, 1.
- lunatic is not liable to, 123.
- married women liable to, 124.
- minor not liable to, 123.
- previous, statement of, 169, 172.
- proceedings, debtors liable to, 122.
- „ how begun in England, 117.
- refusal of discharge for previous, 433, 442.
- trustee in, not a creditor, 16

Bankruptcy Act,

- application of, to Provincial Insolvency Act, 6

Bar,

- power of Local Government to, certain provisions of the Act, 759.
- suit, of, for compensation, 242
- „ of, for dividend, 671

Bare right to sue,

- vesting in receiver of, 275

Barred debt,

- acknowledgment of, in schedule saves limitation, 752.
- when provable, 363

Bedding,

- debtor's, and necessary wearing apparel are exempt from vesting in receiver, 311.

Benami,

- jurisdiction of Insolvency Court to decide if a transaction is, 47
- keeping property, is an act of insolvency, 85.
- prevalence of, in India, 38.

Benamidar

- creditor, of, is creditor, 15.

Beneficial,

- winding up of the business, receiver's power to carry on, for, 623.

Benefit,

- assignment for, of creditors, an act of insolvency, 83, 89.
- creditors get, of execution when they acquire lien, 508
- execution, of, when creditor entitled to, 497, 501.
- fund, compulsory depend in private, when vests, 316
- secured creditor gets, of execution, 508
- to oneself, preference for, is not preference, 571
- transfer for, of creditor's, act of insolvency, 83, 89

Bengal Tenancy Act,

- occupancy holding under, vests in receiver, 274

Bill,

- exchange, of, petition may be based on debt due on, 140.

Bogus debts,

- mention of, in schedule, no ground of refusing adjudication, 240

Bona fide

- good consideration not sufficient if not, 528
- onus to prove absence of, in transfer, 550.
- „ „ absence of, in case of fraudulent preference, 580.
- „ „ when on the transferee, 596.
- „ „ of transferee, 596.
- pleading of, transfer without notice, 596.
- property in the hands of chaser for value' notice does not purchaser in 510.

Bona fide—contd

purchaser for valuable consideration, 532.

purchaser, protection of, 592.

subsequent, purchaser whether protected, 545.

transactions, protection of, 592, 595

transferee from a preferred creditor, protection of, 586

Bond,

stamp duty payable on security, 202

Books,

vesting of, of a lawyer, 311

Books of account,

attachment of, 204

disclosing business transaction and financial position, failure to produce, refusal of discharge for, 432

duty of debtor to produce, 206.

failure of debtor to produce, effect of, 209

false, penalty for keeping 691
liable to be seized in insolvency, 200, 204

production of, 209

refusal of discharge for omission to keep, 432, 437

vesting of, in receiver or Court, 253

Book debts

sale of, by receiver, 626

Breach of contract, right of suit for is not property, 20**Breach of trust,**

debts arising out of, not provable, 359

discharge does not release debts incurred by, fraudulent, 459

refusal of absolute discharge for, 433

British India,

adjudication in, its effect outside, 12.

British India—contd.

adjudication in England, its effect in, 10.

adjudication by foreign Court, its effect in, 11.

definition of, 9.

departure out of, an act of insolvency, 83, 102

extent of Act V of 1920 to the whole of, 1, 9

law relating to immovable property outside, 12

" " to insolvency in, 1, 2.

" " to movables outside, 12

property transferred must be in, 93

transfer of property whether in, or elsewhere with intent to defeat or delay is an act of insolvency, 83, 88, 89, 93

" for benefit of creditor in, is an act of insolvency, 83, 89

" by way of fraudulent preference in, is an act of insolvency, 83, 98

Bundelkhand Alienation of Land Act,

land of a member of agriculturist tribe under, does not vest, 313

Burdens,

property with all advantages and, vests in receiver, 317

Business,

affairs, culpable neglect of, refusal of discharge for, 433

allowance to insolvent for assisting to carry on 673,

Business—contd

- carrying on, by gomasta, effect of, 113
- goods in trade or, of the insolvent vest in the receiver, 252 298
- jurisdiction of Court within which debtor carries on, 161, 164
- new, liability of minor for debts incurred in, 265
- power of receiver to continue, for beneficial winding up, 623, 631
- sale of good-will of by receiver, 626
- trade and, meaning of 673
- transactions, refusal of discharge for failure to keep accounts to show, 432

C**Calculation,**

- dividend, of, 665
- provision for creditor residing at a distance in, of dividend, 665
- retention of assets in, of dividend, 665

Call,

- accounts, for Courts discretion to, 208

Cancel,

- power to, one of concurrent orders of adjudication 379

Carriage,

- proceedings, of, 182
- " power of Court to change, 182

Carrier,

- common, lien of, 24

Carries,

- debtor's petition to state the place where he, on business, 168

Carries—contd

- jurisdiction of Court arises where the debtor, on business, 161, 164

Cases,

- in which Court must, refuse an absolute discharge 432

Cause,

- dismissal of creditor's petition for sufficient, 233 236

Central Provinces Tenancy Act,

- agricultural holdings under, exempt from attachment, and vesting 312

Certain,

- debt, or contingent, provable 359

Certificate,

- debtor does not include debtor under 19
- grant of, that insolvency was due to misfortune and not misconduct, removal of disqualification, by 713
- refusal of, that insolvency was caused by misfortune and not misconduct, 714
- succession, not necessary for payment of dividend, 671

Cestui que trust

- right of, to follow property in the hands of trustee, 279

Change,

- carriage of proceedings, power of Court to, 182

Charge,

- act of parties by, 23
- appointment of receiver, by, 28
- attachment, by 28
- beneficiaries, of 27
- by act of parties, 23
- by operation of law, ^
- costs of suit and are first 513

Charge—contd

- distinction between mortgage and, 22
- distinction between, and lien, 23
- equitable, 27
- equitable assignment, by, 30
- hypothecation of movables, by 29
- joinder of 697
- procedure on, for offences under sec 69, 701
- secured creditor is a person holding mortgage or lien 14
- transfer of property includes creation of, on property, 14
- Children,**
 - maintenance for wife and 675
- Civil Court,**
 - decree for payment of money, must be of 104
 - District Court is principal, 14
 - jurisdiction of Insolvency Court is co extensive with 40
 - of insolvency Court to go behind decision of 51
 - " of to entertain suits after adjudication 334
 - power of stay of, 333
 - procedure of on adjudication, 336
- Civil jurisdiction,**
 - Insolvency Court to follow the procedure of Court of original, 67
- Civil prison,**
 - costs of maintaining debtor in, 740
 - detention of debtor in, 200, 349
- Civil Procedure Code,**
 - Act III of 1907 passed in super session of, 3
 - application of, to insolvency proceedings, 69

Civil Procedure Code—contd

- benefit of execution under 497
- execution of decrees and orders of Insolvency Court as in, 77
- first law of insolvency contained in, 3
- inherent power of insolvency Court under sec 151, 72
- jurisdiction of Insolvency Court to extend time for discharge under sec 148, 73
- jurisdiction of Insolvency Court to decide claim under Or XXI, r 63, 51, 294
- objection to jurisdiction under sec 21, not allowed in appeal or revision, 69
- Orders IV, VI, VII, how far apply to insolvency petitions 190
- Order IX when applies to insolvency matters, 70
- Order XXI r 63 suit against decision under, 50 294
- Order XXI r 90, insolvent's right to apply under, 285
- Order XXII, rr 2, 3, application of, 285
- Order XXII, r 4, does not apply on the death of insolvent defendant, 190
- Order XXII, r 8, application of, 285
- Order XXII, r 12, application of, 285
- Order XXXIX, r 6, applies to insolvency proceedings, 75
- Order XLI, r 5, applies to insolvency proceedings 81
- Order XLVII r 1, how far applies to insolvency proceedings 76
- power of High Court to sus-

Civil Procedure Code—Contd.

- pend interlocutory orders of Insolvency court under, 81.
- power of Insolvency Court to rescind its order under, 75
- procedure for admission of insolvency petitions to be the same as plaints under, 190.
- property exempt from attachment under, does not vest in receiver, 21, 253.
- reference to, of 1877 & 1882 to be construed to refer to Act V of 1920, 761.
- sale of property by receiver after declaration under sec 68, 647.
- sale of property by receiver not governed by, 627.
- second appeal under sec. 100, 719, 732
- subject to the provisions of Insolvency Act, applies, 69

Civil suit,

- High Court and District Court have same powers in insolvency matters as in, 63,
- leave for, against act or decision of receiver, not necessary, 686.

Claim,

- actionable, is property that vests, 274
- breach of contract, for, when vests in receiver, 276.
- damages, for, vest, 276.
- disputed proof of, retention by receiver of sum to meet, 665
- jurisdiction of Insolvency Court to decide, under Order XXI, r 63, C. P. C. 50, 294.
- proof of numerous, 492.
- proof of, as secured creditor, 22.

Claim—Contd.

- settlement of, withdrawal of petition for, 177.
- statement in petition of amount and particulars of all pecuniary, 169, 171.
- Classes,**
 - fraudulent transfers, of, 87.
- Classification,**
 - acts of insolvency, of, 85.
- Clerk,**
 - salary of, priority of, 650, 654, 655.
- Co-debtor,**
 - discharge of debtor does not release, 460, 468.
- Code,**
 - Civil Procedure, *see* Civil Procedure Code *infra*.
 - complete, the Act is a, 5.
 - Criminal Procedure, *see* Criminal Procedure Code *supra*.
- Collateral,**
 - attack of order of annulment,, 458.
- Collector**
 - power of, to dispose revenue paying or agricultural property, 647.
 - procedure for sale by, 647, 650.
 - sale by, of revenue paying or property held or let for agricultural purposes, 647.
- Commencement,**
 - leave of Court necessary for, of proceedings after adjudication, 252.
 - proceedings, of, against person of debtor, 290.
 - proceedings, of against property of debtor, 291.
 - suit or other legal proceeding after adjudication of, 252, 288, 289.
- Commission,**
 - agent, goods held by, vest in receiver, 260.

Committee,

- inspection, of appointment of, 678
- power of control of, over receiver, 678, 679
- qualification of members of, 678, 679

Communication,

- seclusion to deprive creditors of means of, an act of insolvency, 84, 103

Company,

- incorporated, not liable to adjudication under the Act, 130
- incorporated, petition by, 120
- liable to adjudication, 124
- registered, petition against, 124
- unincorporated, liable to adjudication, 130
- unincorporated, may be a petitioning creditor, 120
- unregistered, petition against, 130
- winding up of incorporated, 130

Compensation,

- application for, 243
- award of, to debtor on dismissal of creditor's petition, 242
- bar of suit for, 242, 244
- dismissal of creditor's petition, on, 243
- dismissal of creditor's petition as frivolous or vexatious, on, 242, 244

Complaint,

- Court, by, to magistrate of offences by debtor, 701
- duty of Court before making, to magistrate, 706
- matters to be considered before making, 706

Complete,

- Code, the Act is a, 5

Comply,

- consequences of refusal or neglect to, with duties before adjudication, 209

Composition,

- acceptance of, 395
- acceptance of, by creditors whose debts are proved, 395, 400
- acceptance by creditors of, condition precedent 399
- after adjudication, 395, 396
- amendment of proposal of 395, 401
- „ of schedule framed in, 413
- annulment of, 413
- annulment of, for fraud, 415
- annulment of, on the ground that, or scheme cannot proceed without injustice or undue delay, 415
- annulment of adjudication on approval of, 406, 408
- appeal against approval or acceptance of, 406
- approval of, by Court, 396
- approval or refusal by Court, 396, 404
- before adjudication 396
- binds creditors whether entered in the schedule or not, 406 410
- binds debtor and his estate, 410
- creditors' resolution to accept, 400
- creditors' right to prove in, 668
- criminal liability of debtor after, for offences under s 69, 709
- date of hearing of proposal 395
- deed of, execution of, before adjudication is act of insolvency, 90

Composition—contd.

- default in payment of instalment under, 415.
- discharge and, difference between, 461.
- discretion of Court to approve or refuse, 396, 404.
- effect of annulment of, 417.
- „ annulment on, 412.
- „ order on approval of, 408.
- „ wrongly approved, 405.
- framing of schedule on approval of, 406, 407.
- notice of the proposal of, 395, 398.
- order embodying the terms of, 406, 407.
- order on approval of, 406, 407.
- out of Court, 405
- power of Court to enforce security in, 402
- „ „ to re-adjudge debtor insolvent, 415
- procedure in Court, for, 398
- proposal for, 395, 397.
- provision in, for payments of debts payable in priority, 396, 404.
- re-adjudication after annulment of, 415, 416
- re-adjudication relates back, 416.
- receiver's report on, 395.
- refusal to approve, unless it provides reasonable security for payment of not less than six annas in the rupee, 396, 402.
- refusal of, by Court, to approve 396, 401, 404.
- refusal of, for misconduct, 396, 403.
- refusal of discharge for previous, 433, 442.
- resolution by creditors to accept, 400

Composition—contd.

- revesting of property on annulment of, 385, 408.
- „ in debtor on approval of, 408.
- right of unscheduled creditors in, 414.
- „ debtor to surplus, 415.
- schedule of creditors, framing of, on approval of, 407.
- scheme of arrangement and, 395.
- security for payment of not less than six annas in the rupee required by Court for approval of, 396.
- what is, 397.

Compromise,

- receiver's power to, with leave of Court, 624, 640.

Compulsory,

- deposit in private benefit fund, whether vests, 316.

Computation,

- exclusion of period bet. adjudication and annulment of adjudication in, of period of limitation for suit and application for execution, 743, 751.
- exclusion of period of limitation only in case of debts proved, 744
- three months, of, in case of dismissal of petition for adjudication, 145.
- „ „ of, in case of execution of decrees, 144.
- „ „ of, in case of transfers¹ 144, 577.
- „ „ for annulment of „ „ „ 577.
- two years, of, 542.

Concealment,

- accounts, of, no ground for dismissal of petition, 225
- affairs, of, fraudulent, offence, 691, 696
- arrest of debtor for, of documents 201
- debts of, 692
- dismissal of petition for, of property, 239
- fraudulent, of property offence, 691, 697
- fraudulent transfer, or, need not be enquired in a debtor petition, 224
- penalty for, of debt, 692
- refusal of discharge for removal of, of property, 433, 443
- state, of affairs, of, 691

Concurrent,

- annulment of, adjudication 379
- consolidation of separate petition in Courts of, jurisdiction, 181
- jurisdiction of Courts invested, 32, 33, 34
- order of adjudication, power to cancel, 379
- order of suspending and attaching condition to order of discharge, 433
- pennons, 127
- power to cancel order of adjudication, 379
- proceedings for adjudication, 379
- stay of, proceedings, 379, 380

Conditions,

- avoidance of preference, of, 560
- avoidance of voluntary transfers, of, 521
- creditor's petition, of, 134, 136
- debtor's petition, of, 151, 152
- discharge subject to, 417, 426

Condition—contd.

- modification of, of discharge 433
- petitions for adjudication must be subject to the, specified in the Act, 117
- precedent, three months not a period of limitation but, 144
- to the issue of attachment, 205
- to injunction, 205
- to prohibition, 205
- to warrant of arrest 205
- leave of Court to commencement of suit or legal proceedings against insolvent, 252, 292
- acceptance by creditors, of the proposal of composition or scheme of arrangement, is, 399
- secured creditor's petition, of, 135
- suspension of discharge and attaching 433, 443

Consent,

- creditors' no ground of annulment of adjudication 377
- goods in possession order or disposition of debtor by, of true owner vests in receiver, 252, 260, 298

Consequences,

- refusal or neglect, of, to comply with duties debtor, before adjudication, 209

Consideration,

- contract for valuable protection of, 592, 595
- transfer made before and in of marriage, protection of, 522

Consideration—contd.

transfer made in good faith
and for valuable, protection
of, 522.
valuable, what is, 532.

Consolidation,

petitions, of, 180.
" of, after admission, 181.
" of, by creditors, 180
separate petitions, of, 181.
simplification of proceedings,
for, 181.

Constitution,

Court, of, and its powers, 32.

Contempt,

committal by District Court
for, 614.
" by High Court for, 614
Court, of, Act, XII of 1926,
614.
" of, committal for, 614.
obstruction to receiver is, of
Court, 613.

Contents,

creditor's petition, of, 169, 170.
debtor's petition, of, 168, 169.
secured creditor's petition, of,
135, 175.

Contingent,

creditor, 16
debt, when provable, 367.
" when not provable, 367.
interest of a reversioner,
vesting of, 276.

Continuance,

power of receiver for, of suit,
623.
proceedings, of, after adjudica-
tion, effect of, 335
proceedings, of, on death of
debtor, 185
refusal of discharge for, of
trade, knowing himself to
be insolvent, 432.
right of suit or proceeding,

Continuance—contd.

after adjudication, 284, 330,
351.

Contract,

breach of, right of suit for, is
not property, 20.
damages for breach of, claim
to when vests in receiver,
275.
debts, of, without expectation
of payment, refusal of dis-
charge for, 433
preference pursuant to, 572.
refusal of discharge when in-
solvent, debt without ex-
pectation to pay, 432, 439
valuable consideration, for,
protection of, 592, 595.

Convenient,

speed, duty of receiver to
realise property with all, 623.

Conveyance,

fraudulent, act of insolvency,
83.
receiver, by, not exempt from
stamp duty, 640.

Convict,

adjudication of, 124.

Conviction,

debtor, of, for offences under
the Act, 692.

Coparcener,

vesting of Hindu joint family
property on adjudication of
a, 271.

Copyright,

insolvent, of, vests, 260.

Corporation,

exemption of, from ,
proceeding, 129.
insolvency petition
does not lie, 102.

Costs,

- administration, of priority of, 658
- annulment of adjudication for failure to deposit, 378
- award of, against receiver, 741
- discretion of Court, in, 740
- indemnity of, by creditor to receiver, 591
- inherent power to order security for, 730
- liability of receiver for, 637
- maintaining a debtor, of, in civil prison, 740
- petitioning creditor liable for, 740
- proceedings, of, in the discretion of Court, 740
- proof, of, 492
- publication of order of adjudication of, 341, 740
- receiver when liable for, 615
- security for, 338, 730
- suit and execution, of, when first charge, 513, 521

Co-trustee,

- discharge does not release 460
- 468

Council,

- disqualification of insolvent to sit as member of, 713
- Privy, appeal to, 736
- " leave for appeal to, 64, 736

Court,

- abuse of process of annulment of adjudication for, 374
- " of process of, when adjudication is 374
- " of process of, when adjudication is not, 375
- " of process of, dismissal for, 240
- " of process of, inherent power of dismissal for, 72, 240

Court—contd

- abuse need not be enquired into on a debtors' petition, 224
- additional District Judge, of jurisdiction of, in insolvency, 32
- adjournment of hearing of petition by, 217.
- adjudication, order of, by, 244
- appeal against order of, under s. 68, 690
- appeal of, power and procedure of, 68, 737
 - to, against receiver, 679
 - to District Court from subordinate, 719, 726
 - to High Court from District, 719, 732
- appointment of committee of inspection by, 178
 - of interim receiver by, 194
 - of Official Receiver by, 618
 - of receiver by, 599
- approval of composition by, 396 404
- attachment of property by, 200
- auxiliary to each other, to be 742
- avoidance of preference by, 558
 - of voluntary transfers by, 522
- award of compensation by, 242
 - of costs by, 740
- by whose order debtor has been arrested must be stated in petition for adjudication 168
- cancellation of concurrent adjudication by, 379
- cases in which, must refuse absolute discharge, 432

Court—contd.

- civil, power of stay of, 333
- committal by, for contempt, 614
- complaint to magistrate by, against debtor, 701
- concurrent jurisdiction, of, 34,
- conflict of jurisdiction of, 66, 380
- consolidation of separate petitions in, 181
- constitution and powers of, 31
- contempt of, obstruction to receiver, is, 613
- decision of, final, 37
- decision of insolvency, *res judicata*, 37
- decree must be of, 104
- defined, 14
- delegation of power by, for admission or rejection of proofs, 494
- delivery of property by, executing decree, 513
- discharge of debtor by, 417
- , by foreign, 430
- discretion of, to call for account, 208
- discretionary power of when moved under s 68, 686
- dismissal of petition by, 233
- " of petition for default, power of, to set aside, 70
- , of petition for abuse of process of, 72, 240
- District Court shall be, having insolvency jurisdiction 32
- " powers of, in regard to proceedings in subordinate, 68
- duty of, in appointing interim receiver, 196
- " " executing decree as to property taken in execution, 513, 519

Court—contd.

- duty of debtor to attend, 206
- " " insolvency, to annul preferences and transfers, 587
- " " insolvency, to frame schedule, 350, 353
- " " insolvency, before complaint, 706
- enquiry by, into entries in schedule, 493
- examination of debtor by, 217
- execution of decrees and orders of insolvency, 77
- extension of period of discharge by, 245, 248
- extra territorial jurisdiction of, 44
- fixing date of hearing by, 191,
- foreign, adjudication by, effect in India, 11
- foreign, discharge by, 430
- framing of shedule by, 351, 353
- general powers of insolvency, 67
- grant of certificate by insolvency, removal of disqualification by, 713
- " of discharge by insolvency, 417
- " of protection by insolvency, 210, 341
- having insolvency jurisdiction, 32, 161
- hearing of petition by, 217
- High, powers of, in its original jurisdiction, 77
- " " in its extraordinary jurisdiction, 80
- " " in its appellate jurisdiction, 80
- " " in its revisional jurisdiction, 81
- " " of revision by, 712, 729
- " " to stay process, 382

Court—*contd*

- imperial jurisdiction of, 35
- inherent jurisdiction of insol
vency, 72
- „ power of dismissal for
abuse of the process
of, 72
- „ power of, to grant
interim protection,
72
- „ power to order security
for costs, 730
- insolvency, District Courts shall
be, 32
- „ extent of jurisdiction
of, 35
- „ power of, to order
stay 333
- „ status of, 68
- interim proceedings in, 200
- „ receiver, appointment
of, 194
- invested with jurisdiction,
32, 33
- issue of warrant of arrest for
departing from local jurisdic
tion of, 201
- jurisdiction of, invested, 34
- jurisdiction of insolvency, 32
- „ of, within which the
debtor ordinarily re
sides, 161
- „ of, within which deb
tor carries on busi
ness, 161
- „ of, where the debtor
has been arrested or
imprisoned, 161
- „ of, where debtor per
sonally works for
gain, 161
- „ of insolvency, co-ex
tensive with Civil
Court, 40
- „ of insolvency, discre
tionary, 61
- „ of insolvency, limit to,
52

Court—*contd*

- jurisdiction of insolvency, not
exclusive, 55
- „ of insolvency, objec
tion to, 161
- „ of insolvency, to annul
transfers more than
2 years old, 47, 554
- of insolvency, to annul
transfers on death of
debtor, 538
- of, to annul transfers
from transferees, 49,
543
- „ of insolvency, to decide
questions of title or
priority, fact or law,
37, 40
- of insolvency, to decide
questions as to part
nership, 42
- of insolvency, to
decide questions of
any nature what
ever, 37, 41
- of to enquire into
mesne profits, 42
- of, to avoid transfers
during insolvency,
537
- of, insolvency, to go
behind decision of
Civil, 51, 539
- „ of, to go behind judg
ment, 539
- of insolvency, subject
to the provisions of
the Act, 37, 44
- „ of insolvency, to sum
mon persons for in
formation, 641
- „ of insolvency, where
ought to be exercised,
63
- „ of insolvency, where
ought not to be
exercised, 63

Court—contd

- jurisdiction of insolvency, to order refund, 42
- law and procedure of insolvency, for equities under s 4, 53
- leave of, for petition after annulment, 151, 159
- " condition precedent for suit or legal proceedings against person or property of insolvent, after adjudication, 252, 290
- " powers of receiver exercisable with, 623, 630
- " without, 623, 626
- limit to jurisdiction of insolvency, 52
- limitation to the power of, 495
- local jurisdiction of insolvency, 35
- matters to be considered by, before making complaint, 706
- may fix remuneration of receiver, 599
- nature of attachment by insolvency, 204
- nature of proceedings in, for avoidance of voluntary transfers, 547
- notice fixing date of hearing in, 191
- " to Court executing decree, effect of, 513, 519
- objection to jurisdiction of insolvency, 69
- petition shall be presented to which, 161
- position and power of, before and after adjudication, 201
- power of appellate, 68
- " of insolvency, general, 67
- " and procedure of, the

Court—contd

- same as in civil suit, 67
- power of High Court and District Court, 68
- " of amending schedule of creditors after annulment of adjudication, 496
- " of, to arrest after adjudication, 349
- " of insolvency, to order attachment by actual seizure, 200
- " of insolvency, to change carriage of proceedings, 182
- " of insolvency, to decide questions of title, priority, fact or law, 37
- " of, to annul adjudication, 370
- " of insolvency, to detain debtor in civil prison, 200, 349
- " of, to set aside *ex parte* order of dismissal for default, 70
- " on annulment, 389
- " to deliver possession, 630
- " to dismiss petition for abuse of process of Court, 240
- " to enforce its orders 60
- " to extend time for discharge, 73, 450
- " to execute its decrees and orders, 77
- " if no receiver, 622
- " of, to interfere with sale by receiver, 629.
- " of, over receiver, 599 615
- " of, over official receiver, 621

Court—contd.

- power of, to remove a person from possession, 599, 609.
- " of restitution, 76.
- " of review, 75.
- " to re-adjudicate insolvent, 415, 416
- " of, to grant discharge, 417, 421.
- " of, to refuse discharge, 417, 421.
- " of, to suspend discharge or attach conditions, 417, 421
- " of, to review order of refusal of discharge, 444.
- " of, to extend the period of discharge, 73, 248.
- " to go behind judgment, 51, 495
- " to grant interim protection, 72.
- " of insolvency, to grant temporary injunction, 74.
- " to issue warrant of arrest of debtor, 200, 349.
- " to order security for appearance of debtor, 200.
- " of insolvency, to require information, 641.
- " of, to order stay, 333.
- " of, to stay sale, 518
- " of, to sell without deciding the question of title, 37.
- " of, on annulment, 389.
- " of, to stay proceedings, 75.
- " of, to stay sale in execution, 718

Court—contd.

- preliminary inquiry by insolvency, before complaint to Magistrate, 701, 705.
- procedure of insolvency, 69
- procedure in, for consideration of proposal for composition, 398
- proof required by, that the creditor or debtor is entitled to present the petition, 217.
- property vests in, 252, 282
- " vests in, when no receiver, 283, 622.
- protection to debtor given by, 72, 210, 341
- re-adjudication of debtor by, 415
- receiver, Court's powers over, 680.
- refusal of discharge by, 417, 422.
- release of debtor by, 210
- restriction on power of, for removal of person in possession, 611.
- revenue, protection from arrest in execution of decrees or order of, 216
- right of restraint of, over secured creditor, 300
- sale by receiver is not sale by, 627.
- schedule of creditors, framing of, by, 350, 351.
- security by receiver, may, require, 599.
- status of, 68.
- stay of proceedings by, 75
- stay of pending proceedings by, 333
- subordinate to District, Court, local Government may invest with jurisdiction, 32
- substitution by, of one creditor by another, 182.

Court—contd

- summary administration by, 716
- summon, power of, to 641
- vesting of property in, 252, 283
- what should, enquire on creditor's petition 218
- what should enquire in debtor's petition, 221
- where ought to exercise jurisdiction 63
- where ought not to exercise jurisdiction, 63
- withdrawal of petition by leave of, 176

Credit,

- false, obtained in respect of goods in possession, 296
- prosecution for obtaining by insolvent, 710
- penalty for obtaining by insolvent, 710
- undischarged insolvent obtaining to the extent of fifty rupees 710

Creditor,

- acceptance of composition by, 395, 399
- adjudication on the petition of, 244
- aliens may be petitioning 121
- amendment of petition by, 147
- annulment of judicial proceedings in favour of, 558
 - , of payment to 558
 - , of transfer by, 587
 - , of transfer to, 558
- appeal by, 719, 722
 - , by, against receiver 683
- application for annulment of transfer by, 587
 - , of ss 5 and 12, Lim. Act, to petitions of, 145, 744

Creditor—contd

- appointment of committee of inspection by, 678
- assets realised before admission of petition, entitled to, 497
- assignees may be petitioning, 121
- avoidance of preference to, 558
- bankrupts may be 121
- benefit of execution, when entitled to 497
- benamdar of creditor is, 15
- bona fide payment by insolvent to 592
- conditions of petition by, 134, 136
- consent of, no ground for annulment of adjudication, 377
- consolidation of petition by, 180
- contents of petition by 169, 170, 174
- contingent, not a, 16
- costs of suits and execution of, first charge, 513
- costs payable by, 740
- debt due to petitioning, must amount to, Rs 500, 34
 - , of petitioning is to be liquidated, 134
- debts which are to be excluded from schedule of, 354
- debtor cannot prove against, 662
- defined, 14
- dismissal of petition by, 233, 234
- distinction between secured creditor and, 16
- duty of debtor to give list of, and debtor, 206
- effect of framing schedule of, 356
- examination of debtor petition of, 217, 231

Creditor—contd

execution, under, restriction
 of right of, 497
 executors may be, 121
 extension of limitation of peti-
 tion by, not allowed, 145
 framing of shedule of, by
 Court, 351
 general rule as to interest pay-
 able to, on adjudication, 486
 hearing of petition by 217,
 218
 husband as, 121
 includes, 14, 15
 incorporated company as, 120
 infants may be petitioning,
 121
 individual, petition by, 119
 intent to defeat or delay,
 83, 101
 interest payable to, 485
 joint, petition by, 121
 " " by one of, 120,
 139
 lien of attaching, 28
 limitation for petition by, 134
 " of rights of, on
 annulment of ad-
 judication, 743
 locus standi of, to apply for
 annulment without leave
 591
 married women as, 121
 mode of proof by, 490
 mutual dealing between insol-
 vent, and, 470
 notice to, before discharge, 420
 " " before final divi-
 dend, 670
 " " on admission of
 debtor's petition,
 191
 " " on admission of
 creditor's petition,
 191
 " " suspending payment,
 an act of insolvency,
 84

Creditor—contd

parties in appeal by, 723
 Partners as, 120
 Payment made by insolvent to
 when protected, 592, 594
 " of interest to, rule as
 to, 485, 486
 " of interest to, by
 receiver, 677
 petition by, 117, 119
 " amendment of, 147
 " contents of, 169,
 174
 " to state act of
 insolvency, 169,
 174
 " to state amount
 of his claim,
 174
 " a secured, 135
 " for annulment of
 transfer by, 587,
 590
 " one of joint,
 139
 " consolidation of,
 180
 " for annulment of
 transfers and pre-
 ferences by, 587
 position of, on annulment,
 394, 743
 power of secured, to prove,
 476
 precluded from making peti-
 tion, 122
 preference is transfer in favour
 of a, 564
 private arrangement with, 377
 proceedings on petition of
 218
 proof of acts of insolvency of
 debtor by, 220
 proof by, of debt payable in
 future, 469
 proof of debt by, 219
 proof of right to present peti-
 tion by, 217

Creditor—*contd.*

- provision for, residing at a distance, 666
- refund of money realised in execution by, 507.
- relationship of debtor and, 136.
- relinquishment of life-interest in fraud of, an act of insolvency, 95
- remedies of, 135
- remedy of, against property of insolvent, 287
- remedy of, on adjudication of debtor, 286
- remedy of, in respect of debts provable under the Act, 286
- remedy of, when loss is occasioned by wilful default of receiver, 616
- remedy of, on refusal to pay dividend, 672
- resolution by, to accept composition, 400
- restitution of benefit under execution by, 507
- restriction of rights of, under execution, 497
- right of, on annulment, 393
- right of, to adduce evidence in opposition to debtor's petition, 230
- right of, to contest application by another, 221
- right of, to dividend, 667
- right of, proving, 492
- right of, to prove in a composition, 668
- right of, under execution, restriction of, 507
- right of, who acquires a lien, 508
- right of, who has not proved before declaration of dividend, 667
- right of, to prove debt after final discharge, 667.
- right of secured, 22

Creditor—*contd.*

- right of, to prove in summary administration, 669
- rules for meeting of, 755
- schedule of, framing of, by Court, 350, 353
- scope of enquiry on petition of, 218
- secured, defined, 14, 21
 - " creditor, not a, 16
 - " petition by, 120, 135, 150
 - " petition, conditions of, 135
 - " position of, in insolvency, 253, 318
 - " proof of claim as, 22
 - " right of, how far affected by, s 4, 43
 - " right of, to realise security is absolute, 319
 - " under a trust deed, 484
- seclusion to deprive communion with, an act of insolvency, 84, 103
- security for costs from, when he applies for annulment, 591.
- sole, petition by, 120
- substitution of, 182.
- surety a contingent, 16
 - " may be a petitioning, 121
- surrender of life interest in fraud of, an act of insolvency, 95
- three months not a period of limitation of petition of, 144
- transfer for benefit of, an act of insolvency, 83, 89
 - " in favour of, is preference, 564
 - " to a secured, is preference, 564.
 - " with intent

Creditor—contd.

or delay, an act of insolvency, 93
 trustees may be, 121.
 „ in bankruptcy, not, 16
 unincorporated company as, 120
 what should Court enquire on petition by, 217, 218
 what, to prove to adjudicate debtor insolvent, 218
 when entitled to present petition, 134
 when can apply for annulment of transfers, 587, 590
 who is, 15, 136
 who is not, 16
 whose debt is barred is not a, 16

Criminal,

liability of insolvent for offence under s 69, after discharge or composition, 709.

Criminal Procedure Code,

appeal from conviction under s 69 does not lie under s 476, 708
 compensation under sec 26 to be realised as fine under, s 386, 241
 complaint by Insolvency Court for offence under s 69 to be dealt under, 702
 discharge does not release from liability for maintenance under sec. 488 459, 460, 463
 protection from arrest for failure to pay maintenance under s 488, 215

Crown,

debts, discharge does not release, 459, 461
 debts due to, Indian Companies Act, under, 653

Crown—contd

mortgage entitled to priority over, 653
 payment in priority of, 650, 651
 right of, to prove, 652

Culpable,

neglect, of business affairs, refusal of discharge for 433, 441.

Custody,

jurisdiction of Court arises when the debtor is in, 161, 166
 recommitment of debtor to, on annulment of adjudication, 446
 statement in petition of the place of 168

D**Damages,**

claim for, vests, 276
 claim for, is property, 276
 demands in nature of unliquidated, not a provable debt, 359
 receiver liable for costs and, 615, 637
 suit for, against creditor for dismissal of application, does not lie, 242

Damdupat,

application of rule of, 490

Date,

absence of notice of, of hearing, effect of, 193
 act of insolvency, of, to be stated in petition, 170 175.
 adjournment of, of hearing, 218, 233
 adjudication, of, obligation incurred before is provable, 365

Date—contd

- adjudication, of, obligation incurred after, not provable, 368
- adjudication, of, relates back to the presentation of petition, 263, 327
- annulment of transfers within two years from, of transfer, 522
- avoidance of preference of transferor within three months after, 558
- hearing of, of petition to be fixed by Court on admission of petition, 191
- hearing of, proof required by Court is that the creditor or debtor is entitled to present the petition, 217
- hearing of, proposal for composition, 395
- hearing of, application for discharge, 417
- operation, of, of Act V of 1920 7
- service of notice of, of hearing by Court is not an act of insolvency, 747
- transaction after, adjudication, 597
- transaction before of adjudication, protected, 597

Dayabhaga,

- joint family property under, vesting of, 266

Dealing,

- mutual, and set off, 470

Death,

- abatement of proceedings on, of debtor, 190
- after adjudication, 188
- annulment of transfer on, of debtor, 538
- before adjudication, 187

Death—contd

- continuance of proceedings on, of debtor, 185
- effect of debtor's 186
- notice on, of debtor, 189
- substitution of legal representatives on, of debtor, 70
- termination of insolvency proceedings on, of debtor, 187

Debt,

- acknowledgment of, in schedule saves limitation, 752
- affidavit in proof of, 490
- amendment of proof of 353
- arrear of rent is provable, 364
- assignment for past, an act of insolvency, 96
- barred, provable, 363
- bogus, dismissal of petition for, 240
- certain or contingent, when provable, 359
- concealment of, offence of, 692
- contingent, when not provable, 367
- contracting without any reasonable expectation to pay, effect of, 432, 439
- crown, discharge does not release, 459, 461
- crown, priority of, 650, 651
- defined, 14, 17
- discharge releases from all provable 460, 464
- discharge does not release, incurred by fraud or fraudulent breach of trust, 459, 462
- dismissal for debtor's ability to pay, 235
- dower, transfer for, 526
- due to creditor must amount to Rs 500, 134
- due to crown, priority of, 650, 651
- due to local authority, priority of, 650, 654
- effect of order of discharge on, 460

Creditor—contd

or delay, an act of insolvency, 93
 transtees may be, 121
 „ in bankruptcy, not, 16
 unincorporated company as, 120
 what should Court enquire on petition by, 217, 218
 what, to prove to adjudicate debtor insolvent, 218
 when entitled to present petition, 134
 when can apply for annulment of transfers, 587, 590
 who is, 15, 136
 who is not, 16
 whose debt is barred is not, 16

Criminal,

liability of insolvent for offence under s 69, after discharge or composition, 709.

Criminal Procedure Code,

appeal from conviction under s 69 does not lie under s 476, 708
 compensation under sec 26 to be realised as fine under, s 386, 241
 complaint by Insolvency Court for offence under s 69 to be dealt under, 702
 discharge does not release from liability for maintenance under sec 488 459, 460, 463
 protection from arrest for failure to pay maintenance under s 488, 215

Crown,

debts, discharge does not release, 459, 461
 debts due to, Indian Companies Act, under, 653

Crown—contd

mortgage entitled to priority over, 653
 payment in priority of, 650
 651
 right of, to prove, 652

Culpable,

neglect of business affairs, refusal of discharge for 433, 441

Custody,

jurisdiction of Court arises when the debtor is in, 161, 166
 recommitment of debtor to, on annulment of adjudication, 446
 statement in petition of the place of 168

D**Damages,**

claim for, vests, 276
 claim for, is property, 276
 demands in nature of unliquidated, not a provable debt, 359
 receiver liable for costs and, 615, 637
 suit for, against creditor for dismissal of application, does not lie, 242

Damdapat,

application of rule of, 490

Date,

absence of notice of, of hearing effect of, 193
 act of insolvency, of, to be stated in petition, 170
 175
 adjournment of, of hearing 218, 233
 adjudication, of, obligation incurred before is provable, 365

Date—contd.

adjudication, of, obligation incurred after, not provable, 368.

adjudication, of, relates back to the presentation of petition, 263, 327.

annulment of transfers within two years from, of transfer, 522

avoidance of preference of transferor within three months after, 558.

hearing, of, of petition to be fixed by Court on admission of petition, 191.

hearing, of, proof required by Court is that the creditor or debtor is entitled to present the petition, 217.

hearing, of, proposal for composition, 395.

hearing, of, application for discharge, 417.

operation, of, of Act V of 1920 7.

service of notice of, of hearing by Court is not an act of insolvency, 747.

transaction after, adjudication, 597.

transaction before, of adjudication, protected, 597.

Dayabhaga,

joint family property under, vesting of, 266

Dealing,

mutual, and set off, 470

Death,

abatement of proceedings on, of debtor, 190.

after adjudication, 188

annulment of transfer on, of debtor, 538.

before adjudication, 187.

Death—contd

continuance of proceedings on, of debtor, 185

effect of debtor's 186.

notice on, of debtor, 189.

substitution of legal representatives on, of debtor, 70.

termination of insolvency proceedings on, of debtor, 187.

Debt,

acknowledgment of, in schedule saves limitation, 752

affidavit in proof of, 490

amendment of proof of, 353

arrear of rent is provable, 364.

assignment for, past, an act of

210.

certain or contingent, when provable, 359.

concealment of, offence of, 692.

contingent, when not provable, 367.

contracting, without any reasonable expectation to pay, effect of, 432, 439.

crown, discharge does not release, 459, 461.

crown, priority of, 650, 651.

defined, 14, 17.

discharge releases from all provable 460, 464.

discharge does not release, incurred by fraud or fraudulent breach of trust, 459, 462.

dismissal for debtor's ability to pay, 235.

dower, transfer for, 526

due to creditor must amount to Rs. 500, 134.

due to crown, priority of, 650, 651.

due to local authority, of, 650, 654

effect of order of discharge 460.

Debt—contd.

enquiry as to existence of, 141.
 enquiry into provable, 369.
 entitled to priority, 650, 655.
 equality of, entitled to priority, 650, 658
 failure to prove, effect of, 491.
 fictitious, dismissal of petition for, 240
 five hundred rupees, of, condition of debtor's petition, 151, 155.
 fraud, incurred by, discharge does not release, 459.
 future, provable, 359
 genuineness of, need not be enquired when adjudicating, 222
 includes interest and cost, 139.
 incurred after adjudication not provable, 361, 362, 367.
 incurred after presentation of petition but before adjudication is provable, 361, 362
 incurred by fraud or fraudulent breach of trust, discharge does not release, 459, 461.
 interest on, 485.
 interest on, payable in future, 489.
 joint, provable, 363.
 joint, set off of, 473.
 limitation for proof of, 357.
 liquidated sum, must be, 134, 139.
 maintenance not a provable, 463
 meaning of provable, and proof, 352.
 method of proof of, 469.
 mode of proof of, 490
 must amount to five hundred rupees to found a petition, 134

Debt—contd.

must be a liquidated sum for the purpose of insolvency, 134
 must be payable immediately or at some certain future time, 134.
 must be personal, 363.
 must be subsisting, 359
 not provable, 367.
 notice of suspension must be of entire, 109.
 or liability incurred by fraud or fraudulent breach of trust, 360
 owing by debtor must be five hundred rupees or more, 134, 139.
 payable immediately or at some certain future time, 134, 141.
 present, provable, 359.
 prima facie proof of inability to pay, 227.
 priority of, 501.
 proof of, after adjudication, 350.
 " in summary administration, 718.
 " of, before discharge, 351.
 " of, by a secured creditor, 476.
 " of, by post, 469
 " of, payable at a future time, 469, 470.
 " of, whole, on relinquishment of security, 476, 481.
 provable, 359
 " discharge releases from all, 460, 464
 " receiver to retain sums to meet, 665
 refusal of discharge when insolvent contracts, without expectation to pay, 432

Debt—*contd*

- release of all provable, by discharge, 460
- remedy of creditor in respect of, provable under the Act, 286
- rent decree is a, 156
- right of creditor who has not proved, 667
- salary of any clerk, priority of, for, 650
- schedule, to be excluded from, 351, 354
- scheduled and unscheduled, payment of, priority in payment of, 662, 663
- secured, not provable, 368
- subsisting, must be, 359
- suit or other legal proceeding commencement of in respect of, after adjudication, 252
- suspension must be of entire, 109
- tender of proof of, 350
 - " " of, at any time before discharge 350
- unable to pay, 151, 563
- unliquidated damages are not, 359
- value if incapable of being fairly estimated is not, 359
- wages of servants and labourers, priority of, for, 650
- what constitutes, 152
- which is to be excluded from schedule of creditors, 354
- whole, proof for, on relinquishment of security, 476, 481

Debtor,

- abatement of proceedings on death of, 190
- acts of insolvency of, 83
 - " of insolvency need not be proved on petition by, 222.

Debtor—*contd*

- adjudication of, by bankruptcy Court in England, effect of, 10
 - " of, by foreign Court, effect of, 11
 - " of, in India, effect of, 12
 - " of, order of, 244
- alien, liable to adjudication, 123
- amendment of terms of composition by, 395, 401
- annulment of adjudication when, ought not to have been adjudged insolvent, 370, 372
 - " of concurrent order of adjudication of, 379
 - " for failure to apply for discharge by, 446
- appeal by 719, 721
- appeal by legal representative of, 722
- appearance of, reasonable security for, 200
- application for discharge by, 417, 419
- arrest or imprisonment of, a condition for petition, 151
- attachment by actual seizure of property of, 200, 203
- avoidance of preference by, 558
 - " of transfer by, 552
- award of compensation to, 242
 - " under, is not, 18
- bad faith of, when to be considered, 223
- bankruptcy
 - protection of, 1.

Debtor—*contd*

benefit of execution of decree against property of, 497, 501
 books of account, duty of, to produce, 206, 209
 companies liable to bankruptcy proceedings, 124
 composition by, 395
 conditions on which, may petition 151, 152
 contents of petition of, 163
 continuance of proceedings on death of, 185
 costs of maintenance of, in civil prison 740
 convicts liable to bankruptcy proceedings, 124
 death of, effect of, 186
 " of, jurisdiction of Court to avoid transfers on, 538
 debt owing by, must be Rs 500, 134
 " must be a liquidated sum, 139
 defined, 14, 17
 delivery of property of, to receiver by Court executing decree, 513
 discharge of, by Bankruptcy Court in England, 468
 " of, grant or refusal of, 417
 dismissal of petition of, 233, 238
 dismissal for want of service of notice on, 233, 235
 does not include infants, married women, lunatic, legal representative or debtor under award, or certificate, 18, 19
 duties of, after adjudication, 252, 254
 " of, before adjudication, 206, 207

Debtor—*contd*

effect of adjudication of, 252
 255
 " of death of, 185
 " of dismissal of petition of, 242
 examination of, 207
 " of, mandatory, 231
 execution of decree against property of, 497
 failure to perform duties by, effect of, 255.
 firm, liable to bankruptcy proceedings, 124
 foreigner, liable to adjudication, 123
 fresh petition by, 126
 general rule as to interest payable by, to insolvent estate, 487
 good faith of, not to be enquired at the time of adjudication, 223
 hearing of petition of, 217
 221
 includes firm, 17, 124
 " judgment debtor, 17
 infants does not include, 18
 interest payable on adjudication of, 485
 interim proceedings against, 200
 " receiver shall be appointed on petition by, 210
 inventory of properties duty of, to give, 206
 joint petition by, 124
 jurisdiction to annul transfer on death of 538
 leave of Court for arrest of, after adjudication 252, 287
 leave of Court for fresh petition of adjudication by, on annulment, 151, 159
 legal representative of not liable to adjudication 18

Debtor—contd.

- liable to bankruptcy proceedings, 122
- " must be personally liable, 138
- " aliens and foreigners, 123.
- " companies, 124.
- " convicts, 124
- " firm, 124
- " lunatics, 123.
- " minors, 123.
- " women, 124.
- lunatics, does not include, 18
- " not liable to adjudication, 123.
- married women, does not include, 18.
- " liable to adjudication, 124.
- minor, liable to adjudication, 123.
- must be personally liable, 138
- notice to, on creditor's petition for adjudication, 191, 192.
- offences by, 691.
- order of adjudication of, to specify time within which to apply for discharge, 244
- parties in appeal by, 721.
- petition by, for adjudication 117.
- " to be presented to a Court in any local area in which, ordinarily resides, 161.
- " " an act of insolvency, 117, 129
- position of, on annulment, 446, 453
- power to readjudge, 325
- presentation of petition for adjudication by, an act of insolvency, 117, 129.
- previous adjudication of, statement of, 134

Debtor—contd

- proceedings on petition by, 221
- procedure at hearing of petition of, 217, 221.
- proof by, against creditor, 662
- " of debt for adjudication of, 219.
- " of inability to pay by, 217.
- " required by Court is that, is entitled to present petition, 217.
- property of, vests on adjudication in Court or receiver, 252, 257.
- " of, vests on annulment in such person as the Court appoints, 383, 387.
- prosecution of, for offences, 691.
- protection of, from arrest, 341
- " of, from interim arrest, 210.
- readjudication of, 415, 416
- rearrest of, 210.
- recommitment of, 210
- relation back of order of adjudication of, 253, 327.
- relationship of, and creditor, 136
- release of, on arrest, 210
- remedy of creditor on adjudication of, 286.
- " of creditor in respect of debts provable under the Act, 286
- revesting of property of, on annulment, 385, 453
- right of creditor to adduce evidence in opposition to a petition by, 230
- right of, to surplus, 415
- rules of procedure where, is a firm, 755
- scope of, 221.

Debtor—contd

- security for appearance of, 200, 202.
 - statement of previous adjudication of, 169, 172.
 - summary administration of the estate of, 716
 - termination of insolvency proceeding on death of, 187
 - vesting of property of, on adjudication, 252, 256.
 - „ of property of, on annulment of adjudication, 383, 387.
 - what constitutes, 157.
 - what has, to prove for his adjudication, 217, 225
 - „ should Court enquire on petition of, 221.
 - „ should Court not enquire on petition of, 222
 - who can not be adjudged insolvent, 18
- Debtors, joint petition by several, 153**
- Debutter,**
- absolute, does not vest in receiver, 281.
 - partial, vests in receiver, 281.
- Deccan Agriculturists Relief Act,**
- immovable property of an agriculturist under, does not vest, 314.
 - provisions of, not affected by Act V of, 1920, 760.
- Decision,**
- absence of, under sec. 4, suit lies in, 66
 - appeal against receiver's act or, 679
 - Court's power of, in all questions of title and priority, law and fact, 37.
 - Court's, final, 37.

Decision—contd

- having the force of decree, 743.
 - jurisdiction of Insolvency Court to go behind, of Civil Court, 51
 - order and, from which appeal lies to High Court, 762.
 - partnership, as to, not *res judicata*, 59.
 - res judicata* when? 57.
 - under s. 4 shall be a decree, 743
 - under sec. 4, a judgment in *rem* and *res judicata*, 57
 - under sec. 53, is *res judicata*, 557.
 - under sec. 54 *res judicata*, 585
 - under sec. 68 *res judicata*, 684
- Declaration,**
- dividend, of, right of creditor who has not proved before, 667
 - final dividend, of, 670.
 - first dividend, of, 670.
 - notice of, of dividend, 670.
 - willingness, of, to place all property at the disposal of Court, 169, 171.
- Declaratory,**
- suit, leave when not necessary for, 66
 - receiver not a necessary party in, suit, 66.
- Decree,**
- benefit of execution of, to assets realised before admission of petition, 497.
 - bona fide* purchaser in execution of, protected, 497.
 - Civil Court, must be of, 104
 - computation of three months in case of sale in execution of, 144.
 - costs of suit and execution of, when first charge, 573.

Decree—contd

- decision of Insolvency Court under sec 4 is 743
- delivery of property to receiver in custody of Court in execution of, 513
- duty of Court executing as to property taken in execution 513
- execution of by insolvent, 285
 - , of, after adjudication is void, 264
 - , of, by secured creditor, 322
- imprisonment in execution of, is act of insolvency, 84, 112
- notice to Court executing, of admission of petition, effect of, 573
- null and void when receiver not made party in a suit by secured creditor, 325
- order of attachment in execution of, a ground for debtor's petition, 157
- particular of, must be stated in petition for adjudication, 169
- payment of money, for, must be 105
- power of Insolvency Court to execute its own orders and, 77
- rent, under Agra Tenancy Act not provable debt, 16, 156
- restriction on right of creditor executing 497.
- revenue Court of, protection from arrest in execution of, 216
- restriction of right of secured creditor to execute, 322, 497
- right to present petition when debtor is under arrest or imprisonment in execution of, 151

Decree—contd

- sale in execution of, is an act of insolvency, 84, 104.
- Decreeholder,
 - benefit of execution when, auction purchaser, 512
 - costs of suit and execution, of, when, first charge, 513
 - creditor includes, 14
- Deed,
 - execution of, of composition or trust, is act of insolvency, 89
 - receiver, by, not exempt from stamp duty, 640
 - rights of a secured creditor under a trust, 484
- Default,
 - dismissal for, does not bar fresh application for adjudication, 70
 - , for, does not operate as *res judicata*, 70
 - , of petition for, 70
 - power of Court to set aside *ex parte* order of dismissal for, 70
 - re adjudication for, in payment of instalment of composition or scheme, 415
 - wilful, of receiver, remedy of creditors, for, 599, 616
- Defeat,
 - creditors, proof of intention to delay and, 97, 101
 - , transfer with intent to delay and, is an act of insolvency, 83, 101
 - departing out of British India with intent to, creditors, is act of insolvency of 83, 102
 - , out of dwelling house with intent to, creditor is act of insolve 102

Debtor—contd

security for appearance of, 200, 202.

statement of previous adjudication of, 169, 172.

summary administration of the estate of, 716

termination of insolvency proceeding on death of, 187

vesting of property of, on adjudication, 252, 256

„ of property of, on annulment of adjudication, 383, 387

what constitutes, 157

what has, to prove for his adjudication, 217, 225

„ should Court enquire on petition of, 221.

„ should Court not enquire on petition of, 222

who can not be adjudged insolvent, 18

Debtors, joint petition by several, 153

Debutter,

absolute, does not vest in receiver, 281.

partial, vests in receiver, 281.

Deccan Agriculturists Relief Act,

immovable property of an agriculturist under, does not vest, 314.

provisions of, not affected by Act V of, 1920, 760

Decision,

absence of, under sec. 4, suit lies in, 66.

appeal against receiver's act or, 679

Court's power of, in all questions of title and priority, law and fact, 37.

Court's, final, 37.

Decision—contd

having the force of decree, 743.

jurisdiction of Insolvency Court to go behind, of Civil Court, 51.

order and, from which appeal lies to High Court, 762

partnership, as to, not *res judicata*, 59.

res judicata when, 57.

under s 4 shall be a decree, 743.

under sec. 4, a judgment *rem* and *res judicata*, 57.

under sec 53, is *res judicata* 557.

under sec. 54 *res judicata*, 58.

under sec. 68 *res judicata*, 68.

Declaration,

dividend, of, right of creditor who has not proved before 667.

final dividend, of, 670

first dividend, of, 670

notice of, of dividend, 670

willingness, of, to place all property at the disposal of Court, 169, 171.

Declaratory,

suit, leave when not necessary for, 66

receiver not a necessary party in, suit, 66.

Decree,

benefit of execution of, to assets realised before admission of petition, 497.

bona fide purchaser in execution of, protected, 497.

Civil Court, must be of, 104

computation of three months in case of sale in execution of, 144.

costs of suit and execution of, when first charge, 573.

Decree—contd

- decision of Insolvency Court under sec 4 is 743
- delivery of property to receiver in custody of Court in execution of, 513
- duty of Court executing as to property taken in execution 513
- execution of, by insolvent, 285
 - of, after adjudication is void, 284
 - of, by secured creditor, 322
- imprisonment in execution of, is act of insolvency, 84, 112
- notice to Court executing of admission of petition, effect of, 573
- null and void when receiver not made party in a suit by secured creditor, 325
- order of attachment in execution of, a ground for debtor's petition, 157
- particular of, must be stated in petition for adjudication, 169
- payment of money, for, must be 105
- power of Insolvency Court to execute its own orders and, 77
- rent, under Agra Tenancy Act not provable debt, 16, 156
- restriction on right of creditor executing 497
- revenue Court of, protection from arrest in execution of, 216
- restriction of right of secured creditor to execute, 322, 497
- right to present petition when debtor is under arrest or imprisonment in execution of, 151

Decree—contd

- sale in execution of, is an act of insolvency, 84, 104
- Decreeholder,**
- benefit of execution when, auction purchaser, 512

Deed,

- execution of, of composition or trust, is act of insolvency, 89
 - receiver, by, not exempt from stamp duty, 640
 - rights of a secured creditor under a trust, 484
- Default,**
- dismissal for, does not bar fresh application for adjudication, 70
 - for, does not operate as *res judicata*, 70
 - of petition for, 70
 - power of Court to set aside *ex parte* order of dismissal for, 70
 - re adjudication for, in payment of instalment of composition or scheme, 415
 - wilful, of receiver, remedy of creditors, for, 599, 616

Defeat,

- creditors, proof of intention to delay and, 97, 101
- transfer with intent to delay and, is an act of insolvency, 83, 101
- departing out of British India with intent to, creditors, is act of insolvency of 83, 102
- out of dwelling house with intent to, creditors, is act of insolvency 102

Defeat—contd

- intent to, and delay creditors, 83, 101
- proof of intent to, and delay creditors, 97
- transfer with intent to, and delay creditors act of insolvency, 83, 101

Defect,

- Act III of 1907, in 157
- removal of, in Act III of 1907, 158

Defend,

- receiver's power to, suits, 623

Defendant,

- procedure in suits or proceedings on adjudication of, 337

Deferred,

- payment, receiver's power to sell on, 624, 639

Deficiency,

- assets, of, failure of insolvent to account for, refusal of discharge for, 433, 440

Definition, 13

- act of insolvency, of 66
- creditor, of, 14 15
- debt, of, 14
- debtor, of, 14
- District Court, of, 14 32
- Insolvency Court, of, 32
- insolvent, of, 84
- prescribed, of, 14
- property, of, 14
- secured creditor, of, 14
- transfer of property, of, 14, 87
- words and expressions not defined in the Act of, 14

Delay,

- intent to defeat or, creditor, 83, 101
- undue, readjudication, where composition or scheme can not proceed without, 415

Delegation,

- duty, of, to receiver or subordinate Court, 69
- duty, of, to receiver, 53
- jurisdiction, of, for avoidance of voluntary transfers, 540
- powers, of, to official receiver, 757
- " of, to receiver for admission and rejection of proof, 494

Delivery,

- possession, of, by Court, 630
- property, of, in possession of Court executing decree to receiver, 513, 519

Demands,

- in the nature of unliquidated damages not provable, 359 367

Departure,

- arrest for, from local limit of the jurisdiction of Court 201
- British India, out of, an act of insolvency, 83, 102
- dwelling house, from, an act of insolvency, 83, 102

Deposit,

- compulsory, in private Benefit fund, vesting of, 316,
- money, priority of, 657
- security, does not vest, 317
- trust, is not, 657

Detention,

- debtor, of, in civil prison, for not furnishing security, 200, 349

Difference

- bet, order of adjudication and order of admission of petition, 331
- " composition and discharge, 461

Difference—*contd*

- bet, interim Receiver and Receiver after adjudication, 159, 617
- " properties before adjudication and after-acquired, 307.
- " receiver in insolvency and receiver in action, 604
- " receiver and official receiver, 620
- " scopes, of, ss 53 and 54, 562
- " secured creditor and creditor, 16, 564.
- " void and voidable, 536
- " voluntary transfer and fraudulent preference, 562.

Disability,

- insolvency is not a, for debtor to recover his dues, 750
- leave removes, for legal proceedings by creditor, 751.

Disallowance,

- entries, of, in schedule, 493.

Discharge, 417, 418.

- absolute, grant of, 417.
- " refusal of, 417.
- after-acquired property, subject to conditions with respect to, 417.
- annulment of adjudication for failure to apply for, 446.
- annulment for failure to appear on the day fixed for hearing of, 446, 453
- appeal against order of, 432.
- application for, when to be made, 417, 419, 448
- automatic, termination of suspension of, 426.
- bad faith, enquiry about, at the time of, 421.
- cases where Court must refuse absolute, 432.

Discharge,—*contd*

- co-debtor, does not release, 460, 468.
- composition and, difference between, 430.
- condition, subject to, 417, 426.
- " of, modification of, 430.
- co-trustee, does not release, 460, 468
- criminal liability under s. 69, after 709.
- " liability of an insolvent does not arise after, for obtaining credit during insolvency, 710.
- crown debts, does not release, 459, 461.
- date of hearing of application for, 417.
- difference in effect of, bet the Act and C. P. C. 465.
- difference between composition and, 461.
- does not release co-debtor, 468
- does not affect secured creditor, 468.
- does not divest property, 467.
- earnings, subject to condition with respect to future, 417.
- effect of, by foreign Court, 430.
- " of, on after-acquired property, 311.
- " of, on insolvency proceedings, 431.
- " of outside India, 468.
- " of failure to apply for, 446.
- " of failure to draw up a formal order of, 430.
- " of order of, 459.
- " of, on secured creditor, 468
- enquiry about bad faith at the time of, 421.
- extension of period of, of Court for, 244, 248, 1

Discharge,—contd

- failure to apply for, within time, effect of 420, 446
- firm, of, releases all debts, 466
- foreign Court, by, 430
- grant of, 417, 432, 434
 - „ of subject to conditions, 417
 - „ or refusal of absolute, 417, 422
- grounds for refusal of absolute, 432
- hearing of the application for 417
- income, subject to conditions with respect to future, 417
- insolvency proceedings, effect of order of, on, 431
- jurisdiction to avoid preferences is not affected by, 562
- modification of conditions of, 430
- notice of application for, 417, 420
 - „ of extension of period of, publication of, 245
- objection to, hearing of, 417
- omission to keep books of account, refusal of, for, 432, 437
- onus, of, by Receiver, 551
- order of, 418
 - „ of adjudication, must specify time to apply for, 244
- period of, to be fixed in the order of adjudication, 244 247
- power of Court in the grant of, 417
 - „ of Court to suspend and attach conditions concurrently, 433
 - „ of Court to extend the period of, 73, 248
- procedure on application for, 417

Discharge,—contd

- proof of debt before, 351, 358
 - „ of debt before and after, 359
- prosecution under sec 69 lies before, or after, 709
- prosecution of an undischarged insolvent obtaining credit does not lie after, 710, 712
- receiver, of, pendency of insolvency proceeding until, 288
- receiver's report is evidence in considering 420, 433
- refusal of, 417, 432
 - „ of an absolute order of, 417, 422
 - „ of, for concealment and removal of property, 432
 - „ if insolvent's assets are less than eight annas in the rupee, 432
 - „ if insolvent omitted to keep books of account, 432
 - „ if insolvent trades knowing himself to be insolvent 432
 - „ if insolvent contracts debt without expectation to pay, 433
 - „ if insolvent fails to account for loss or deficiency, 433
 - „ if insolvent has brought on insolvency by rash or hazardous speculation, 433
 - „ if insolvent has shown undue preference 433
 - „ if insolvent has been previously adjudicated or made composition, 433
 - „ if insolvent concealed or removed property, 433

Discharge —*contd*

- refusal of, if insolvent is guilty fraud or fraudulent breach of trust, 433
- „ of, not a termination of proceedings, 443
- release from all provable debts, by, 460, 464
- „ from debts by fraud or fraudulent breach of trust, by, 459, 462
- „ from liability to maintenance, by, 459, 463
- „ of crown debts, by, 459, 461.
- „ of a co partner or co-trustee by, 460
- removal of disqualification on, 713
- review of the order of refusal of, 444.
- review of the order of suspension of, 426
- revocation of order of, 431.
- right of creditor to prove debt after final, 667.
- scope of hearing of application for, 421
- secured creditor, does not affect, 468
- statutory limitation to grant, of, 422
- subject to condition, 417, 426
- summary administration, in, 716
- suspension of, and attaching conditions thereto, 417, 424, 433
- suspension of, for a specified time, 417, 424
- termination of proceedings on, 431
- time for making application for, 419.
- what is, 418
- who can apply for extension of period of, 251

Disclose,

- failure to, any document likely to be of any use to creditors, 201.
- omission to keep books which, debtor's business, 432, 437.
- penalty for failure to, property and affairs, 691, 696.

Discovery,

- examination of witnesses for, of insolvent's property, 641
- penalty for not making, 209.

Discretion,

- annul, to, or stay concurrent proceedings, 380.
- appointment of committee of inspection, of, 678.
- costs are in the, of Court, 740
- Court's, to call for accounts, 208
- discharge, grant of, in the, of Court, 417, 421.
- exception to the exercise of, to grant discharge, 432.
- grant of protection is in, of Court, 346
- interim proceedings, taking of, in the, of Court, 200.
- „ receiver, appointment of, in the, of Court, 194
- inventory of debtor's property, list of creditors, etc. demand of, is in the, of Court, 194
- jurisdiction to decide questions of title and priority in the, of Court, 37, 61.
- leave for appeal, grant of, is in the, of Court, 734.
- „ for fresh petition on annulment of adjudication in the, of Court, 159.
- „ for withdrawal of petition in the, of Court, 178.

Discretion—contd

preliminary enquiry as to
debtor's offences in the, of
Court, 705
protection from arrest after
adjudication in the of
Court, 346
release of debtor before ad-
judication in the, of Court
210

Discretionary,

appointment of interim
receiver, 195
order of release, is, 214
grant of protection is, 346
power of Court when moved
under s 68, 686
jurisdiction under s 4, 61.

Dismissal,

abuse of process of Court, in
herent power of, for 72
" of process of Court, for
240,
act of insolvency, for failure
to prove, 235
appeal against order of, of
debtor's petition, 242, 762
appeal from of application
for restoration of appeal,
733
assesses exceeding liabilities,
for, of debtor's petition, 239
award of compensation on,
of creditor's petition, 242,
243
concealment of property, of
debtor's petition, for, 239
creditor's petition, of, 233,
234
" " of, for failure
to prove act of
insolvency,
235
" " of, when frivo-
lous or vexa-
tious, 242, 243

Dismissal—contd

creditor's petition, of, for deb-
tor's ability to
pay, 235
" " of, for want
of service of
notice on debtor,
233, 236
debtor's petition of, 233, 238
default for, power of Court
to set aside order of, 70
effect of, of creditor's petition
237
of debtor's petition, 242
failure to keep accounts of
debtor's petition, for,
239
" to produce books of
account, of debtor's
petition for, 240
" to prove act of insol-
vency, 235
fictitious debts, of debtor's
petition for, 240
frivolous and vexatious, 242,
244
petition, of, 233
proof of right to present
petition, for want of, 233
receiver of, by Court 615
substitution before, of petition
184
sufficient cause, of insolvency
petition, for, 233 236
suit or other legal proceed-
ing, of, without leave, 296
when Court is not satisfied
with proof of right to
present the petition, 233
Disposal,
suit, of, *ex parte* receiver, 637
Disposing power,
commission agent has a 260
father's, of joint Hindu family
property, vesting of, 20, 267
means power of appointment
exercisable for one's own
benefit, 20

Distruction,

arrest or attachment for, of documents, 201

Divest,

discharge does not, property, 467.

Dividend,

calculation of, by receiver 665

creditor's remedy on refusal to pay, 672.

creditors residing at distant places, provision for payment of, to, 665, 666

creditor's right to, 667

creditors who have not proved before declaration of, right of, 667.

debts payable at a future time, regarding, 469

declaration of, 670

distribution of, by receiver, 623

distribution of, with convenient speed, duty of receiver, 623

final, 670

form of notice of, 671

notice before final, 670

" of declaration of, 670

personal liability of the receiver to pay, 672

priority of claims in payment of, 655

refusal by receiver to pay, 671, 672

remedy of creditors on receiver's refusal to pay, 671, 672

secured creditors excluded from, 476, 484

speedy distribution of, 623

succession certificate for, 671

suit for, 670

Division,

of property among creditors which cannot be sold, 624

Doctrine,

relation back, of, of the order of adjudication, 253, 327

Document,

altering, penalty for, 691

execution of, by debtor when required by Court, 206

failure to disclose, 206

falsifying, penalty for, 691

penalty for wilfully destroying, 691

preventing or purposely withholding, penalty for 691

production of, by third party by order of Court, 641

" of, withholding 691.

receiver executing, not exempt from stamp duty, 640

Dower,

debt, transfer for, whether in consideration of marriage, 526

Due,

insolvent means a person unable to pay his debts as they become, 84

means legally recoverable, 473, rent, to landlord, priority of 659

unable to pay debts as they become, 558, 563

Duty,

consequences of refusal or neglect of, by debtor, 209 appointing interim receiver, in, 196

Court, of, executing decree as to property taken in execution, 513

" of, to annul voluntary transfers and preferences, 587.

" of, to frame schedule, 350, 353

Duty—contd.

- Court of, when appeal is made against receiver 686.
 „ of, before complaint, 706.
 debtor, of, after adjudication, 252, 254.
 „ of, before adjudication, 206, 207.
 „ of, to attend Court and receiver, 206, 207.
 „ of, to execute instruments, 206.
 „ of, to give inventories of property, 206, 207.
 „ of, to give list of debtors and creditors, 206, 207.
 „ of, to produce books of accounts, 206, 207.
 „ of, to submit to examination, 206, 207.
 executing Court, of 513, 519.
 failure of debtor to perform, 255.
 receiver, of, 604, 623, 624.
 stamp, deeds by receiver not exempt from, 640.
 stamp, payable on security bond, 202.
 wilful failure to perform, is an offence, 691, 695.

Dwelling house,

- departure from, an act of insolvency, 83, 102.
 ryot, of, exempted from vesting, 312.

E

Earnings,

- discharge subject to condition with respect to future, 417.
 personal, vesting, of, 258.

Effect,

- absence of notice of date of hearing, of, 193.

Effect—contd.

- acts of insolvency, of, 116.
 adjudication, of, order of, 252, 253.
 „ of, by foreign Court, 11.
 „ of, in England, 10.
 „ of, in India, 12.
 adjudication, of, on payment, 330.
 „ of, on proceeding thereafter, 330.
 „ of, on suits or legal proceedings instituted before adjudication without leave, 330.
 „ of, on transfers, 329.
 allowing proceedings to continue, after adjudication, of, 335
 annulment, of, of adjudication, under s 35, 373
 „ of, adjudication under s. 36, 382.
 „ of, of adjudication for failure to apply for discharge, 446, 458.
 „ of, of composition, 415, 416
 „ of, of preference 586
 „ of, of voluntary transfer, 556
 „ of, on composition, 406.
 appointment of interim receiver, of, 196.
 approval of composition, of, 396, 404.
 continuance, of, of proceedings after adjudication, 335.
 difference in, bet order of adjudication and order of admission of petition, 4
 death of debtor, of, 186.
 discharge, of, on after properties, 311.

Effect—*contd*

- discharge of, on certain debts 459
- of on debts not proved 464
- of on insolvency proceedings 431
- of on rights of a secured creditor 468
- of on schedule 464
- 465
- outside India, 468
- dismissal of creditor's petition of, 237
- " of debtor's petition of, 233 238
- failure to prove debts of 491
- failure to draw up a formal order of discharge of, 430
- foreign adjudication of on execution proceedings in India 513
- framing schedule, of, 356
- non compliance with provision of sec 47 by a secured creditor, of, 476, 484
- omission or misstatement of assets and liabilities, of 239
- proceedings continued after adjudication of 335
- protection order on limitation, of, 349
- release of debtor, of, 217
- retrospective, of provision for exclusion of period under s 78 (2), 751
- retrospective of sec 4 38
- of the Act 7
- " of disqualifications in sec 73, 714
- rules framed under the Act, of, 755
- sale of, in execution after admission of petition for insolvency, 521
- sale by receiver, of, 629

Effect—*contd*

- schedule of creditors, of, framing, 356
 - suit or other legal proceedings without leave, of, 296
 - vesting of, in receiver, 283
- Eight annas,**
- assets less than, in the rupee onus to prove reason for, 433 436
 - order to pay more than in the rupee not justified, 437
 - refusal of discharge for assets less than in the rupee, 432, 434

Ejectment,

- monthly tenant holding over, of on insolvency, 272

Election,

- disqualification of insolvent from to any office of any local authority, 713
- remedies of, by creditor, 135
- of by persons dissatisfied with act or decision of receiver, 683
- of by secured creditor or 479

Elements,

- set off, of 475

Employment,

- of pleaders by receiver, 123

Encumbrance,

- property does not vest free from, 317

Encumbrancer,

- purchaser or, in good faith and for valuable consideration protected 522, 527

Endowed,

- property does not vest in receiver, 281

England,

- adjudication in, effect of, 10
- bankruptcy proceedings how begun in, 117
- discharge in, effect of, 10
- machinery in, for admission or rejection of proofs, 493

English law,

- application of, 6
- „ as to proceedings on creditor's petition, 218
- „ automatic protection under, 211
- „ interpretation of the act in the light of, 6
- „ property that vest under, 257

Enquiry,

- bad faith of debtor, into, not at the time of adjudication, 223.

- „ „ at the time of discharge, 421

Court, by, before removing a person in possession, 611

entries in schedule, about, 494

existence of debts as to, 141

judicial, by receiver is not, 625

law and procedure for, under s 4, 53

notice before, into offences by debtor, 705

onus in, under sec 4, 55

preliminary, into debtor's offences under sec 69, 701, 705

„ „ under sec 72, 710

provable debt, into, 369

receiver, power of, for, under sec 4, 53

- „ power of, for, as to right of possession by third party, 599, 609

Enquiry—contd

scope of, for avoidance of voluntary transfers, 542

„ of, on creditor's petition, 175

„ of, on debtor's petition, 218

validity of debts, into, 141, 219,

Entries,

disallowance of, in schedule, 493

expunge of, 493

false, by debtor, penalty for, 691

reduction of, in schedule, 493

Enumeration

acts of insolvency, of, 83, 84

Equality,

debts, of, entitled to priority, 650, 658

Equitable,

assignee is a secured creditor 478

assignment, charge by, 30

lien, 27

owner as distinguished from legal owner, 299

rights of unpaid vendor, 478

Equity,

redemption, of, vests in receiver, 276 317

receiver's remunerations on, 606

sale by receiver is subject to, 629

vesting of debtors' property in receiver is subject to, 285

Estate,

residuary, vests, 278

Estimate,

the value of security, of, 135

Estoppel,

agreement by, 111
 failure to appeal against order
 of receiver operates as,
 685

Evidence,

annulment of transfers must
 be based on legal, and not
 on suspicion or surmises,
 555
 inability to pay, of, 217, 226,
 227
 grant of time by Court to
 produce, 218
 memorandum of the oral, of
 debtor, 218
 receiver's report on fraudu-
 lent preference is
 not, 584
 „ report on fraudulent
 transfer is not, 553
 „ report on the appli-
 cation for dis-
 charge is, 433, 445
 „ report is no, in pro-
 secution under s
 69, 706
 right of creditor to adduce, in
 opposition to a debtor's
 petition, 230

Examination,

debtor, of, 217
 „ of, mandatory for his
 adjudication, 231
 duty of debtor to submit to,
 in respect of his property,
 206
 person, of, in possession of
 property of insolvent, 641

Existence,

of debt, enquiry as to, 141.

Exception,

voluntary preference, to, 572,
 573

Exchange,

bill of, insolvency petition by
 drawer of, against the ac-
 ceptor, 111

Exclusion,

period between adjudication
 and annulment, of, for pur-
 poses of limitation, 576, 580

Exclusive,

jurisdiction of Insolvency
 Court to avoid voluntary
 transfers, 420
 jurisdiction of Insolvency
 Court under s, 4 is not, 55

Executing Court,

application to, for delivery of
 property taken in execution,
 513
 application to, if no, 516

Execution,

assets realised in, before ad-
 mission of petition, decree-
 holder entitled to, 497.
 attachment in, confers no
 right, 504
 attachment before judg-
 ment is not attachment in,
 505
 benefit of, creditors when en-
 titled to, 497, 501.
 bona fide purchaser in, rights
 of, 497, 510
 costs of suit and, when first
 charge, 513, 521
 creditor under, restriction of
 rights of, 497
 creditor who acquires a lien
 in, 23, 398
 decrees and orders, of, by in-
 solvency Court, 77.
 decrees, of, restriction of rights
 of creditors under, 497
 decrees of, by secured credit-
 or, 322, 497, 508.
 delivery of property in custo-
 dy of Court in, 513

Execution—*contd.*

- duty of Court as to property taken in, 513.
- effect of foreign adjudication in, proceedings, 513.
- effect of sale in, after admission of petition for insolvency, 521.
- imprisonment in, of decree an act of insolvency, 84, 112.
- instrument, of, by debtor, 165
- leave of Court for, of decrees after adjudication, 233.
- order for rateable distribution in, effect of, 508
- power of Court to stay sale in, 718.
- property taken in, duty of Court as to, 513.
- purchaser in good faith in, 497, 510
- testitution in, 507.
- restriction of rights of creditors under, 497.
- rights of secured creditors in, 497, 508.
- rights of creditors who acquire a lien in, 508.
- sale in, is an act of insolvency, 84, 104.
- sale, bona fide purchaser in, 497, 510
- sale by receiver to satisfy charge of costs of suit and, 513.
- secured creditors, by, 497, 508
- steps to be taken by receiver in, 506.

Executor,

- petitioning creditor, may be 121.

Exemption,

- corporation, of, from insolvency proceedings, 129.
- property, of, from vesting in receiver, 253, 311.

Ex parte,

- 70.

Expectation,

- refusal of discharge for contracting debt without reasonable, to pay, 433, 439.

Expenses,

- administration, of, priority of, 665.
- arrears of rent are, 658.
- proceedings of, 677.

Extend,

- power of Court to, period for discharge, 73, 248.

Expunge,

- entires of, in schedule, 493.

Extension,

- Act V of 1920, of, to scheduled districts, 10.
- limitation, of, presupposes adjudication, 752
- „ of, by acknowledgement, 752.
- „ of, on proof of debt, 753.
- notice of, period of discharge, of, 245.
- period fixed for discharge, of, 245, 248.
- „ of discharge, of, after expiration of the period fixed for discharge, 249.
- „ of limitation, of, for creditor's petition, 145.

- power of Court for, of the period of discharge, 244, 248, 249, 450.

- who can apply for, of the period of discharge, 251.

Extent

- Act V of 1920, of, 1.
- jurisdiction of Insol Courts, of, 35.

Extent—contd

protection, of, 215

receiver's powers, of, 623, 625

Extraordinary jurisdiction,
power of High Court in
its 80

Extra territorial,
jurisdiction of Insolvency
Court, 44

Extravagance,
unjustifiable, in living refusal
of discharge for, 433, 441

F**Facts,**

fresh applicatinn on same is
in abuse, 172

jurisdiction of Court to decide
questions of, or law, 37

reputed ownership, to be
proved to establish, 303

Failure,

account to, for loss or defi-
ciency of assets a ground for
refusal of discharge, 433,
440

act of insolvency, dismissal
for, to prove, 235

annulment of adjudication for
to apply for discharge, 446

annulment of adjudication for,
to appear on the day fixed
for hearing, 446, 453

apply for discharge, to, within
time, 420

deliver properties, to, penalty
for, 691

deposit, to, costs of publication
of adjudication, 341, 740

disclose to, documents or pro-
perty, penalty for, 209, 691.

effect of, to prove debts, 491

keep or produce accounts, to,
dismissal of petition for,
239, 240

penalty for, to keep or pro-
duce accounts 691

Failure—contd

perform duties, to, penalty for,
wilful 691

produce, to, books of accounts,
dismissal of petition for,
239, 240

prove debts, to, effect of, 491
refusal of discharge for, to
keep accounts, 432, 440

retain assets, to, for distant
creditors, 665

Faith,

bad, not to be enquired at
the time of adjudication,
223

no ground for refusal of
adjudication, 223

encumbrancer or purchaser in
good, and for valuable
consideration is protected,
522, 528

enquiry into bad, at the
time of discharge, 421

not at the time of hearing
of application by debtor, 223

good, purchaser in, protection
of, 522, 528

False,

books, keeping penalty for,
691.

credit obtained by debtor in
respect of property in
possession, 298

dismissal of petition for
giving, debts 240

entries, making, penalty for,
691

statement in a prospectus by
bankrupt, 462

Family,

adjudication of a minor
member of a 133

allowance for support of
insolvent and his, 674

Dayabhaga joint property vest-
ing in receiver, 266

Family—contd.

Hindu joint, firm not liable to adjudication, 132.

Hindu, firm how far vests in receiver, 265.

insolvent, of, allowance for support of, 673, 674.

Mitakshara joint, property does not vest in receiver, 267.

petition for adjudication against joint Hindu, 132.

Fictitious,

assets and liabilities, no refusal of adjudication for, 240.

Fi Fa,

goods seized under, must be sold before adjudication to entitle benefit under execution, 498.

Final,

Court's decision, 37

order of District Court in appeal is, 719, 728.

discharge, right of creditor to prove debt after, 667.

Financial,

position, omission to keep books of accounts disclosing, refusal of discharge for, 432.

Fine,

compensation to debtor to be realised as, 242.

Firm,

act of insolvency of a, 113.

adjudication of a, 124, 248.

" of a minor member of a, 133.

discharge of a, releases all debts, 446.

Hindu family, vests, 265.

Hindu joint family, acts of insolvency of, 115.

rules for adjudication of a, 755.

First charge,

costs of suit and execution form, 513, 521.

Five hundred,

rupees, debt owing by debtor must amount to, 134, 151.

Foreign,

country, law relating to movables in, 13

Court, adjudication by, effect of, 11.

" discharge by, effect of, 430.

Foreigner,

debtor does not include, 19.

" petition against, 123.

Form,

notice, of, declaration of dividend, 671.

Formulas,

secret, are property of insolvent which vest in receiver, 259

Forum,

for trial of offences under s. 69, 707.

for trial of offence under s 72, 711.

Framing,

schedule of creditors, of, by Court, 351, 353.

schedule of creditors, of, by receiver, 354.

Fraud,

adjudication order obtained by, annulment of, 372, 373.

assignment in, of creditors, 91.

composition, in effect of, 415.

debts incurred by, or fraudulent breach of trust, discharge does not release, 459, 462.

gomastha, of, binds the principal, 113.

Fraud—contd

- ground for refusal of final discharge, 433
- presumption of, in voluntary transfers 549
- readjudication when approval of composition was obtained by, 415
- relinquishment or surrender in, of creditors is act of insolvency, 95

Fraudulent,

- breach of trust, refusal of discharge for, 433
- concealment of property an offence, 691, 697
- concealment of property refusal of discharge for, 433, 443
- discharge does not release from debts, incurred by fraud or, breach of trust, 459, 462
- conveyance, 83
- intention, proof of, 97
- preference, an act of insolvency, 83, 98
- preference, when not, 100
- removal of property, refusal of discharge for, 433, 443
- test to determine, preference, 567
- transfer, classes of, 87
 - " need not be enquired into on a debtor's petition, 224

Free,

- from encumbrances, property does not vest, 317

Fresh,

- adjudication on, petition without leave, 160
- application for adjudication on same facts, 172
- leave for, petition by debtor, on annulment of adjudication, 151, 159

Fresh—contd

- leave for, petition, grant of, discretionary, 159
- petition for adjudication, 126
- petition without leave of Court, adjudication on, 160, 370

Frivolous,

- award of compensation when creditor's petition is, and vexatious, 242, 244
- damages for petition, 243
- dismissal of, petition, 242, 243
- meaning of, 244
- suit for damages for, petition, 242, 244

Full,

- annulment of adjudication for payment in, 370, 376
- payment in what is, 370, 376, 677

Fund,

- provident, money, does not vest in receiver, 315
- " when vests, 315

Furniture

- hiring, does not create reputed ownership, 299

Future,

- debt payable either immediately or at a time, 134, 141
- debt, provable 367
- interest on debts payable in 489
- proof of debts payable in, 469, 470

G**Gain,**

- works for, jurisdiction of Court within which debtor personally, 161, 165

- Gambling,**
 refusal of discharge for, 432
- Gazette,**
 adjudication order, publication of, in local official, 340
 application for discharge, publication in the local official, of the date of hearing of, 417, 766
 declaration barring application of the Act, publication of, in local official, 759
 effect of notification in, of the order of adjudication, 340
 notice in summary administration not required to be published in local official, 716
 notification in, is notice, 298
 publication in local official, of notification investing subordinate Courts with powers, 32
 publication in, of the date fixed for hearing of petition for adjudication, 191, 765
 publication in local official and Gazette of India of rules framed under the Act 753
- General,**
 lien and special, 24
 powers of Insolvency Court, 67
 rule as to interest payable to creditors on adjudication, 486
 rule as to interest payable by insolvent's debtors, 487.
- Genuineness,**
 debts, of, need not be proved at the time of adjudication, 222
- Gift,**
 wife, to, is voluntary transfer, 526
- Gomosta,**
 agent, 113
 fraud of, binds principal, 113
 trader carrying on business by, can be adjudged insolvent, 113
- Good faith,**
 good consideration, and, necessary, for protection, 522
 proof of, 529
 purchaser in, and for valuable consideration, transfer to, is valid, 522, 531
 purchaser in, in execution of decrees acquires good title, 497, 510
 transaction in, is protected, 456, 592
 transfer to purchaser in, and for valuable consideration, protected, 592, 597
- Goods,**
 held in trust are not property that vest, 301
 held by commission agent, vest, 260
 held under hire purchase system do not vest, 302
 in order or disposition of the insolvent in his trade or business with consent of true owner vest, 252, 260, 293
 pledged, right of secured creditors in respect of, 320
- Goodwill,**
 property that vests, is, 265
 sale of, of business by receiver, 626
 secret formulas and, are of the insolvent's 259

Government,

- local, appointment of official receiver by, 618
- .. Court empowered by, to summon person in possession of insolvent's property, 641
- .. investment of subordinate Court with insolvency jurisdiction by, 32
- .. power of to bar application of certain provisions of the Act 759
- .. rules to be made with the sanction of, 755
- sale of property paying revenue to, 647.

Governor-General,

- High Court to make rule, with sanction of, 755

Grant,

- allowance, of to insolvent, 673
- leave, of, for suit, 202.
- leave for appeal to Privy Council power to 82
- protection, of, discretionary 346
- refusal, or, of absolute order of discharge, 417, 432.

Gratuity,

- does not vest, 317.

Gross,

- negligence, of receiver, 509

Grounds,

- refusal of absolute order of discharge, for, 432.

H

Hazardous,

- speculation, refusal of discharge, for, 443, 442.

Hearing,

- absence of notice of date of, effect of, 193

Hearing—contd.

- adjournment of, of petition for adjudication, 218, 223
- annulment for failure to appear on the day fixed for, 446 453
- application for discharge of scope of 421
- examination of debtor at, 217, 231
- fixing a date for, 191
- fixing a date for, of application for discharge 417.
- notice of date fixed for, of application for discharge, 417
- notice of date fixed for, of petition for adjudication 193
- oral evidence at, memorandum of 218
- petition of for adjudication procedure at 217
- procedure at 217
- proof at 217
- summary administration in 716

Held,

- agricultural purposes sale of immovable property, or let for, 647

High Court,

- appeal from District Court to 719
- .. to, with leave, 719
- .. to, without leave, 719
- calling for record from District Court by, 718
- committal by, for contempt 614
- grant of leave by, 734
- limitation for appeal to 719
- order in appeal of District Court subject to revision by, 719, 729
- power and procedure of, in

High Court—contd

- regard to proceedings under the Act, 68.
- power of, in its appellate jurisdiction, 80
- .. of, in its extraordinary jurisdiction, 80.
- .. of, in interlocutory matters, 81
- .. of, in original jurisdiction, 77.
- .. of, in its revisional jurisdiction, 81.
- .. of, to grant leave for appeal to Privy Council, 82 736
- revision by, 719, 729.
- rules, framing of, by, 755.
- second appeal to, when lies, 719, 732
- stay of proceedings by, 382
 - in Court subject to its superintendence, 382.
 - in Court not subject to its superintendence, 383

Hindu,

- adjudication of a minor member of, family, 123, 133
- joint family, acts of insolvency of manager or karta of, 116
- family firm, acts of insolvency of, 113
- .. not liable to adjudication, 132
- .. firm assets are property that vest, 265
- .. property, interest of a coparcener in, vests, 271.
- .. property, partition of, is act of insolvency, 95

Hindu—contd

- joint family, minor's share in, vesting of, 266.
- petition against, maintainable, 123.
- property, vesting of, on adjudication of a coparcener, 271
- property under attachment before adjudication vesting of, 270
- law, creditor's lien under, 25.
- Hire-purchase,**
 - goods held undet, vesting of, 342
- Holding,**
 - agricultural, exempt from vesting, 312
 - occupancy, vesting of, 312
- House,**
 - agriculturist, of an, exempt from vesting, 312.
 - dwelling, departing from, an act of insolvency, 83, 102
 - dwelling, of a ryot exempt from vesting 312
 - keeping, an act of insolvency, 103
- Husband,**
 - gift by, to wife is voluntary transfer, 526.
 - may be a petitioning creditor, 121
- Hypothecation**
 - movables, charge by, 29.
- Ignorance,**
 - suits or proceedings in, of adjudication, 296
- Immaterial,**
 - absence of notice, of date hearing, 297.

Immediately,

debt to be provable must be payable either, or at some future time, 134, 141

Immovable property,

nature of sale of, by the receiver, 627

property includes both movable and, 20, 519.

sale of, held or let for agricultural purposes, 647

sale of, paying revenue to Government, 647

special provisions relating to sale of, 647

title to, outside British India, 12.

Imperial,

jurisdiction of Insolvency Court, 35

Imprisonment,

effect of release from, 217.

execution of decree, in, an act of insolvency, 84, 112

jurisdiction of Court arises from, within its local limits, 161, 166

offences by debtor punishable with, 692

petition by debtor if under arrest or, 151.

protection on arrest or 210

release of debtor if under arrest or, 210.

release from, bars re-arrest in execution of the same decree, 217.

statement of, necessary in petition, 168, 171.

undischarged insolvent obtaining credit is liable to, or fine, 710

Inability to pay,

debts, 226.

condition of debtor's petition, 151, 153.

Inability to pay—contd

nature of proof of, 217, 227.

no ground for creditor's petition, 143, 220.

prima facie proof of, 217, 227.

proof of, 155, 217, 221.

statement of, necessary in a debtor's petition, 168, 170

Includes,

meaning of, 15

Income,

discharge, subject to condition with respect to future, 417

Incorporated company,

exemption of, from adjudication, 130

petitioning creditor may be, 120

Incumbrancer,

good faith, in, protected, 522
who is, 527

India,

adjudication by foreign Court and its effect in, 11

" in England and its effect in, 10

, under Act V of 1920 and its effect outside, 12

British, extent of, 9

consolidation and amendment of law relating to insolvency in British, 1

departing or remaining out of British, act of insolvency 83, 102.

discharge outside British, effect of, 468

effect of foreign adjudication on execution proceedings in, 513

insolvency proceedings how begun in, 118

law relating to insolvency in, 1, 2, 3

India—contd

machinery in, for admitting entries in schedule, 494

property in British transfer by debtor of all act of insolvency 183

transfer of property in British or elsewhere for benefit of creditors, act of insolvency, 83, 88

transfer of any property in British, or elsewhere amounting to fraudulent preference, act of insolvency, 83, 98

transfer of all property in British or elsewhere with intent to defeat or delay creditors, act of insolvency, 83, 101

Indian Companies Act,

Act VII of 1913 130

company registered under exempt from adjudication under Insolvency Act, 130

Crown debts under, priority of, 653

Indian Penal Code,

criminal charges against the debtor to be framed as in cases of offences under, 708

prosecution of debtor may be either under sec 69 of this Act or secs 421, 424, 700

Individual,

creditor, petition by, for adjudication 119

Infant,

debtor does not include, 18

petitioning creditor may be, 121

Information,

Court's power to summon person for, 641

Inherent,

power of Insolvency Court, 72

power of Insolvency Court to grant interim protection, 72, 213

power of Court for dismissal for abuse of process of Court, 72

power to order security for costs 730

Initiation,

proceeding of, under s 4, 53

prosecution, of, for offences by debtor, under s 69, 700

Injunction,

attachment by prohibition and, 204

condition precedent to issue of, 205

power of insolvency Court to grant temporary, 74

Inquiry,

see 'Enquiry' *supra*

Insolvency,

acts of, 83, 84

acts of, of agent is that of principal, 84, 112

aim of law of 2

Court see 'Court,' *supra*

, extent of jurisdiction of 35

, extra territorial, jurisdiction of 44

, limit to jurisdiction of 52

, power of, to decide all questions of title, priority, fact and law, 37, 40

, power of, to stay sale, 578

Districts Courts shall be Courts having jurisdiction in, 32

effect of sale in execution

Insolvency—*contd.*

- after admission of petition for, 521.
- exclusive jurisdiction of, Court to avoid transfers, 538
- jurisdiction of, Court to decide questions of partnership, 42
- jurisdiction of, Court subject to provisions of the Act, 37, 44.
- jurisdiction of, Court not exclusive, 55
- jurisdiction to avoid transfer during, 537
- law relating to, in British India outside Presidency Towns, 1, 3
- law of, in Presidency Towns, 3.
- petition in, see 'Petition,' *infra*.
- pendency of, proceedings, 288
- position of secured creditor in, 253, 318
- powers of Court to decide all questions arising in, 37.
- power of, Court to set aside *ex parte* order of dismissal for default, 55.
- power of, Court to order stay, 333.
- previous, statement of, in debtor's petition, 169, 172
- principle of distribution in, 497.
- procedure of, Courts, 53, 69
- proceedings, how begun in India, 118
- " corporations exempt from, 129
- " effect of order of discharge on, 431.
- " on death of debtor, continuation of, 185

Insolvency—*contd.*

- proceedings pendency of, 288
- " remedy of creditors during, 286, 287.
- " rights of creditors during pendency of, 286, 287.
- " stay of, 75, 379.
- " suspension of limitation during, 749.
- " termination of, 431
- proof of acts of, 220
- subordinate Courts may be invested with jurisdiction in, 32
- termination of, on death of debtor, 187
- trading with knowledge of, refusal of discharge for, 433, 438

Insolvent,

- allowance to, and his family 673, 674
- appeal by, against act or decision of receiver, 679.
- appointment of, for management of property and to carry on trade, 673.
- arrest of, after adjudication, 349, 350
- discharge of, 417.
- disqualification of, 713.
- distribution of property of, 650.
- duty of, on adjudication, 252, 254.
- family of, allowance for support of, 673, 674
- goods in order or disposition of, in his trade or business, 252, 298
- locus standi* of, in the administration of the estate, 682

Insolvent—contd

- management by, of his property, 673
- payment made by, to creditor, when protected, 592, 594
- payment made to, when protected, 592, 594
- petition to be adjudged, in act of insolvency, 84, 106
- power to require information regarding property of, 641
- proceedings against person of, 290, 291
- property acquired by or devolving upon, after adjudication vests in receiver, 252, 271, 304
- property of, not to include those exempted by C P C from attachment, 253, 311
- property of, what is, 21
- prosecution of, lies only on adjudication 693
- protection of, from arrest, 341
- refusal of discharge of, when assets less than eight annas in the rupee, 433, 434
 - , when, omitted to keep book of account, 431
 - , when continued to trade knowing himself to be, 432
- .. when, contracted debts without expectation to pay, 433
- , when, failed to account for loss or deficiency of assets, 433
- .. when, brought on insolvency by rash and hazardous speculation, 433
- .. when, shows undue preference, 432
- .. when, had been previously adjudged or en-

Insolvent—contd

- tered into a composition, 433.
 - refusal when, concealed or removed property, 433.
 - .. for fraud or fraudulent breach of trust, of, 433
 - .. when, trades knowing to be, 433
 - release of, from provable debts by discharge, 460, 464
 - remedy of creditors against property of, 252, 287
 - right of, to after-acquired property, 307
 - right of, to continue proceedings after adjudication, 284
 - right of, to surplus, 676
 - right to amend the schedule by, 496
 - schedule of creditors of, framing of, by Court, 350, 353
 - suit or proceeding against property of, 234, 252, 289, 291
 - summoning person known or believed to be in possession of property of, 641
 - support of, allowance for, 673, 674
 - transfer by, for valuable consideration, protected, 592, 594
 - undischarged, obtaining credit, 710
 - vesting of whole property of, in Court or receiver, 252
 - when, can sue, 636
- Inspection,
- appointment of committee for, 678
 - control of committee of, over receiver, 678, 679
 - qualification of members committee of, 678, 679
- Instances,
- legal lien, of, 23

Instalment,

default in payment of, in composition, 415

Institution,

of suits or legal proceeding by receiver, 623,

Instrument,

execution of, by debtor, 206

Insurance,

policies of life, vest in receiver, 259

Insurer,

lien of, is legal lien, 24

Intent,

defeat or delay creditors, to, 82, 97.

transfer with, to defeat or delay creditors, an act of insolvency, 82, 97

Intention,

fraudulent, proof of, 97

preference to creditor, in, is the test to determine fraud 567

Interest,

contingent, does not vest in receiver, 277

general rule as to, payable to creditors, 485, 486

general rule as to, payable by debtors, 485, 486

higher rate of, proof for, 485, 489

insolvent's, in surplus, 676

leasehold, is, property that vests in receiver, 271.

mortgagee's right to, 489

payable after demand in writing, 485

„ on written instrument, 485, 488

„ in future, 489

payment in full including, 676

Interest—contd

payment of, after adjudication, 488

„ of, before adjudication, 488

„ of, subsequent to adjudication, 488, 664

proof of, 485

provable in bankruptcy is six percentum, 485

rate of, due prior to adjudication, 488

rate of, provable in insolvency, 485

rebate of 469

receiver's in property that vests is that of a trustee, 283

reversionary, does not vest in receiver, 279

rule of damdupat, application of, 490

subsequent to adjudication, 485

vested, when vests in receiver, 277

when not agreed or reserved 485

when agreed or reserved, 485

written instrument, payable by virtue of, 483

Interim,

application of provisions of s 56 to, receiver, 599

arrest of debtor, 200, 205

automatic, protection under English Law, 211

delivery of property by executing Court to, receiver, 573

Juries of debtor, 206

proceeding against debtor, 200

protection, inherent power of Court to grant, 72, 213

receiver, appointment of, 194

„ „ discretionary, 195

„ and receiver after ad

Interim—*contd*

- judication, difference between, 199 617
- receiver and receiver in action, difference between 199, 617
- , duty of Court in appointing, 196
- .. effect of appointment of, 196
- not a representative of the insolvent, 199
- , object of appointment of, 196
- , powers of, 197
- .. power of, to apply under Or XXI, r 89, C P C, 197
- .. power of, to apply under s 47, C P C 197
- .. receiver includes, 506, 577
- status of, 197

Interlocutory,

- matter, powers of appellate Courts in, 81

Interpretation,

- Act, of the, 6
- statutes of, 7

Inventory,

- property, of, duty of insolvent to give, 206

Issues,

- in avoidance of voluntary preferences, 579
- in avoidance of voluntary transfer, 548

J

Joint

- adjudication, vesting in case of, 658
- creditors, petition by, 120
- .. petition by one of, 120, 139

Joint—*contd*

- Dayabhaga, family property, vesting of, 266
- debts, priority in payment of, 660
- , proof of, 363
- , set off of, against separate debts, 473
- Hindu family, acts of insolvency of Karta or Manager, of, 116
- not liable to adjudication, 132
- Mitakshara, family property, vesting of, 266
- petition against Hindu, family, 132
- against several debtors for adjudication, 124
- , by several debtors, 153
- property, distribution of, 650
- stock company not liable to insolvency proceedings, 130

Judge,

- District, Court of, having jurisdiction of, 32
- District, Court of additional, jurisdiction of, 32

Judgment,

- attachment before, confers no right, 505
- in rem, of Insolvency Court, 57
- Insolvency Court's power to go behind, 51, 495, 539
- res judicata, of Insolvency Court, 57

Judgment-debtor,

- debtor includes a, 14, 17

Judicial,

- lien, 27
- powers of receiver not, 625
- proceeding taken or suffered by insolvent, fraudulent, annulment of, 558, 576

Jurisdiction,

Additional District Judge of, 32
 annulment of transfers more than two years old, for, 47, 554
 , of transfers on death of debtor, for 538
 , of transfers of 47
 " of transfer from transferees of 69, 543 545
 appellate Court of in insolvency, 68,
 avoidance of fraudulent preference for, 558
 , of transfer during insolvency, of 537
 , of voluntary transfers, for, 522
 " of transfers after annulment of adjudication, for, 537
 " of preference, of, ceases on annulment of adjudication, 561
 co-extensive, of Insolvency Court, with Civil Court, 40
 concurrent, of Courts, invested, 48
 Court having 16
 invested, 34
 Court, of, subordinate to District Court invested, 32 33 34
 decision of Civil Court of insolvency Court to go behind, 51
 delegation of, for avoidance of voluntary transfer, 540
 discretionary, of Court, 60
 discretionary, exercise of, by Insolvency Court, 37, 61
 District Courts are Courts having, 32
 exclusive, of Insolvency Court to decide questions

Jurisdiction—contd

of title and priority 37, 40
 of Insolvency Court to void voluntary transfers, 535
 extent of, of insolvency Court 35
 extra territorial, of Insolvency Court, 44
 High Court power of, in its appellate, 80
 power of, in extraordinary, 80
 power of, in its original, 77
 power of, in interlocutory, matters 81
 powers of, in its revisional, 81
 imperial of Insolvency Court, 35
 Insolvency Court, of, 35
 Insolvency Court, of, to decide questions of title and priority 37, 40
 , to decide questions of any nature whatsoever, 37, 41.
 " , to enquire into mesne profits 42
 , to decide question of title between purchasers, 42
 , to decide questions as to partnership, 42
 " " to order refund 42
 limit to, of Insolvency Court, 52
 local, of Insolvency Court, 35
 local, issue of warrant for arrest for absconding or

Jurisdiction—*contd.*

- departing from, of Court, 201.
- objection to, 69.
- official receiver's, local limits of, 618
- questions of title and priority fact or law, to decide, 27, 40.
- question of partnership, to decide, 42.
- refund, to order, 42.
- statement in petition to show, 170.
- subject to the provision of the act, 37, 44.
- " of sec, 53, 45.
- summon persons for information, to, 645
- where Court ought to exercise, 63.
- where Court ought not to exercise, 63.

K

Karachi,

- excluded from operation of Act V of 1920, 9.

Karta,

- acts of insolvency of, or manager of joint Hindu family, 116.
- vesting of joint family property on adjudication of, 267.

Keeping,

- house or secluding is an act of insolvency, 103.

Knowledge,

- purchase with, of insolvency not protected, 510.
- refusal of discharge if insolvent trade with, of insolvency, 433, 431

L

Labourer,

- wages of servant or, priority of, 650, 654.

Landlord,

- agricultural tenancy, of, not a creditor under the Agra Tenancy Act, 16, 156.
- rent due to, priority in payment of, 657.
- secured creditor, a, 24.

Law,

- bankruptcy, of, its policy, object 1.
- charge by operation of, 23.
- English, interpretation of the Act in light of, 6.
- Insolvency, of, in India in Presidency towns, 3.
- " outside " 3.
- jurisdiction of Court to decide questions of, or facts, 37.

Law and procedure,

- Insolvency Court, of, in enquiry under sec. 4, 53

Lease,

- forfeiture of, on insolvency, 271

Lease hold,

- interest, vests in receiver, 271

Leave,

- adjudication on fresh petition with, 160.
- annulment of adjudication obtained without, 370, 378.
- " of transfer or preference by creditor with, of Court, 587
- appeal from District Court to High Court with, 719, 732.
- " from District Court to High Court without, 719, 732.
- " to Privy Council of, for, 82, 736.

Leave—contd

- cases where, not necessary, 66, 294
- civil suit for not necessary, 686
- condition precedent for suit or other legal proceeding after adjudication, 292
- declaratory suit, not required for, 66
- dismissal of suit or other legal proceeding commenced without, 296
- effect on suit or other legal proceeding without, 296
- effect of adjudication on suits or legal proceedings instituted before adjudication without, 330
- fresh petition, for, discretionary, 159
- grant of, by the District Court for appeal, 719
- „ of, by High Court for appeal, 719
- liability of receiver acting without, in certain matters, 637
- locus standi of creditor to apply for annulment without, 591
- petition for adjudication on annulment lies only with, 151
- „ for annulment of transfer or preference without of Court, 587
- powers exercisable by receiver with, 623, 630
- „ exercisable by receiver without, 623, 626
- prosecution of undischarged insolvent obtaining credit lies with, 710, 711
- receiver acting without, liability of, 637
- stay of suit or other proceeding

Leave—contd

- dings started after adjudication without, 334
- suit before adjudication for, not required, 331
- suit against receiver lies without, 604
- by receiver, for 623, 634
- by a secured creditor for, not necessary, 323
- or other legal proceeding after adjudication lies only with, 252, 292
- by third party lies without, 66
- validation of suits or other legal proceedings without, on annulment, 459
- when not necessary, 294
- withdrawal of petition with, 176
- withdrawal of petition, for, discretionary, 178

Legal,

- evidence, annulment of transfers, must be based on, and not on suspicion or surmises 555
- lien, instances of, 23
- owner, 239
- proceedings, commencement of suit or, after, adjudication by creditors, 252, 288, 289
- „ against property, 291
- „ against person, 290
- „ dismissal of suit or other, without leave, 296
- „ effect of adjudication on suits or, instituted before adjudication without leave, 330
- representative, of debtor, appeal by, 722

Legal—contd

representative of debtor not
liable in adjudication
18, 138

" substitution of on death
of debtor, 70

true owner includes, and
equitable owner, 299

validation of suits or other,
proceedings without leave
on annulment 459

Letter,

registered proof by post
490

Letters of Administration,

remedy of creditors to, and
application for insolvency
135

lex loci rei sitæ, 35

Liable,

debtor must be personally
138

Liability,

contingent, is a provable debt,
367

criminal, does not cease with
discharge or composition,
709

dismissal of debtor's petition
when assets exceed 239

future is a provable debt,
367

maintenance to, does not
cease with discharge 459
463

personal, of receiver for acting
without leave 637

receiver, of for costs, 615 637

receiver of, to render accounts
599, 606

schedule of, petition to be
accompanied by, 169, 171

secretary of state, of, for act
done by official receiver 620

License,

personal, does not vest, 281

Lien,

advocate's 28

agent's, 24

attaching creditor's, 27, 28

attorney's, 24

bailee's 24

barman's 25

banker's 24

cestui que trust, of, 24

common carrier's, 24

creditor's under Hindu law,
25

" under Mahomedan
law, 25

creditors who acquire, by
operation of law, 23

defined, 23

distinction between charge
and 9 22

equitable 27

factor's, 24

general 24

insurer's 24

judicial 27

landlord's 24

legal, exceptions to 25

, instances of 23

maritime 24

mortgage charge or, 14 22

partner's, 24

policy broker's 24

right of creditors who acquire,
508

salvage 24

secured creditor's 14

shipowner's 24

solicitor's, 24

special, 24

trustee's, 24

unpaid vendor's, 24

wharfinger's, 24

what is, 23

Life-estate,

relinquishment or
of an act of
95

Life Insurance Policy,

property, is, 259
vests in receiver, 259

Limit,

jurisdiction of Court, to, 52

Limitation,

act of insolvency within three months is not a period of, but condition precedent, 144.

amendment of creditor's petition, for, 147

annulment of adjudication, for, 379

„ of voluntary preferences, for, 578

appeal against act or decision of receiver, for, 680, 688

„ against order of Court, for, 719, 738

application of annulment, for, 379, 541

application for execution of decree, for, on annulment of adjudication, 743

computation of two years of, for annulment of voluntary transfers, 542

creditor's petition, for, 134

decision under sec 4 a decree for purposes of, 743

exclusion of period of, between adjudication and annulment, 743

„ of period of, for suits or applications for debts not proved, 744

extension of, by acknowledgement, 752

„ of, in case of creditor's petition, 145, 146

„ of, only after adjudication, 752

„ of, on annulment of adjudication, 753

Limitation—contd

extension of, not without proof of debt, 753, 744

power of Court, to, 495

proof of debt, for, 357

protection order, its effect on, 349

rights, of, on annulment of adjudication, 394

statutory, to grant discharge, 422

substitution of another creditor as petitioner, for, 184

suits when no decision of title under sec 4, for, 66

suits, for, against receiver, 633

„ for, by receiver, 634

„ for, on annulment of adjudication, 743.

suspension of, during pendency of insolvency proceedings, 749

„ of, presupposes adjudication, 752

three months for a creditors petition is not a period of, but condition precedent, 144

when, for appeals begins to run, 689

Limitation Act,

acknowledgement saves limitation under s 19, 752

application of, to the Prov Insol Act, 337

„ „ ss 4 and 5, to appeals under s 68, 689

„ „ ss 4, 9—18, 22 to appeals and applications under the Act, 747

„ „ ss 5 and 12 of, to appeals and applications

Limitation Act—*contd.*

- under the Act, 743, 744.
- application of ss. 5 and 12 of, to creditor's petition, 145, 745.
- " " s. 14, to insolvency proceedings, 147.
- " " Art. 130, to suits for declaration of title 66.
- " " Art. 181, for avoidance of voluntary transfers, 541.

Limited Company,

- joint stock or, governed by the Indian Companies Act, VII of 1913, 130
- not liable to bankruptcy proceeding, 130.

Liquidated sum,

- creditor's debt must be, 17, 134, 139.
- enquiry into the existence of, 219.
- payable immediately or at some certain future time, 134

Lis pendens,

- receiver in insolvency not affected by, 635
- revesting of property on annulment of adjudication subject to, 387.

List,

- debtors and creditors of, duty of debtor to give, 200.
- effect of omission to give, of debtors and creditors, 200.

Living,

- unjustifiable extravagance in, refusal of discharge for, 433, 441.

Local Authority,

- debts due to, shall be paid in priority, 650, 654.
- disqualification of insolvent to the office of, 711.
- " of insolvent from sitting or voting as member of any, 711.

Local Government,

- appointment of Official Receiver by, 618.
- barring application of certain provisions of the act to certain Courts by, 759
- framing of rules by High Courts subject to sanction of, 755.
- investments of subordinate Courts with jurisdiction by, 32.
- provisions of the Act which may be barred by, 763.
- summoning a person by Court for information if empowered by, 641

Local jurisdiction,

- Court, of, 35.
- issue of warrant of arrest for departing from, 201.
- locus standi of creditor to apply for annulment without leave, 591.

Loss,

- deficiency, or, failure to account for, is a ground for refusal of discharge, 432, 434.
- remedy of creditor when, is occasioned by wilful of receiver, 616.

Lower Burma Courts

Act VI of 1900. 761

Lunatic,

debtor does not include, 18
liable to bankruptcy proceeding, 18, 183

M**Machinery,**

England, in, for admission and rejection of proof of debt, 493

India, in, for admission and rejection of proof of debt 494

Magistrate,

complaint by Insolvency Court of offences by debtor under s 69 to, 701

complaint by Insolvency Court of offence by debtor under s 72 to 710

complaint against debtor to be dealt with by, under Cr P C, 702

conviction of debtor by, 692

disqualification of an insolvent from acting as, 713

leave for prosecution before, 711

offences triable by, 691, 692

procedure on charge by, 701, 708

prosecution before, 701, 707

undischarged insolvent obtaining credit triable by, 710

Mahomedan law,

creditor's lien under, 26

vesting of after acquired property under, 306

Maintenance,

allowance to insolvent, 673, 674

arrest of debtor for arrears of, protection from, under s 488, Cr P C, 215

discharge does not release liability for, 459, 463

Maintenance—contd

not a debt provable in insolvency, 215

protection order does not apply to order for, under s 488, Cr P Code, 348

wife and children, for, 665

Management,

insolvent by, 673

Manager,

act of insolvency of, or Karta of joint Hindu family, 116

Mandatory,

annulment of adjudication for failure to apply for discharge whether, 449, 451
examination of debtor when, 231

Maritime,

lien, 24

Marriage,

transfer made before and in consideration of, protected, 522, 525

Married woman,

debtor does not include, 18

liable to bankruptcy proceedings when carries on business as *feme sole*, 124

may be petitioning creditor, 121

Matters,

to be considered before making complaint under s 69, 706

Meaning,

annulment, of, 371

provable debt and proof, of, 352

Meeting,

amendment of terms of composition in, 395, 401.

Meeting—contd.

creditors, of, to consider proposal of composition or scheme of arrangement, 395.
rules for, of creditors, 755, 767

Members,

adjudication of minor, of a family, 133.
adjudication of minor, of a firm, 133.
agricultural tribe, land of, does not vest, 313
committee of inspection, of, qualification of, 678
disqualification from being, of any local authority, 713

Memorandum,

examination of debtor, of, 218

Mesne profits,

jurisdiction to enquire into, 42
" " power of Court to award, on annulment of transfers, 556
" " in annulment of preferences, 585

Method,

proof of debts, of, 469

Minor,

adjudication of a, 123
" of, member of a family, 133
" of, member of a firm, 133
share of, in joint family property does not vest in receiver, 133
share of, in partnership assets does not vest in receiver, 133

Misconduct,

discharge with a certificate that insolvency caused by

Misconduct—contd.

misfortune and not, removes disqualification of an insolvent, 713
refusal of composition for, 403

Misfortune,

discharge with a certificate that insolvency caused by, and not by misconduct removes disqualification of an insolvent, 713

Mis-statement,

assets and liabilities of, effect of, 239

Mitakshara,

father's right to sell son's interest is property, that vests, 20

Mitakshara joint family property,

adjudication of a coparcener and vesting of, 271
" of the father and vesting of the shares of the minor sons in, 265, 266
" of Karta, 267
" of the manager and vesting of the, 267
vesting of, in receiver, 267, 268

Mode,

proof of debts, of, in insolvency, 490

Money,

decree must be for payment of, 105
decree holder when secured creditor, 477.
duty of receiver to give receipts for, 623

Money—contd

property that vests in receiver,
1, 258.

provident fund, when vests,
315
when Does
not vest, 315

Months,

act of insolvency must occur
within three, of presenta-
tion of petition 134, 143

avoidance of preference made
within three, of insolvency
358, 377

computation of three in case
of presentation of peti-
tion for adjudication
145

" in case of sale in execu-
tion of decree, 144

" in case of transfers, 144

extension of limitation of
three, 145

penalty of imprisonment for,
for an undischarged in-
solvent obtaining credit
710

refusal of discharge for undue
preference within, three
433, 442

More than 2 years old,
jurisdiction to annul trans-
fers, 47.

Mortgage,

after-acquired property, of, 307
charge or lien, secured cred-
itor means a person holding,
14, 22

decree, null and void, when
receiver not made a party
325

discharge does not affect, 311
distinction between charge
and, 22

equity of redemption only
vests when property is sub-
ject to, 317.

Mortgage—contd.

execution of decrees of, 322
receiver, by, 624, 639.

redemption of, 476, 482.

secured creditor is one who
holds charge or lien, 14, 22.

suit, appointment of receiver
in, 612

, leave for, by a secured
creditor, not necessary,
323

, not affected by provisions
of the Act, 253, 318

notice to receiver before,
326

receiver a necessary party
in 323

removal of receiver in
612

said of 338

what vests in receiver when
property is subject to, 317

Mortgagee,

not a person proving in bank-
ruptcy, 373

right of, to interest, 489

secured creditor, is a, 477

Movae,

preference, for, 368

Movables,

hypothecation of, charge by,
39

law relating to, outside British
India, 13

property includes both, and
immovable, 21.

Mutual,

dealings, accounts in case of,
475

dealings and set-off, 472

N**Names,**

creditors, of, in petition by
debtor, 169.

Nature,

application, of, to summon,
646

attachment, of, by Insolvency
Court, 204

offences, of, by debtor, 694

proceedings, of, by way of
appeal under s 68, 681

proceedings, of, in Court in
avoidance of voluntary
transfer, 547

property that vests in receiver
of, 676

prosecution, of, for offences
of the debtor, 700

questions of any, whatsoever
jurisdiction to decide, 37, 41

sale, of, by receiver, 627

scope and, of the Prov Ins
Act, V of 1920, 5

Necessary,

party, receiver a, in suit by se-
cured creditor, 323

Neglect,

consequences of, or refusal to
comply with duties by deb-
tor 209

culpable, of business affairs
refusal of discharge, for,
433, 441

Negligence,

loss occasioned by, of receiver
599

Non-compliance,

effect of, with provisions of
s 47 by secured creditor,
476, 484

Non-delivery,

property, of, when no offence,
696

Non-disclosure,

effect of, of insolvency in ob-
taining credit, 710

insolvency of, an offence, 710,
711

Non-scheduled,

debts, composition binds both
scheduled and, 406, 410

discharge releases all debts
both scheduled and, 460,
464

distribution of assets with
notice of claim of, creditors,
665

priority in payment of, debts,
650

Notice,

absence of, of the date of
hearing effect of, 193

admission of petition, of, to
Court executing decree,
effect of, 513

absence of, immaterial 297,
515

annulment, before, 372

„ for failure to apply for
discharge before 450

„ of adjudication of, 384
application for discharge, of,

417, 420

„ to annul transfer,
of, 548

„ to enter name in
schedule, of 351

composition, of, 395, 398

creditor, to, on debtor's
petition, 191

creditors, to, before declara-
tion of final dividend, 670

death of debtor, on, 189

debtor, to, on creditor's
petition 191, 192

declaration of dividend, of,
670

disallowance and reduction of
entries in schedule, for, 493

discharge, of, 417, 420

dismissal of creditor's petition
for want of service of, on
debtor, 233, 236

duty of executing Court on
receipt of, of admission
petition, 513, 515, 519.

Notice—contd

final dividend of, 670
 form of, of declaration of dividend 671
 onus to prove want of, in bona fide transactions, 596
 pleading of bona fide transfer without 576
 private to creditors 193
 proof of service of, on debtor 217
 prosecution, before, 705
 receiver, to before suit, 326
 service of, 192
 sufficient, must be, 107
 summary administration, in, 716
 suspension of payment, of an act of insolvency 84, 107
 transferee, to, before annulment of transfer, 548
 what constitutes of suspension of payment, 108
 „ is not, 111
 when sufficient, 109
 withdrawal, of, of petition for adjudication, 178

Null and void,

decree, when receiver not made a party in a suit by secured creditor, 325

Numerous claims,

proof of, mode of, 492

O

Object,

appointment of interim receiver, of, 196
 „ of receiver, of, 600
 „ framing of, section 4 38
 law of insolvency of, 1
 publication, of, of notices of adjudication, 340

Objection,

composition, to, 395

Objection—contd

jurisdiction to, 69
 place of presentment, to, 161, 167
 sales by receiver, to, 628

Obligation,

incurred before adjudication a provable debt, 286, 359, 365

Obstruction,

receiver, to, contempt of Court, 613

Occupancy,

holding under Bengal Tenancy Act not exempt from vesting in receiver, 274

right is property that vests 273

, that does not vest, 312

, under Punjab Tenancy Act does not vest, 313

Offence,

affairs concealment of, is 691
 charging any property is 692
 complaint by Court of, by insolvent 701

concealment by debtors is 691

criminal liability of debtor after discharge or composition for, under s 69 709

debtor, by, 691

discharge of any debts, is, 691

failure to deliver properties when no, 691

false entries, to make is, 691

falsification of accounts is, 491

fraudulent concealment of affairs is 691, 696

, of property is, 691, 697

„ destruction of documents, is 691

Offence—*contd.*

fraudulently diminishing sum to be divided is, 691

joinder of charges, of, 697

keeping false books, is, 691.

making away with property, is, 692.

mortgaging property is, 692

nature of, 694

„ of prosecution for, 700

non-delivery of property, when no, 696

notice before prosecution for, 705

omission to enter properties in schedule when no, 696

place of trial for, under s 69 707

preliminary enquiry into, 701, 705

procedure on prosecution for, 701

prosecution for, before or after adjudication, 691

prosecution for, initiation of, 700

„ for, lies only on adjudication, 693

punishable on conviction with imprisonment which may extend to one year, 692

receiver's report is no evidence of, 706

undischarged insolvent commits, for obtaining credit, 710

undue preference is, 691

wilful failure to deliver up is, 691

wilful failure to perform duties under s 22 is, 691

withholding production of documents is, 691.

Official Receiver,

appeals from act or order of, 757, 759

Official Receiver—*contd.*

application by, for annulment of fraudulent preferences, 589.

„ by, for avoidance of voluntary transfers, 589.

appointment of, by local Government, 618, 619.

Court's powers over, 621

delegation of power to, by High Court, 757.

difference between receiver and, 620

duties and powers of, 623

ex parte applications, determination of, by, 757

express order necessary for vesting property in, 619

interim orders by, in case of urgency, 757

liability of Secy of State for acts done by, 620

local limits of jurisdiction of, 618

power of, to determine unopposed or ex parte applications, 757

„ of, under sec 4, 53

proof of creditors, rejection of, by, 757

receiver and, difference between, 620

remuneration of, 621

schedule by, framing of, 587

status of, 619

vesting in, 619

Omission,

effect of, or mis-statement of assets and liabilities in petition, 239

enter properties in schedule, to, is no offence, 696

keep books of accounts, refusal of discharge, 432, 437.

Onus,

- discharge of, by Receiver, 551
- enquiries, in, under s 4, 55
- insolvent, on, to prove circumstances under which assets are less than eight annas in the rupee, 432, 436
- insolvent, on, to prove reasonable expectation to pay, 439
- receiver, on, in avoidance of fraudulent preference, 580
- " on, in avoidance of voluntary transfers, 550
- " on, in question of title, priority, fact or law, 55
- transferee, on, to prove bona fide transaction, 596
- " on, to prove want of notice, 596

Operation,

- Act V of 1920, date of, of, 7
- " of, beyond British India, 11
- " Karachi excluded from 9
- of law, charge by, 23

Oral evidence,

- memorandum of, of debtor at his examination for adjudication, 218

Order,

- absolute, of discharge, 417, 422
- adjudication, of, 117, 128, 244, 245
- " of, effect of, 252, 255
- " of, must be unconditional, 246
- " of, must specify time for discharge, 244, 247
- " of, publication of, 346

Order—contd

- adjudication of, relates back to the date of presentation of petition, 253, 327
- " annulment, of, 446
- " " can not be attacked collaterally, 458
- " appeal against, 252
- " " annulment 457
- appointment of receiver, of, on adjudication essential, 600
- approval on, of composition, 406, 407.
- " on of composition, effect of, 408
- cancellation of concurrent, of adjudication, 379
- Court's power to execute its own, under s 60
- Court's power to execute its own and decree, 77.
- discharge, of, 417, 418
- " of, effect of, 459
- " of refusal of, 417, 422
- decision and, from which appeal lies to the High Court, 762
- duties of debtor on, admitting the petition, 206
- execution of decree and, power of, 77.
- fixing a date of hearing, 191
- goods in, or disposition vest, 252, 260, 298
- payment of more than eight annas in the rupee, for, not justified, 437.
- protection, after adjudication, 341.
- protection, before adjudication, 210

Order—contd

- rateable distribution, of, 508
 - receiving, 118
 - relation back of the of adjudication, 253, 327.
 - release of, discretionary 214
 - review of, of annulment, 457
 - revocation of, of discharge, 431
 - setting aside of, of annulment, 456
 - vesting must be by express, 619
 - simultaneous, of adjudication and annulment of transfer, 247
 - supplementary, of vesting 456
- Ordinarily resides,**
- debtor's petition to state where debtor, 168
 - jurisdiction of Court where debtor, 161, 163

Original,

- High Court in its, jurisdiction, power of stay of, 77

Outside,

- India, effect of discharge, 468

Owner,

- equitable, 299
- legal, 299
- reputed, 252, 299
- true, 252, 299

Ownership,

- facts to be proved in reputed 303
- rights of secured creditor not affected by reputed, 300

P**Partial,**

- debtor is property that vests in receiver, 281

Particulars,

- property, of, to be given by debtor in his petition, 169, 171

Parties,

- charge by act of, 23

Partition,

- with intent to defeat creditors, act by insolvency, 95

Partner,

- adjudication of, dissolves partnership, 264
- discharge does not release, 460
- disposing power of, 264
- liable to insolvency proceedings, 125
- lien of, in partnership assets, 24
- petitioning creditor, may be, 120
- undivided share of, attachment of, 264

Partnership,

- Act IX of 1932, 264, 265
- assets, distribution of, 650, 658
- decision as to not *res judicata*, 59
- dissolution of, on adjudication of a partner, 262
- jurisdiction of Court to decide question as to, 42
- petition against registered, 129, 130
- vesting of, assets, 263

Party,

- appeals, in, 719
- " in, against order of adjudication, 723
- " in, by creditors, 723
- " in, by debtor, 721
- receiver a necessary, in a declaratory suit, 723
- " a necessary, in suit by secured creditor, 323
- " not a necessary, in appeal by creditor against order, 723

Party—contd

receiver, decree null and void, when, not made, in a suit by secured creditor, 325

Past,

debts, assignment for, is an act of insolvency, 96

Pay,

inability to, *prima facie* proof of 174, 217, 227
unable to, statement of, in debtor's petition, 168, 170

Payment,

annulment of, to creditor, 558
decree must be for, of money, 105
deferred, sale by receiver on, 624, 639
full, in, of insolvent's debts, annulment of adjudication for, 370, 376
full, in, surplus after, 176, 677
interest of, subsequent to adjudication, priority of, 664
non-scheduled debts, of, priority in, 663.
notice of suspension of, act of insolvency, 54, 107.
priority, in, provision for, in composition, 396, 404
priority, in, crown debts, 650
" salaries and wages not exceeding twenty rupees, 650
private arrangement is not, to creditors, 377
protection of, to creditors, 592
" of, to insolvent, 592
scheduled debts, priority in payment of, 662.
suspension of, notice of, 84, 107

Payment—contd

what constitutes notice of suspension of, 108
what is not notice of suspension of, 111.

Pecuniary,

claims against debtor, statement of, in petition 169, 171

Penalty,

charging property, for, 692
concealment of debt, for, 692
concealment of property, for, 692
deliver property, for failure to, 691
discharge, for not applying for, 446
duty, for failure to perform, 691
false documents, for keeping, 691
" entries, for, 691.
falsification of documents for, 691
mortgaging property, for, 692
offences by debtor, for, 691.
produce documents, for failure to, 691
undischarged insolvent obtaining credit, for, 710
undue preference, for, 691.
withholding entries, for, 690

Pendency,

insolvency proceedings, of, what is, 288

Pending,

proceedings, stay of, on adjudication, 330

Pension,

Act, 314
political, exempt from vesting in receiver, 314
" is not property that vests in receiver, 314

Period,

appeal, of, under s 68, 680,
688

discharge, of, order of adjudication to specify, 244,
247

" of, power of Court to extend, 248, 249, 250

" who can apply for extension of, discharge, 257

Permanent,

tenures, vest, 273

Person,

aggrieved, appeal by, 679, 682

commencement of legal proceeding against, after adjudication, 252, 290

Court's power to remove, from possession whom the insolvent has not the present right to remove, 599, 609

incompetent to be appointed receiver, 601

Personal,

debt to be provable must be, 363

earnings, vest, 258

liability of receiver to pay dividends, 672

license does not vest, 281

Personally,

debtor's petition to contain where he, works for gain, 168

jurisdiction of Court where debtor, works for gain, 161, 163

liable, debtor must be, 138

receiver when liable, 615, 637

Petition,

about *in process of Court*, dismissal of, for, 240

as *in proceedings*, by debtor to be *in insolvent*, 24, 141

Petition—contd

adjudication, for, 117, 136

" " act of insolvency, 84, 106

" for, must be subject to provisions of the Act, 117, 118

" on fresh, without leave, 160

" order relates back to presentation of, 253, 327

admission of, 190

allegation of act of insolvency in, 117, 118

amendment of, 174

" of creditor's, 147

annulment of preference within 3 months from, 558

" of transfers within 2 years from, 522

association, registered, against, 129

award of compensation to debtor on dismissal of creditor's 242

benefit of execution to assets realised before admission of, 497, 503

bogus debts in, dismissal for, 240

company, registered, against, 129

compensation to debtor on dismissal of creditor's, 242

concurrent, 127

condition precedent to creditor's, 134

" " on which a debtor may, 151, 152.

consolidation of, 145

contents of debtor's, 168

corporation, against, 129

Court to which, to be filed, 161.

creditor, by, 117, 1

Petition—contd

- creditor, by, for annulment of transfers and preference, when lies 587
- " conditions of, 134, 136
- " contents of, 170
- " scope of inquiry on, 218
- " to contain allegation of act of insolvency, 117, 118
- creditors precluded from making, 122
- date of admission of, 191
- date of hearing of, fixing, 191
- debtor, by, an act of insolvency, 84, 106, 117, 129
- debtor's, 117
 - " conditions of, 151, 152
 - " contents of, 168
 - " on annulment of adjudication, 151, 157
 - " scope of enquiry on, 179
- dismissal of, for want of right to present, 233
- dismissal of creditor's, 233, 234
- dismissal of debtor's 233, 238
- effect of dismissal of creditor's, 237.
- effect of dismissal of debtor's, 242
- effect of omission or misstatement of assets and liabilities in, 239
- effect of sale in execution after admission of, for insolvency, 521
- extension of period of limitation of a creditor's, 145, 747.
- fresh, for adjudication, 126
- frivolous and vexatious, award

Petition—contd

- of compensation on dismissal of, 242
- Hindu joint family, against, 132
- inability to pay debts, a condition of debtor's, 133
- incorporated company, against, 130
- individual creditor, by, 119
- joint, against several debtors, 124
- joint by several debtors, 153
- leave for fresh, after annulment of adjudication, 151, 157
- limitation for creditor's 134, 144
- mis statement in, 239
- must allege acts of insolvency, 117, 118
- notice to Court executing decree of admission of, effect of, 513
 - " to creditor on debtor's' 191
 - " to debtor on creditor's, 191
- omission in, 239
- particulars to be contained in, 168
- presentation of, adjudication relates back to, 253, 327
 - " of, an act of insolvency, 84, 106.
- previous, for adjudication, statement of, 169, 172
- procedure at hearing of, 217.
 - " for admission of, 190
 - " on admission of, 191
- proceedings on creditor's 191
 - " on debtor's 191, 221
- proof of right to present, dismissal for want of, 233
- receiver, by, for annulment

Petition—*contd*

- of transfers and preferences, 587.
- relation back of adjudication to the date of presentation of, 253, 327.
- right of creditor to adduce evidence in opposition to a debtor's, 230
- secured creditor, by, 120, 150
- separate, 181
- statement of inability to pay in, 168
- subject to conditions specified, to be, 117, 118
- to be in writing and verified, 168
- unincorporated company, against, 130
- verification of, 168
- what should the Court enquire on a creditor's, 218
- „ should the Court enquire on a debtor's, 221
- „ the Court should not enquire on a debtor's, 222
- withdrawal of, for adjudication, 176
- „ of, before adjudication, 176.
- withdrawal of, after adjudication, 177
- „ of, leave for, 178
- „ of, notice of, 178
- writing, to be in, 168

Petitioner,

- aliens may be, 121
- assignees may be, 121
- bankrupts may be, 121.
- executors may be, 121.
- husbands may be, 121
- substitution of one creditor as, in the place of another, 182

Petitioner—*contd*

- what the creditor has to prove when he is, 217, 218
- what the debtor has to prove when he is, 217, 225

Petitioning creditor,

- incorporated companies may be, 121
- individual creditor may be, 119
- infants may be, 121
- joint creditor may be, 120
- married woman may be, 121
- partner may be, 120
- secured creditor may be, 120
- sole creditor may be, 120
- sureties may be 121
- trustees may be, 121
- unincorporated companies may be, 120
- who may be, 119

Place,

- presentment of petition, of, 161
- presentation of petition, of, objection to, 161
- trial, of, of offences under s 69, 707
- where debtor ordinarily resides, carries on business or personally works for gain or he has been imprisoned or where he is in custody, must be stated in petition 168

Plaint,

- procedure for admission of insolvency petition to be the same as in case of, 190

Plaintiff,

- procedure in suits or proceedings on adjudication 336

Pleader,

disqualification of, on account of insolvency, 713

receiver's power to employ, 623, 638

Pleading,

bona fide transfer of, without notice 596

Pledge,

mortgage or, by receiver, 624

Pledged,

rights of secured creditor in goods, 320

Policy,

law of bankruptcy, of, 1

Life Insurance, is property and vests in receiver, 259

Political,

pension exempt from vesting, 314

Position,

and power of Court before and after adjudication 201

creditor, of, on annulment, 394 410

debtor, of, on annulment, 378, 382, 384, 453 458

receiver, of, on annulment, 392

secured creditor, of, in insolvency, 252, 318

Possession,

Court's power to deliver, 630

delivery of property in, of Court, 513 519

goods in, of the insolvent in trade or business when vest, 252, 260, 298

obstruction to receiver in taking, is contempt of Court, 613

property in, of Court, duty of Court to deliver, 513, 519

Possession—contd

receiver's right to, of the property transferred, 537

removal by Court of person in, on appointment of receiver, 599, 609

restriction on Court's power to remove person in, 599

summoning for information person in, 641

Post,

proof of debt by, 490

Power

appellate Court, of, 68, 80, 737

Civil Court's, to stay, 333

delegation of Court's, to official receiver, 757

disallowance and reduction of entries in schedule, of, 493

disposing, of insolvent, 14, 20, 258

District Court of, 68

High Court, of, in its appellate side, 80

" " of, in its original side, 77

" " of, the same as in civil suits, 68

" " of, to commit for contempt, 614

" " of, to make rules, 755

Insolvency Court, of, to decide question of title, priority, fact or law, 37, 40

Insolvency Court, of, over receiver, 615

interim receiver, of 197

local government, of to appoint Official Receiver, 618

local government, of to bar application of certain provisions, 759

local government, of, to invest

Power—contd

- subordinate Courts with insolvency jurisdiction, 32
- receiver, duties and, of, 623
- " of, under s 4, 53.
- review, of, 75.
- secured creditor, of, to prove for the balance, 476, 480
- secured creditor, of, to realise his security, 253, 319, 479

Power of appointee,

- on annulment, 393, 455

Power of Court,

- adjudication, to order, 244, 245
- admission and rejection of proof, of, 493
- annul adjudication to, 370
- " adjudication, to, on composition, 406
- " adjudication, to, on failure to apply for discharge, 446
- annulment of adjudication, on, 370, 389
- appoint committee of inspection, to, 678
- " receiver, to, after adjudication, 599
- " receiver, to, before adjudication, 194
- approve or refuse composition, to, 396
- arrest after adjudication, to, 349.
- " before adjudication, to, 200
- attach and sell property of receiver, to, 599
- avoid fraudulent preferences, to, 558
- " voluntary transfers, to, 522.
- award compensation, to, 242
- award mesne profits an annulment of transfer, 556.

Power of Court—contd

- cancel one of concurrent orders of adjudication, to, 379
- change carriage of proceedings, to, 182
- confirm, reverse or modify act or decision of receiver in appeal, to, 679.
- consolidate petitions, to 180
- constitution and, 32
- decide questions of title, priority law or fact, to, 37, 40.
- deliver possession, to, 60, 630
- discretionary, when moved under s 68, 686
- dismiss petition, to, 233
- " receiver, to, 615
- enforce its own orders, to, 60
- extend the period of discharge, to, 73
- " the period of discharge after its expiration, to, 249
- general, 67
- grant absolute order of discharge, to, 417, 422
- " leave for appeal to Privy Council, to 82
- " temporary injunction, to 74
- " discharge subject to conditions, to, 417, 426
- " protection after adjudication, to, 341
- " if no receiver, 622
- inherent, of dismissal for abuse of process of Court, 72
- " to grant interim protection, 72
- " to order security for costs, 730
- interfere, to, with sales receiver, 629
- judgment, to go be 495.

Power of Court—contd

limitation to the 495
 order stay, to, 333
 over receiver position and,
 before and after adjudica-
 tion 201
 proceedings under the Act, in
 regard to 67
 re-adjudge debtor insolvent,
 to 415 416
 refuse discharge to, 417, 422
 release debtor, to 210
 remove to a person from
 possession whom the insol-
 vent has not the present
 right to remove, 599, 690
 require information regarding
 insolvent's property, to, 641
 restriction on, for removal,
 599, 611
 review to, 75
 review order of refusal of dis-
 charge, to, 444
 review order of suspension of
 discharge, 426
 sell to, 37
 set aside *ex parte* order of dis-
 missal for default, to, 70
 set aside sale, to, 496, 629
 stay proceedings, to 75, 379
 stay sale, to, in execution 718
 stay sale, to, 518
 substitute as petitioner one
 creditor in the place of
 another, to, 182
 summon any person for infor-
 mation, to, 641
 suspend discharge, to, 417
 424
 " " and attach |
 condition
 thereto to,
 433, 445
 when no receiver, 622

Power of receiver,**Power of receiver,—contd**

compromise, to, 624, 640
 continue suit or proceeding
 to 623, 636
 defend suit or proceeding, to,
 623, 635
 distribute dividends, to, 623
 divide property among credi-
 tors, to, 624
 duties and, 604
 employ pleader or agent, to,
 623, 638
 enquiry, of under s 4, 42
 exercisable with leave of,
 Court, 623, 630
 , without leave of
 Court, 623, 626
 give receipt for money, to, 623,
 630
 institute suit or proceeding,
 to, 623, 632
 mortgage or pledge, to, 624,
 639
 not judicial, 625
 realise property, to, 623
 sell to, 623, 626
 sell agricultural property, to,
 647
 , on deferred payment, to,
 624, 639
 " revenue paying property,
 to 647

Precedent,

leave of Court, condition, to
 commencement of suit or
 other legal proceeding, 252,
 292

Preference,

annulment of, to creditor 558
 " of, to secured cre-
 ditor, 564
 application for annulment of,
 to be made by receiver, 587,
 589
 avoidance of, 558
 benefit to oneself is not, 571

Preference—*contd*

bona fide transfer to creditor is not, 568

bona fide transferee under, protection of, 587

contract, pursuant to, is not, 572

creditor, to, 558

" to, is an act of insolvency, 83

" when can apply for annulment of, 587, 590

decision re, *res judicata*, 585

effect of annulment of, 586

fraudulent, an act of insolvency, 83, 98

issues to be proved for annulment of, 579

judicial proceeding suffered is, 558

jurisdiction to annul, ceases on annulment of adjudication, 537, 561

limitation for annulment of, 578

meaning of, 565

mesne profits on annulment of, 585

motive for, 568

obligation incurred is, 558

onus of proof of, 580

payment to a creditor is, 558

penalty for undue, 433, 691, 698

pressure, under, is not, 573

proof of, 584

procedure for annulment of, 580

pursuant to contract is not, 572

receiver to apply for annulment of, 587, 589

receiver's report on, no evidence, 584

refusal of discharge for undue, 433, 442

Preference—*contd*

secured creditor, to, 564

surety, to, 565

test to determine, 567.

transfer by way of fraudulent, an act of insolvency, 83

" of property to a creditor with a view to prefer is, 564, 565

" to a secured creditor is not, 564

undue, refusal of discharge for, 433

under pressure, is not, 573

voluntary, 566

voluntary transfer and, difference between, 562

what is not, 573

what is to be proved in case of undue 579

when can a creditor apply for annulment of, 587, 590

when, is not fraudulent, 100

who can apply for annulment of, 579

within three months of petition can only be annulled, 558, 577

Preliminary,

enquiry into offences under s 69, 701, 705

" into offences under s 72, 710

Prescribed,

defined, 14, 19

rules, by, framed under sec 79, 755

Present,

debt, provable, 359

dismissal for want of right to, petition, 233

right to, petition, by a creditor, 134

" by a debtor, 151.

Presentation of Petition,

act of insolvency, 84, 117, 129.
adjudication relates back to the date of, 253, 327.

annulment of fraudulent preference within three months of the date of, 558, 577

re adjudication does not relate back to, 416

three months not a period of limitation but condition precedent to, 144

Presentment, objection to the place of, 167

Presidency,

Towns Insolvency Act, leave of Court to present petition in District Court on annulment of adjudication under, 151, 157, 158, 159.

Towns Insolvency Act not affected by this Act, 760.

Towns Insolvency Act, power of Court under, to stay proceedings and annul order of adjudication in any other Court, 77, 78, 79

Towns, laws of insolvency outside, 3

Pressure,

preference under, is not preference, 573

what is not, 574

Presumption,

fraud, of, in voluntary transfers, 549

Previous,

insolvency a ground for refusal of absolute discharge, 433

insolvency, statement of, in debtor's petition, 169, 172.

Prima facie proof of inability to pay debts, 217.

Principal,

act of insolvency of agent is act of insolvency of, 84, 112

Principle,

distribution, of, in insolvency, 497.

Priority,

arrears of rent, of, 658.

costs of administration, of, 658

Crown debts, of, 650, 651

debts due to any local authority, of, 650, 654

deposit money, of, 657.

equality of debts entitled to, 650, 658

expenses of administration, of, 658

jurisdiction of Court to decide questions of title and, 37, 40

other debts entitled to, 655

partnership property, distribution of, 650, 658

provision in composition for payment of debts payable in, 396, 404

question of title and, decision by Insolvency Court, 37.

rent due to landlord, of, 57.

salary of clerks of, 650, 654

scheduled debts, of 662

secured debt, of 657.

trust money, of, 656

wages of servant or labourer, of, 650, 654

Prison,

civil, power of Court to order detention of debtor in, 200, 349

Private,

arrangement, not payment in full, 366.

Private—*contd*

arrangement with creditors is
not payment in full, 377
benefit fund, compulsory
deposit in whether vests
316

Privy Council,

appeal to against order under
s 4, 67
appeal to, 82, 736
leave for appeal to, 82, 736
right of appeal to, 82, 736

Procedure,

adjudication, on, in pending
suits or proceedings, in case
of plaintiff, 336
adjudication, on, in pending
suits or proceedings, in case
of defendant, 337
admission of petition, for, 190
" of petition, on, 191
annulment, for, of preferences,
580
Court, in, in composition, 398
charge under sec 69, on, 701
C P C applies to, subject to
the provision of the act, 69
Court of appeal, of, 737
Court, of, exercising insolvency
jurisdiction, 67, 69
Court in, for considering pro-
posal of composition or
scheme of arrangement, 398
Court law and, of for enquiry
under sec 4, 53
hearing, at, of petition, 217
power and of Court of appeal,
68
substitution of legal represen-
tatives, in, 188, 189

Procedure—*contd*

suits, in, or proceedings on
adjudication of plaintiff,
336
" " of defendant, 377

Proceedings,

abatement of, on death of
debtor, 190
act of insolvency to discharge,
from, 83
allowing to continue after
adjudication, effect of, 335
annulment, on, 383
bankruptcy, how begun in
England, 117.
carriage of, Court's power to
change, 182
C P C applies to, under the
Act, 69
commencement of any suit or
other legal, after adjudica-
tion, 252, 289
concurrent, for adjudication,
379
" stay or annulment
of, 379, 380
consequent on order of adju-
dication, 341
continuance of, on death of
debtor, 185
costs of, discretion of Court
to allow, 740
creditor's petition, on, 219
debtors liable to bankruptcy,
122
debtor's petition, on, 221
effect of adjudication on pend-
ing 336, 337
effect of foreign adjudication
on execution, in India, 513
effect of allowing to continue
after adjudication, 335
effect of order of discharge
insolvency, 431
expenses of, 677
initiation of, under

Proceedings—contd

- insolvency, how begun in India, 118
- " exemption of corporation from, 129
- " pendency of, 288
- insolvent's right to continue, after adjudication, 284
- interim, against debtor, 200
- judicial, to, suffer, is preference, 558, 576
- legal, commencement of suit or other, without leave, 252, 288
- legal, effect of commencement of, without leave, 296
- liable to stay, not, 339
- nature of, in Court, for avoidance of transfers, 547
- pendency of insolvency, 288
- power to change carriage of, 182
- procedure in suits or, on adjudication of plaintiff, 336
- " on adjudication of defendant, 337.
- refusal of discharge not a termination of, 443.
- simplification of, by consolidation, 181.
- stay of pending, 330
- " power of, 75
- " by High Court, 382
- substitution, 70, 183
- termination of, on annulment, 384, 458
- " of, on discharge, 431
- validation of suits or other legal, without leave on annulment, 459
- which can be stayed, 339

Process,

- abuse of, of Court, annulment of adjudication for, 374
- " to be enquired into

Process—contd.

- not at hearing of debtor's petition, 224
- dismissal of petition for abuse of, of Court, 240
- to be in force on annulment of adjudication, 447

Production,

- books of account, of, 209

Profits,

- mesne, jurisdiction of Court to enquire into, 42

Prohibition,

- attachment by, and injunction, 204
- condition precedent to attachment by, 205

Promise,

- marry, to, damages for, not provable, 368

Proof,

- abuse of process of Court, of 224
- act of insolvency, of 220
- admission and rejection, of, of debt, 493
- " of debt in schedule is, 491
- affidavit, by, 490
- amendment of, of debt 353
- bad faith, of, 223
- balance, for, by a secured creditor, 476, 480
- barred debts, of, 363
- claim of secured creditor, of, 22, 492
- concealment of property, of, 224
- costs of, 492
- Court's power to go behind judgment in, of debt, 445
- debt, of, before discharge, 351
- debt, of, before and after discharge, 351, 358

Proof—contd

debts of, by creditor, 219 352
 debt payable at a future time
 of, 469, 470
 debtor, by, against creditor
 662
 delegation of power by Court
 for enquiry into, of debt,
 494
 discharge, of debt, before 359
 dismissal for want of, of right
 to present the petition, 233
 enquiry by Court into, of
 debt, 493, 494
 extension of period of limi-
 tation on, 744, 753
 failure to, 491
 fraudulent intention, of, 97
 " preference, of, 584
 " transfers, of, 224
 good faith, of, 529
 inability to pay, of, 155
 insolvent's right to challenge,
 496
 interest, for, 485
 joint debts, of, 363
 judgment, by, 495
 limitation for, 357.
 " to the power of
 Court in relation
 to, 495
 machinery in England for
 admission or rejection of,
 493
 " in India for admis-
 sion or rejection
 of, 494
 meaning of, 352
 method of, of debt, 469
 modes of 490
 mutual dealings and set off,
 of, 470
 numerous claims, of, 492
 other modes of, 491
 post, by, 490
 prima facie, of debtor's in-
 ability to pay, 217
 right of creditor on 495

Proof—contd

right, of, to present petition
 for adjudication, 217.
 secured creditor, by, 476, 492
 service of notice on debtor on
 creditor's petition, of 217
 suspension of limitation pre-
 supposes, 753
 when to be tendered, of debt,
 350
 whole debt, for the, by
 secured creditor, on relin-
 quishment of security, 476,
 481
 Property,
 abandonment of, vested, 284
 abroad, vesting of, 262
 acquired in subsequent trade,
 674
 actionable claims are, 274
 administration of, 469
 after-acquired, vests in re-
 ceiver, 252, 271, 304
 agricultural, sale of, 647
 agricultural holding is, that
 vests in receiver, 274
 annulment, that does not vest
 on, 388
 appointment of receiver for,
 599
 attachment of debtor's, 200
 " of receiver's 599
 bailment, held under, vests
 261
 bare right to sue is that vests
 in receiver, 257
 benefit of execution against,
 497, 501
 bona fide purchaser without
 notice, in the hands of, does
 not vests, 282
 books of account are 169,
 British India transfer
 act of insolvency, 83
 charging by debtor
 692
 claim for dam _

Property—contd

commencement of legal proceedings against, 297.
 concealing, by debtor is offence 692
 concealment of, 224.
 „ and removal of, is a ground for refusal of discharge, 433.
 „ dismissal for, 239.
 conditions for avoidance of transfer of, 525
 contingent interest is, that does not vest in receiver, 277.
 copy-right is 260.
 debutter, when does not vest, 281.
 „ when vests, 281.
 declaration of debtor to place, at the disposal of Court, 169
 defined, 14, 20.
 delivery of, by executing Court to receiver, 513.
 discharge does not divest, 467.
 dismissal of debtor's petition for concealment of, 239
 distribution of, which cannot readily be sold, 624
 distribution of partnership, 650, 658
 duty of Court executing decree as to, taken in execution, 573
 „ of debtor to give inventories of, 206.
 „ of debtor to submit to examination in respect of, 206
 endowed, does not vest in receiver, 281.
 equity of redemption is, that vests in receiver, 276
 exempted from attachment by C. P. C., does not vest, 21, 204.

Property—contd.

exempted from vesting, 253, 311
 „ by any other enactment from vesting, 253, 311
 „ by, do not vest, 253, 278
 expropriatory holding is, that vests in receiver, 313
 failure to deliver possession of, an offence, 691.
 fraudulent concealment of, an offence, 691, 697.
 goods held by commission agent are, that vest in receiver, 260.
 „ in order and disposition of insolvent by consent of true owner is, that vest, 252, 260
 „ held in hire purchase system are not, 302
 „ held in trust are not, 278, 301.
 goodwill is, that vests in receiver, 265
 gratuity is, that does not vest, 317.
 held or let for agricultural purposes, sale of, 647, 649.
 Hindu joint family firm is, that vests, 265
 Hindu joint family, in case of adjudication of a co partner, vesting of, 271
 Hindu joint family, is, that vests, 267.
 Hindu joint family, in case of attachment before adjudication, vesting of, 270
 includes actionable claims, 21.
 includes after-acquired, 21.
 „ both movable and immovable, 21.
 „ rights, 20
 insolvent's, creditor's remedy against, 287.
 inventory of, duty of debtor to give, 206

Property—contd

joint family, power of manager to dispose of, vests, 267

" " vests on adjudication of Karta, 267

" " does not vest in case of attachment before adjudication, 270

" " vesting of, on adjudication of a co parccener, 271

leasehold interest is, 271

life insurance policies are, 259

loss to, occasioned by wilful default and gross negligence, sale of property of receiver for, 599

making away with, by debtor is offence, 692

mis statement of, in petition for adjudication, 223

Mitakshara joint family, vesting of, 20, 266, 267

money is, that vests in receiver, 258

mortgaging, by debtor is offence, 692

nature of, vesting in receiver, 676

non-delivery of, when no offence, 696

not liable to attachment exempt from vesting, 253, 311

occupancy right of, that vests, 273

omission to enter, in schedule, is no offence, 696

partial debutter is, that vests, 281

particulars of, to be given in debtor's petition, 169,

partnership assets are, that vest in receiver, 263

Property—contd

pension is not, that vests in receiver, 314.

permanent tenures are, that vest, 273

personal earnings are, that vests in receiver, 258

personal licenses are not, and do not vest, 281.

possession, in, of Court, 519.

power to require information re, of insolvent, 641.

power of manager to dispose of joint property is, 20, 267.

provident fund money is not, that vests in receiver, 315

realisation and distribution of, 623

receiver's power to give receipts, 623

receiver's power to realise, 623

" " to sell insolvent's 623.

" right to possession of, transferred, 537

" right to sell revenue paying, 647

refusal of discharge for concealment or removal of, 433

remedy of creditor against, of the insolvent, 287.

removal of, by debtor, 261.

" of person in possession of insolvent's, 599, 609

residuary estate is, that vests in receiver, 278

revenue-paying, sale of, 647.

reversionary interest in, does not vest in receiver, 278

revesting of, on annulment of adjudication, 383, 385, 453

right of action is, that in receiver, 274

right of Mitakshara " " sell his son's

right of insolvent after acquired,

Property—*contd.*

right to sue for breach of contract, is not, 20.
 salary is, that vests in receiver, 259
 sale of debtor's, in execution of a decree is an act of insolvency, 84, 104
 „ of receiver's, 599, 615
 „ of revenue-paying, 647.
 „ of immovable, held or let for agricultural purposes, 647
 secret formulas are, that vest in receiver, 259
 security deposit is not, and does not vest, 317
 specification of the value of, in petition for adjudication, 169.
spes successionis is, that does not vest in receiver, 278
 statutory tenancy is, which vests in receiver, 272
 subject to mortgage vests in receiver, 317.
 summary administration of insolvent's, 716
 that does not vest, 278
 that does not vest on annulment, 388.
 that vests, 257
 that vests under English law, 257
 that vests under sec. 28, 257.
 tools of trade are not, that vest in receiver, 311.
 transfer of, 14, 30, 87
 „ of, as fraudulent preference is an act of insolvency, 83
 „ of all, in India or elsewhere for benefit of creditors is an act of insolvency, 83, 89.
 „ of all, in India or elsewhere to defeat or delay creditors, an

Property—*contd.*

act of insolvency, 83, 92.
 transfer of part of, is not an act of insolvency, 93.
 „ of, before and in consideration of marriage not liable to be annulled, 522, 525
 „ includes transfer assignment or conveyance, 30
 „ „ any right and profit, 19.
 „ „ partition, 31
 „ „ transfer by decrees, 31.
 „ „ creation of charge, 4, 30
 „ of, in favour of encumbrancer or purchaser in good faith and for valuable consideration not liable to be annulled, 522, 524
 trust, does not, vest, 15, 278.
 under bailment does not vest, 261.
 vested interest in, when vests in receiver, 277.
 vesting of, on adjudication in Court or receiver, 252.
 „ of, on annulment of adjudication, 383.
 „ of, on appointment of receiver, 599.
 „ of, outside British India on adjudication, 12, 602.
 „ of, subject to equities, 285
 „ of after acquired, 304.
 under Mohomedan law, 306
 when no delivery of, is no offence, 696
 wearing apparel of debtor is,

Property—contd.

excluded from vesting in receiver, 311.

with all advantages and burdens vests in receiver, 317

Proposals,

composition and scheme of arrangement, of, 395, 397

amendment of, for composition, 401.

Prosecution,

adjudication, lies only on, 693

appeal against, 700

complaint to magistrate by Court for, 701

duty of Court before making complaint for 706

forum of, 707

initiation of, 700

leave for, under s 72, 711

liability to, after discharge or composition, 709

lies after and before discharge, 709

nature of, 700

no, under s 72 after discharge, 551

notice before, 705

preliminary enquiry before, 701, 705

procedure on, 708

receiver's report is no evidence in, 706

under sec 72, 710, 712

" " does not lie after discharge, 710, 712

undischarged insolvent obtaining credit, of, 710

Protected,

transactions, 593

Protection,

adjudication, after, 341

" before, 210

alimony, in respect of, 215.

Protection—contd.

anticipation of arrest, in, 213

appeal against order of, 349.

arrest or imprisonment, on, only 210, 212.

automatic, in English law, 211

" in Indian law, 212

" under the present Act, 343

" under the old Act 342.

bona fide subsequent purchaser, of, 545

" " transaction, of, 592, 595

" " transfer from a preferred creditor, of, 586

cases in which no, can be granted, 345

contract for valuable consideration, of, 592, 595

Court's discretion to grant, 214, 346

debtor, of, by law of bankruptcy, 1

decrees and orders of Revenue Courts, in regard to, 216

discretionary, 214, 346

effect of, on limitation, 349

execution purchaser in good faith, of, 497, 510

extent of, 341

grant of, is discretionary, 346

inherent power of Court to grant interim, 72, 213

interim, power of Court to grant, 72

interim, from arrest, 210

limitation how affected by, 349.

maintenance under sec. 488, Cr P C, in respect of, 215, 348

nature of, 215

order, its effect on limita 349

Protection—contd

- payment by insolvent to creditors before adjudication, of, 592, 594
- payment to insolvent, of, 592, 594
- petition by creditor, on, 211
- purchaser in good faith for valuable consideration, of, 522
- „ in good faith in execution of decree, of, 497 510
- reason for, after adjudication 344
- subsequent purchaser from transferee, of, 545
- transaction before adjudication, of, 592, 597
- transfer after adjudication of, 592, 597
- „ by insolvent for valuable consideration, of, 592, 595

Prove,

- failure to, debts, effect of, 491

Provable,

- barred debt, 363
- contingent debt incapable of being ascertained, not, 367
- covenant not to molest not, 368
- debt incurred after adjudication is not, 359, 367
- debts, 359
- debts not, 367
- debt for gambling not, 368
- „ founded on illegal consideration not, 368
- „ for compromising or compounding criminal offence, not, 368
- „ to be, must be subsisting, 359
- „ to which debtor is subject at the time of adjudication are, 359

Provable—contd

- debt to be, must be personal, 363
- deferred dower debt not, 368
- future and contingent liabilities are, 367
- joint debts, 363
- obligation incurred after adjudication not, 359
- obligation incurred before adjudication, is, 359, 365
- promise to marry not, 368
- remedy of creditor in respect of debt, 281
- rent or decree under the Agra Tenancy Act is debt, not, 16, 312
- secured debt not, 368

Provable debt,

- alimony is not, 215 367
- annuities for life are, 361
- arrear of rent is 364
- debts incurred after adjudication are not 361
- discharge releases all, 460, 464
- enquiry into 369
- forward contracts are 361
- maintenance is not 173, 215, 360
- meaning of, 352
- money held in suspense is not 361
- „ in deposit in bank is, 361
- obligation incurred before adjudication is, 359, 365
- under the Act 359
- unliquidated damages are, 359

Provident fund,

- Act XIX of 1925, 315
- money of debtor in, does not vest in receiver, 315
- „ when vests, 315

Provincial Insolvency Act,

- Act III of 1907, 3
- Act V of 1920, 1

Provincial Insv. Act—contd.

- adjudication under, its effect-
12.
- amendments of, 1, 5.
- application of, 6.
- “ of English law to,
6.
- assent of Governor-General
to, 1.
- complete Code, 5
- date of operation of, 7
- definitions in, 13
- extent of, 1, 9
- interpretation of, 6
- nature and scope of, 5.
- retrospective effect of, 8

Proving,

- rights of a creditor, 492

Provision,

- creditors, for, residing at a
distance, 665, 666
- secured creditor, for, 666.
- special, in regard to immov-
able property, 647

Provisions,

- application of which may be
barred by the Local Govern-
ment, 763.
- jurisdiction subject to, of s 53,
37, 43
- jurisdiction is not subject to,
of the Act, 45

Public,

- examination of debtor, 217,
231.
- officer, notice to, before suit,
197, 326.
- “ notice when not nec-
essary on, 326.
- receiver is a, officer, 197, 326

Publication,

- adjudication, of, order of, 140
- costs of, 340, 341.
- “ of, failure to deposit,
effect of, 141.

Publication—contd.

- notice, of, fixing date of hear-
ing application for
discharge, 417, 420.
- “ of, fixing date of hear-
ing petition for ad-
judication, 191, 192.
- object of, of order of adjudica-
tion, 340.
- rules of, framed under sec 79,
755

**Punjab Alienation of Land,
Act,**

- Act XII of 1900, 313
- land of member of agricultural
tribe under, s. 16, does not
vest, 313
- sale by receiver of agricultural
holding under, 313.

Punjab Tenancy Act,

- occupancy rights under, do
not vest, 313

Purchase,

- hire, system, goods held in,
do not vest, 302

Purchaser,

- bona fide*, without notice, pro-
perty in the hands of, does
not vest, 282
- good faith, in, protected, 522,
527
- jurisdiction to decide ques-
tions of title bet, 42.
- meaning of, 527
- sale in execution of decree in
good faith in, rights of, 497.
- subsequent *bona fide*, whether
protected, 545.
- subsequent, how far protected
545.
- valuable consideration, for,
522, 527.

Q**Qualification,**

- members, of, of com
inspection, 678, 679

Question,

creditor's right to, debtor during examination, 218
 partnership, of jurisdiction of Court to decide, 42
 nature, of any, jurisdiction to decide, 37, 41
 title, priority fact or law, of, power of Court to decide, 37, 40

R**Railway,**

provident fund not liable to attachment and does not vest in receiver, 315
 receipt is a document of title to goods and vests in receiver, 261.

Rash,

and hazardous speculation
 refusal of discharge for, 433, 440.

Rate,

higher, of interest, 489.
 interest, of, on adjudication, 485, 488.
 „ of, prior to adjudication, 485, 488.

Rateable,

distribution of assets, order for, effect of, 508

Re-adjudication,

debtor, of, 415.
 default in payment of composition, for, 415
 fraud in obtaining approval of Court to composition, for, 415.
 injustice or undue delay in proceeding with composition, for, 415
 relation back of the order of, 416.

Realisation,

aid by insolvent in, of property, 202
 duty of receiver in, 623.
 property, of, 599
 summary administration, of property in, 719

Realised,

assets, 497, 502
 benefit of execution to assets, before admission of petition, 497, 502
 meaning of 502
 when security is said to be, 479

Re-arrest,

debtor of, after release, 210, 217

Reason,

protection, for after adjudication, 344

Reasonable,

security to pay six annas in the rupees 396, 402

Rebate,

interest, of, on dividends for debts payable at a future time, 469

Receipt,

grant of, by receiver for money received, 623, 630

Receiver,

accounts to be submitted by, 599, 606.
 act or decision of, liable to appeal, 680
 action under s 4, to take, 52.
 agricultural property, sale by, 647.
 appeal by, 637, 723
 „ from orders of official, 757.

Receiver—*contd*

- " to Court against act or decision of, 679
- " beyond time, 689
- apply to, for annulment of voluntary transfers and preferences, 587, 589
- appointment of, at any time after adjudication, 599, 601
- " of, at the time of adjudication, 599, 600
- " of official, 618,
- " of, in mortgage suit, 612
- attachment of property of, 599
- award of costs against, 741
- calculation of dividend by 665
- charge by appointment of, 28
- committee to superintend administration by, 678
- Court's power over, 615 680
 - , power over official, 621
 - " power to interfere with sale by, 629
 - " power to deliver possession of property sold by, 630
- decisions of, liable to appeal 680
- declaration of dividend by, 667
- decree null and void, when, not made a party in a suit by a secured creditor, 325
- deed by, not exempt from stamp duty, 640
- default, wilful, by, causing loss, 599, 616
- delegation of power by Court to, for admission or rejection of proof, 494
- delegation of powers to official, 759

Receiver—*contd*

- delivery of possession by Court in sale by, 630
- , of property to, by Court executing decree, 513
- difference, between and official receiver, 620
- discharge of, 288
- discharge of onus by*, 551
- dismissal of, 615
- disposal of suit *ex parte*, 637
- distribution of dividend by 623
 - of property by, which can not be readily sold 624
- duties and powers of 623
- effect of appointment of *interim*, 159
- effect of vesting in, 283
- effect of sale of revenue paying property by, 649
- failure to pay balance due from, 599
 - to retain assets by, 667
 - to submit accounts by, 599
- framing of schedule of creditors, by, 354
- includes *interim* and, after adjudication, 506, 577
- initiation of prosecution by, 700
- in insolvency and receiver in action, difference between, 604
- interference by Court with sale by, 629
- interim*, and receiver after adjudication, difference between, 199, 617
- " appointment of, 194
- appointment of *discretion* 195
- duty of Court in ap 196

Receiver—*contd*

- effect of appointing, 196
- powers of, 197
- status of, 197.
- leave for suits against, not necessary 604
- „ for suits by, 623, 634
- liability of, to render accounts 599, 606
- „ of, for acting without leave, 637
- „ of, for costs and damages, 615, 637
- „ of Secy of State for acts done by Official, 620
- limitation for suits against, 635
- „ of suit by, 630
- loss occasioned by, 599, 616
- mortgage suit, in, removal of, 612
- nature of property vesting in, 676
- „ of sale by, 627
- necessary party in a suit by secured creditor, 323
- negligence of, causing loss, 599, 612
- no suit lies for dividend against, 671
- notice to, before suit, 326, 605
- object of appointment of, 600
- objection to sale by, 628
- obstruction to, contempt of Court, 613
- „ to, in taking possession 613
- Official, appointment of, 618
- onus on, in case of voluntary transfers, 550
- order of appointment of, on adjudication essential, 600
- payment of balance by, 599.

Receiver—*contd*

- personal liability of, for costs, 637
- „ liability, of, for dividend, 672.
- person incompetent to be appointed, 601
- power of Court if no, 622.
- powers of, 623
- power of, on annulment of adjudication, 393
- „ of control over, 679
- „ of, to enquire under s 4 53
- „ exercisable by, with leave of Court, 523, 630
- „ exercisable by, without leave of Court, 623, 626
- „ of Court over, 599, 615
- „ of Court when no, 622
- „ of Court to interfere with sales by, 629
- „ of, not judicial, 625
- „ of to carry on business, 623, 631
- „ of, to compromise, 624, 640
- „ of to continue suits, 623
- „ of, to defend suits, 623, 635
- „ of, to distribute dividends, 623
- „ of, to engage pleader, 623, 638
- „ of, to institute suits, 623, 632
- „ of, to mortgage or pledge, 624, 639
- „ of, to realise property of debtor, 623
- „ of, to refer to arbitration, 624
- „ of, to sell, 623, 626

Receiver—contd

- power of, to sell agricultural land, 647, 649
- „ of, to sell on deferred payment, 624, 626, 639
- „ of, to sell revenue-paying property, 647.
- property that does not vest in, 278, 311
- public officer, is a, 326, 605
- reason for appointment of, 600
- receipts grant of, by, 623
- refusal by, to pay dividends, 672
- remedy of creditors when loss occasioned by wilful default of, 616
- „ on refusal to pay dividend by, 172
- removal of person in possession on appointment of, 599, 609
- remuneration of, 599
- remuneration of, on equity of redemption, 606
- report of, when evidence, 420, 433, 445
- „ of, when not evidence, 553
- „ of no evidence in proceeding under s 69, 706
- restriction on Court's power of removal on appointment of, 599, 611
- retention of assets by, in calculation of dividend, 665
- revenue paying property, sale by, 647,
- right of, to apply for annulment of fraudulent preference, 538
- „ of, to avoid voluntary transfers, 522.

Receiver—contd

- right of, to move the Court under sec 4, 52
- „ of, to possession of property transferred, 537
- „ of, to remove person in possession, 599, 609
- sale by, not governed by C P C, 627
- „ by, objections to, 628
- „ by, power of Court to interfere with, 629
- „ by, subject to equities, 629
- „ „ of goodwill of business, 626
- „ by, to satisfy costs of suit and execution, 513
- „ immovable property of, held or let for agricultural purposes, by, 647, 649
- „ by, of revenue paying property, 647
- schedule of creditor, framing of, by, 354
- security, to furnish, 599, 606
- special, appointment of, 620
- status of, 603
- „ of interim, 197
- „ of official, 619
- Secy of State, liability of, for acts done by Official 620
- steps to be taken by, in execution of decrees by creditors, 506
- title of, to property acquired in subsequent trade, 674
- vesting in, relates back, 253, 327, 602
- „ of property in, 599, 601
- what vest in, 317
- when liable for costs damages, 614
- whole of the
property vests in,

Receiving order,

creditor's petition, on, 118

debtor's petition, on, 118

Re-commitment,

debtor, of, to custody, 210

" on annulment of
adjudication, 446**Redemption,**equity of, is property that
vests in receiver, 276receiver's remuneration on
equity of, 606

security, of, 476 492

Reduction,

entries in schedule, of, 493

Refund,jurisdiction of Court to order
42

restitution or, 507

Refusal,absolute discharge, of, 417
422, 432

adjudication, of, 153, 226

composition, by Court to
approve, 396, 401consequences of neglect or,
to comply with duties by
debtor, 209

discharge, of, 417, 422

" of, does not terminate
proceedings, 443grounds for, of absolute
discharge, 432power of Court to review the
order of, of discharge, 444review of the order of, of
discharge, 444**Registered Association or,
Company,**petition for adjudication does
not lie against, 129**Rejection,**machinery England for admis-
sion or, of proof, 493

machinery in India do, 494

Relation,back of the order of adjudi-
cation, 253, 327.

" of re-adjudication, 416

" of transfers within 2
years, 534" of vesting of property
in receiver, 252, 327,
602

transfers to near, 529

Relationship,debtor and creditor, of, must
be subsisting, 136**Release,**debtor, of, from arrest or
imprisonment, only, 210debts entered in schedule, of,
by discharge, 464

effect of, from arrest, 217

order of, discretionary, 214

provable debts, from, dis-
charge gives, 464

security, on 210, 216

Relinquishment,life interest, of, in fraud of
creditors, an act of insol-
vency, 95proof of whole debt on, of
security, 476, 481

security, of, 135, 151

rem, in, decision under sec 4
is a judgment, 57**Remedy,**annulment of adjudication, on,
159" of adjudication
for failure to
apply for dis-
charge, on, 159creditors of, against property
of the insolvent,
287" of, application in
insolvency is not
the only, 135

Remedy—contd.

- creditors, of, on adjudication of debtors, 286
- " of, in respect of debts provable, 286
- election of, 135, 683
- failure to apply for discharge, for, 151, 159
- surety, against, 203.

Removal,

- possession, of person from, 599, 609
- property, of, from local limits of jurisdiction of Court, attachment for, 201
- receiver, of, in mortgage suit, 471
- restriction on power of Court of, 599, 611

Remuneration,

- Official Receiver, of, 621
- receiver, of, 599
- rules for, of receiver, 755

Rent,

- arrears of, after adjudication are expenses of administration, 658
- " of, before adjudication are provable debts, 364
- " of, priority in payment of, 658
- " of, under Agra Tenancy Act does not make landlord a creditor, 16, 156
- decree-holder is a secured creditor, 478
- decree, or, under Agra Tenancy Act not a provable debt, 16, 156
- distrain under English law for arrears of, 272.
- due to landlord, priority in payment of, 657.

Repeal,

- Acts, of, 671, 764.
- Lower Burma Courts Act, of, 761

Report,

- receiver, of, when evidence, 420
- " of, when no evidence, 553
- receiver's, value of, before prosecution, 706

Representative,

- debtor does not include, of debtor, 19
- legal, continuation of proceedings against, on death of debtor, 185
- " of debtor not liable to adjudication, 19, 138
- receiver a necessary party even in the presence of legal, 284
- substitution of legal, 70

Reputed,

- owner, 252, 299.
- " goods in order or disposition of insolvent as, vests in receiver, 252, 299
- ownership, right of secured creditor not affected by, 300
- " rights of secured creditor not controlled by, 327.
- " facts to be proved in, 303

Resides,

- ordinarily, meaning of, 162, 163
- petition to be presented to Court having jurisdiction local area within w debtor ordinarily, 161

Residuary,

- estate vests in recei

Res judicata,

decision of Insolvency Court
 under s 41 57
 under s 4 where
 not 59
 is to partnership is
 not 59
 under s 53 is 557
 under s 54 is 555
 under s 68 is 654

Resolution,

by creditor to accept compo-
 sition 400

Restitution,

Court's power of 76
 property taken in execution
 of 507
 provision for absence of 507

Restrict,

Court's right of over secured
 creditor 320

Restriction,

rights of creditors of under
 execution 497
 power of Court on of remo-
 val of person in possession
 611

Retention,

assets of in calculation of
 dividend by receiver 665

Retrospective effect,

Provincial Insolvency Act, V
 of 1920 of 7
 Provincial Insolvency Act sec.
 4 of 38
 s 55 of bona fide transactions
 592
 s 73 of for disqualifications
 and their removal 714
 s 78 (2) of 751

Revenue Court,

decrees and orders of protec-
 tion from arrest in execution
 of 216

Revenue paying,

property sale of 647

Reversionary interest,

spes successionis is and does
 not vest in receiver, 278

Revesting,

property of on annulment of
 adjudication 383 385
 453
 of subjects to acts
 done 386
 of subject to *lis pen-
 dens* 387
 of on annulment
 of composition 417

Review,

annulment order of, of 457
 Court's power of 75
 refusal of discharge order of
 of 444
 suspension of discharge order
 of of 426

Revision,

High Court by order of Dis-
 trict Court in appeal is sub-
 ject to 719 729

Revisional,

jurisdiction powers of High
 Court in 81

Revocation,

order of discharge of no pro-
 vision for 431

Right,

action of vests 274
 adjudication a statutory 152
 annul to 372
 assignment of by insolvent of
 after acquired property 307
 attachment *per se* confers no
 right 504
 creditor of proving 492
 creditor of, in annulment
 393

Right—contd.

creditor, of, to contest application by another creditor, 221.

creditors, of, who acquire a lien, 508

debtor, of, to present petition, 157, 217.

dismissal for want of, to present, the petition 233

insolvent's to amend schedule, 496

insolvent's to continue proceedings after adjudication, 284

limitation of, on annulment, 394

mortgagee's, to interest, 489

occupancy, vest, 273

" that does not vest, 312.

proof of, to present the petition, 217

receiver's to possession of property transferred, 537

restraint, of, Court's, over secured creditor, 320

restriction of, of creditors under execution, 497

secured creditor, of, 22, 478, 497, 508

" " in goods pledged, 320

" " of, how far affected by sec 4, 43

" " of, to realise security is absolute, 319

" " not affected by reputed ownership, 300

" " not controlled by reputed ownership clause, sub-sec. (3), 327.

" " under a trust deed, 481.

set-off, of, 474

Right—contd

statutory, adjudication is, 152
suit of, of, insolvent regarding after-acquired property, 307

surplus, of insolvent to, 676

Rules,

adjudication of firm, for, 755

any matter which is to be prescribed, for, 755

appointment of receiver, for, 755

dandupat, of, 490

effect of, framed under the Act, 755

general, as to interest payable to creditor on adjudication, 486

general, as to interest payable by debtor to insolvent estate, 487

Insolvency, Allahabad High Court, 778

" Bombay High Court, 796

" Calcutta High Court, 765

" Lahore High Court, 816

" Madras High Court, 784

meeting of creditors, for, 755

power of High Court to make, 755

publication of, 755

summary administration, for 755

S

Salary,

half of insolvent's, is property that vests, 259

wages or, of clerks and labourers, priority of, 650, 654

Sale,

after adjudication, e 512.

Sale—contd

- agricultural property, of, 647
- Collector, by, procedure of, 650
- Court, by, where no receiver, 623
- Court's power to interfere with, by receiver, 629
- delivery of possession by Court on, by receiver, 630
- effect of, by receiver of revenue-paying property, 649
- execution of decree, in is in act of insolvency 84 104
- goodwill of, a business by receiver, 626
- jurisdiction of Court to set aside, by receiver, 628
- nature of, by receiver, 627
- objection to, by receiver 628
- procedure of, by Collector 647, 650
- property, of, held or let for agricultural purposes 647
- property, of, by receiver, 623, 626
- " of, receiver, of, 599, 615
- receiver, by, not governed by C P C., 627.
- receiver, by, subject to equities, 629.
- revenue paying property, of, special rules as to, 647
- vulnerable interest, of, of the debtor, 37

Sale of Goods,

Act, III of 1930, definition of insolvent in, 84

Salvage,

lien, 24

Savings,

- Dekkhan Agriculturists Relief Act, Ch IV. of, 760
- Presidency Towns Insolvency Act, III of 1909, of, 760

Schedule,

- amendment of, 356
- " of, framed in composition, 413
- " after annulment of adjudication, 496
- application to enter name in, 351
- appeal against amendment of, 496
- assets, of in debtor's petition, 169
- bar of application to provisions specified in, 759, 763
- bogus debt in 222
- composition binds creditors entered in, 405, 410
- creditors, of 355
- creditors of, framing of by Court, 357, 353
- " of, framing of by receiver, 354
- " of, in debtor's petition 169
- " of, when to be framed, 350
- debts priority in payment of, 651, 664
- debts to be excluded from, 354
- disallowance of entries in, 493
- duty of Court to frame, 351, 353
- effect of discharge on, 460, 464
- " of, framing, of creditors, 356
- framing of, by Court, 350, 351
- " of, by Receiver, 354
- how to be framed, 350
- insolvent's right to amend, 496
- liabilities, of, in debtor's petition, 169
- omission to enter properties in, is an offence, 696
- priority in payment of, debts 662

Schedule—contd

priority in payment of non,
663

reduction of entries in, 493

Scheduled Districts

defined, 9

excluded from the operation
of the Act, 1

extension of the Act to, 10

Scheme of arrangement

acceptance by creditors of,
395, 397

affairs, of, proposal for, 395,
396

after adjudication only, 395,
396

annulment of composition
or, 415

approval of composition or
by Court, 396, 404

composition and 395

effect of approval of, 406, 408

" of, wrongly approved,
405

order on approval of composi-
tion or, 406, 407

out of Court 405

proposal of, 395, 397

readjudication on annulment
of 415

refusal by Court to accept,
395, 401

by Court to accept com-
position or, for mis-
conduct of debtor
395, 403

security for due performance
of, 396, 402

Scope,

enquiry, of, under sec 53,
542

" of, difference be-
tween, of secs 53
and 54, 562

hearing of application for
discharge, 421.

Scope—contd

prosecution, of, under sec, 69,
692

Provincial Insolvency Act, of,
6

sec 4, of, 39

Scope of enquiry,

annulment of voluntary trans-
fers, for, 542

bad faith does not come at
the time of adjudication
within the 223

creditor's petition, on, 218

debtor's petition, on, 221

Secluding,

act of insolvency, an, 84, 103

Second,

appeal to High Court from
decision or order under sec
4, 719, 732

Secret,

debt of company on account
of profit made by its promo-
ter is not released by dis-
charge, 462

formulas vest, 259

Secretary of State,

liability of, for acts done by
Official Receiver, 620

Secured creditor,

Court's right of restraint over,
320

creditor and, distinction be-
tween, 16

decree null and void, when
receiver is not made a party
in a suit by, 325

defined, 14, 21

discharge does not affect, 468

effect of discharge on rights
of, 468

effect of non-compliance
provision of s 47
484

Secured creditor—contd.

election of remedy by, 479
 equitable assignee is a, 478.
 estimate of the value of security by a, 135, 150, 476, 482.
 excluded from all shares of dividend, 476, 484
 execution of decrees by, 322.
 landlord is a, 24
 leave for suit by, not necessary, 323.
 money decree-holder when, 477.
 mortgagee is a, 477.
 not a creditor, 16, 479
 notice before suit by a, 327
 petition by, condition of, 135
 petitioning creditor may be, 120.
 position of, 135, 150, 253, 318
 preference to a, 564.
 proof by, 22, 476, 492.
 „ for balance by, 476, 480.
 „ for the whole by, 476, 481.
 realisation of security by, 476, 479.
 receiver a necessary party in a suit by, 323.
 relinquishment of security by, 476, 481.
 remedy of, 253, 319.
 rent decree-holder is a, 478
 reputed ownership affects rights of, 327.
 restraint on, 320.
 rights of, 22, 478.
 „ of, in respect of goods pledged, 320.
 „ of, how far affected by s. 4, 43.
 „ of, not affected by reputed ownership, 300.
 „ of, to realise security, 479.
 right of execution of decrees by, 322.

Secured creditor—contd.

right to prove by, 479.
 „ of, to realise security absolute, 253, 319.
 stay of suit by a, 338.
 suit by a, 321.
 „ by, to realise security, 319
 unpaid vendor is a, 478
 valuation of security by a, 482.
 when entitled to dividend, 476, 484
 „ not entitled to dividend, 484.
 „ money decree-holder is a, 477.
 who is, 14, 21.

Secured debt,

not provable, 368
 priority of, 657.

Security,

amendment of value of, 483
 appearance of debtor, for, Court's power to order, 200
 202.
 bond, Stamp duty payable on, 202.
 costs, for, inherent power to order, 338, 730.
 deposit is not property and does not vest, 317.
 enforcement of, 402.
 estimate of value of, 135, 151.
 furnishing, by receiver, 599, 606
 release from arrest or imprisonment on, 210, 216
 realise, right of secured creditor to, 253, 319, 479.
 reasonable, for composition, 396, 402.
 receiver's right over, of goods, 320.
 redemption of, 476, 482.

Security—contd

- relinquishment of, 120, 135, 150
- „ of, by secured creditor, 476, 481.
- sale of property by receiver subject to, 482, 483
- secured creditor realising, 319, 476, 479
- stay of suit when, challenged, 338
- suit to realise, 321
- valuation of, 476, 482

Seizure,

- interim attachment of debtor's property by actual, 200, 203

Separate,

- petition for adjudication, consolidation of, 181
- properties applicable in the first instance in payment of, debts, 650, 659

Servant,

- wages of, priority of, 650, 654, 655

Service,

- notice, of, of date of hearing of petition, 191, 192
- „ „ dismissal for want of, 233, 236

Set-off,

- accounts in, 475
- costs of, 475
- date of accounts for, 475
- elements of, 473
- joint debts can not be, 473
- mutual dealing and, 470
- right to, 474

Setting aside,

- order of annulment, of, 456

Settlement,

- ante-nuptial, by debtor protected, 525
- transfer by way of, or trust, annulment of, 524

Several,

- debtors, joint petition by, 153

Shall,

- vest, meaning of, 282

Ship owner,

- lien of, 24

Simplification,

- proceedings, of, by consolidation, 181.

Simultaneous,

- order of adjudication and annulment of transfers, 247
- vesting order need not be, with annulment, 391

Sole,

- creditor can be a petitioning creditor, 120

Solicitor,

- lien of, 24

Special,

- lien, 24

Specification,

- value, of, of properties in the schedule, 169

Speculation,

- rash and hazardous, refusal of discharge for, 433, 440

Spes Successionis,

- does not vest in receiver, 278

Stamp,

- duty, deeds by receiver exempt from, 640
- „ payable on security 201

Statements,

inability to pay, of, in debtor's petition, 168
 ordinary residence, of, 168
 arrest or imprisonment, of, 168
 attachment, of, 168
 pecuniary claims, of, 169
 previous insolvency, of, 169

Status,

insolvency Court, of, 68
 interim receiver, of, 197
 Official Receiver, of, 19
 receiver on adjudication, of, 603
 unpaid vendor, of, 478

Statutory,

limitation to grant discharge, 422
 right, adjudication a, 152
 tenancy is property that vests in receiver, 272

Stay,

appeal against order of, 339
 Civil Court has power to order, 333
 concurrent proceedings, of, 379
 High Court's power of, 382
 Insolvency Court's power of, of suits, 333
 mortgage suit, of, 338
 proceedings of, power of, 75
 " on adjudication, 57, 330
 " not liable to, 339
 sale, of, by Insolvency Court, 51.
 " of, before adjudication, 334
 suits, of, or other proceedings started after adjudication without leave, 334
 suits, of, before adjudication, 33

Subject,

to the provisions of the Act, jurisdiction is, 41
 " to the provision of s 53, jurisdiction is not, 45

Subordinate,

Additional District Judge not, to District Judge 33, 726
 Court may be invested with powers by Local Government, 32
 " of Small Causes, to District Court 32
 " all orders of, appealable, 727
 Court, appeal from, lies to District Court, 719, 726
 order of District Court in appeal from, court is final, 719, 728

Subsequent,

bona fide purchaser whether protected, 545
 transferee must be impleaded to be bound by annulment, 547

Subsisting,

debt to be provable, must be, 359

Substitution,

creditor, of, in the case of a defaulting creditor, 182, 183
 death of debtor, on, 70
 dismissal of petition, before, 184
 limitation for, 184
 procedure on, 185
 representative, of, of deceased debtor, 70
 right of receiver to administer without 186

Subsequent,

purchase from transferee, how far protected, 545
 trade, property acquired in, whether vests, 674

Succession,

certificate not necessary for receiving dividend, 671

Sue,

bare right to, does not vest in receiver, 275

leave of Court to, 252, 292, 634

receiver alone competent to, after the vesting order is made, 634

when insolvent can, 636

Suffered,

annulment of judicial proceeding, by a debtor when unable to pay debts, 555, 576

Sufficient,

cause, dismissal for, 233, 236
notice of suspension of payment must be, 109, 110

Suit,

appointment of receiver in mortgage, 612

bar of, by debtor for compensation 242

bare right of, vesting of, 275

before adjudication, no leave required, for, 331

before adjudication, stay of, 332

civil power and procedure of Court same as in 67

commencement of, or other legal proceeding after adjudication, 252, 288, 289

compensation, for, does not lie, 242

costs of, when first charge, 513, 521

creditor's right of, after adjudication, 252, 286

damages for, for frivolous and vexatious petition, does not lie, 242

Suit—contd

declaratory, when lies, 66

decree null and void when receiver is not made party in a, by secured creditor, 325

defending, by receiver, 623, 635

dismissal of, other legal proceeding without leave, 296

disposal of, *ex parte* against receiver, 637

dividend, for, does not lie 671

effect of adjudication on or other legal proceedings instituted before adjudication without leave, 330

effect of, or other proceeding without leave, 296

insolvent's right of, re: acquired property, 307

institution of, by receiver 632

leave for, against receiver necessary, 60

by receiver, 671

" for, by secured creditor not necessary

" for, or other proceedings, 257

" for no third party

" of Court proceedings

legal adjudication

lies in the under

limitation 635

limitation

mortgage

no

Suit—contd

notice to receiver before, 326
605
person of insolvent, against,
290
powers of High Court and
District Court are the same
as in Civil, 68
power of receiver to continue,
623, 632
„ of receiver to defend
623, 635
„ of receiver to institute,
623, 632
procedure in, or proceedings
after adjudication of
plaintiff, 336
„ do of defendant, 337
property of insolvent, against,
252, 291
receiver a necessary party in,
by secured creditor, 323
receiver's right to continue
623, 636
secured creditor, by, 321
„ creditor's right of, 23
321
stay of, 330
„ of suit or other procee
ding started after ad
judication without
leave, 334
„ of, before adjudication,
330
„ of, by a secured creditor,
338
„ of mortgage, 338
surety, against, 203
to prove debt, 219
validation of, or other legal
proceedings without leave
an annulment, 459
when lies for declaration of
title 66

Sum,

debt must be liquidated, to
found insolvency petition
17, 134, 139

Summary,

administration, 716, 717.
„ right of creditor
to prove in, 669
„ value of property
in, 716, 717
„ vesting of property
in, 716, 717
„ decision of Civil
Court, jurisdic
tion of Insolvency
Court to go be
hind, 51
object of, 717
power of Court
to stay sale in,
718
proof of debt in,
718
rules of procedure
to be followed in,
755

Summon,

nature of application to, 646
power of Court to any
person in possession of
insolvent's estate 641
who can apply for, 646

Supplementary,

order of Court, vesting, 456

Surety,

a contingent creditor, 16
petitioning creditor, 121
preference to, 565
remedy against, 203

Surmises,

annulment of transfers must
be based on legal evidence
and not on suspicion or,
555

Surplus,

insolvent's right to, 676

Surrender,

life-interest, of, is transfer, 95

Surrender—contd

relinquishment or, of life interest in fraud of creditors is an act of insolvency, 95

Suspension,

attaching conditions to, of discharge, concurrently, 433, 445

automatic discharge on termination of, 426

discharge of, 417, 424

must be of entire debt, 109

notice of, of payment, an act of insolvency, 84, 107

what constitutes notice of, of payment, 108

what is not notice of, of payment, 111,

review of the order of, 426

termination of, 426

Suspicion,

annulment of transfers must be based on legal evidence and not on, or surmises, 555.

System,

hire-purchase, goods held in, do not vest, 302

T

Temporary,

injunction, jurisdiction of Insolvency Court to grant, 74

Tenancy,

forfeiture of, on adjudication, 271

statutory, is property that vests in receiver, 272.

Tenant,

monthly, holding over liable to eviction on insolvency, 272

Tenures,

permanent, are properties that vest, 273

Termination,

discharge does not mark, of proceedings, 431

insolvency proceedings, of, on annulment of adjudication, 384, 453

" proceeding, of, on death of debtor, 187

refusal of discharge is not, of insolvency proceedings, 443

suspension of discharge, of, 334

Territorial,

extra, jurisdiction of Insolvency Court, 44

Test,

fraudulent preference, of, 567

Three months,

acts of insolvency to take place within, 134, 143

annulment of fraudulent preference within, 558, 577

computation of, in case of dismissal of application for adjudication, 145, 577

" in case of sale in execution of decree, 144

" in case of transfers, 144.

limitation of, for avoidance of voluntary preference, 577.

" of, for petition,

Suit—contd

notice to receiver before, 326, 605
 person of insolvent, against, 290
 powers of High Court and District Court are the same as in Civil, 68
 power of receiver to continue, 623, 632
 „ of receiver to defend, 623, 635
 „ of receiver to institute, 623, 632
 procedure in, or proceedings after adjudication of plaintiff, 336
 „ do of defendant, 337
 property of insolvent, against, 252, 291
 receiver a necessary party in a, by secured creditor, 323
 receiver's right to continue, 623, 636
 secured creditor, by, 321
 „ creditor's right of, 23, 321
 stay of, 330
 „ of suit or other proceeding started after adjudication without leave, 334
 „ of, before adjudication, 330
 „ of, by a secured creditor, 338
 „ of mortgage, 338
 surety, against, 203
 to prove debt, 219
validation of, or other legal proceedings without leave an annulment, 459
 when lies for declaration of title 66

Sum,

debt must be liquidated, to found insolvency petition, 17, 134, 139

Summary,

administration, 716, 717.
 „ right of creditor to prove in, 669
 „ value of property in, 716, 717.
 „ vesting of property in, 716, 717.
 „ decision of Civil Court, jurisdiction of Insolvency Court to go behind, 51.
 „ object of, 717.
 „ power of Court to stay sale in, 718
 „ proof of debt in, 718
 „ rules of procedure to be followed in, 755

Summon,

nature of application to, 646
 power of Court to, any person in possession of insolvent's estate, 641
 who can apply for, 646

Supplementary,

order of Court, vesting, 456

Surety,

a contingent creditor, 16
 petitioning creditor, 121
 preference to, 565
 remedy against, 203

Surmises,

annulment of transfers must be based on legal evidence and not on suspicion or, 555

Surplus,

insolvent's right to, 676

Surrender,

life-interest, of, is transfer, 95

Surrender—contd

relinquishment or, of life interest in fraud of creditors is an act of insolvency, 95

Suspension,

attaching conditions to, of discharge, concurrently, 433, 445

automatic discharge on termination of, 426

discharge of, 417, 424

must be of entire debt, 109

notice of, of payment, an act of insolvency, 84, 107

what constitutes notice of, of payment, 108

what is not notice of, of payment, 111

review of the order of, 426

termination of, 426

Suspicion,

annulment of transfers must be based on legal evidence and not on, or surmises, 555

System,

hire purchase, goods held in do not vest, 302

T**Temporary,**

injunction, jurisdiction of Insolvency Court to grant, 74

Tenancy,

agricultural, landlord of, not a creditor under the Agra Tenancy Act, 16, 156

forfeiture of, on adjudication, 271

statutory, is property that vests in receiver, 272

Tenant,

monthly, holding over liable to eviction on insolvency, 272

Tenures,

permanent, are properties that vest, 273

Termination,

discharge does not mark, of proceedings, 431

insolvency proceedings, of, on annulment of adjudication, 384, 453

" proceeding, of, on death of debtor, 187

refusal of discharge is not, of insolvency proceedings, 443

suspension of discharge, of, 334

Territorial,

extra, jurisdiction of Insolvency Court, 44

Test,

fraudulent preference, of, 567

Three months,

acts of insolvency to take place within, 134, 143

annulment of fraudulent preference within, 558 577

computation of, in case of dismissal of application for adjudication, 145, 577

" in case of sale in execution of decree, 144

" in case of transfers, 144

limitation of, for avoidance of voluntary preference, 577.

" of, for creditor's petition, 134

Three months—contd

limitation of, in case of sale
in execution of
decree 144

„ in case of transfer,
144, 577

not a period of limitation
but condition precedent to
presentation of petition 144
secs 5 and 15 of Limitation
Act do not extend limita-
tion of 145

undue preference to be within
558, 577

Time,

appeal beyond against acts
or decision of receiver, 689

application for discharge, for
making 417, 419

failure to apply for discharge
within, effect of, 420, 446

Title,

adjudication of, against third
person when inexpedient
611

bona fide purchase for valu-
able consideration acquiring
good, 559, 592

jurisdiction to decide ques-
tions of, and priority, 37, 40

Tools,

trade, of, do not vest in recei-
ver, 311

Trade,

business and, meaning of, 673
continuing in, knowing to be
insolvent, refusal of dis-
charge, for, 433, 438

goods in order or disposition
of insolvent in his vest in
receiver, 252 260, 298

insolvent carrying on, for the
benefit of creditors 673

property acquired in subse-
quent 674

tools of, are exempt from vest-
ing in receiver 311

Transaction,

bona fide for valuable consi-
deration after ad-
judication, pro-
tection of, 592,
595

„ for valuable con-
sideration before
adjudication pro-
tected, 592, 595

business refusal of discharge
for failure to keep book of
account to show, 432
protected 593

Transfer,

adjudication, after, when pro-
tected, 597

„ before, how far
protected, 592,
597

all of, or substantially all, act
of insolvency, 83, 92

avoidance of voluntary, 522

before and in consideration of
marriage 522, 525

benefit for of creditors, an act
of insolvency 83, 89

by way of fraudulent prefer-
ence an act of insolvency,
83

classes of fraudulent, 87

computation of three months
in case of, 144 577

„ of two years in avoi-
dance of, 542

conditions for avoidance of
voluntary, 525

consideration of marriage, in,
522

creditor's right to apply for
annulment of, 587, 590

creditor, in favour of, is pre-
ference, 558, 564

delegation of jurisdiction in
avoiding 540

dower debt, for, 526

Transfer—contd

- effect of adjudication on, 329
- “ of annulment of voluntary, 556
- exclusive jurisdiction to avoid, 538
- for benefit of creditors, an act of insolvency, 83
- fraudulent, need not be enquired on a debtor's petition, 224
- from transferees, jurisdiction to avoid, 49, 543, 545
- good faith and for valuable consideration, in, protection of, 522, 528
- intent to defeat and delay creditors, with, 83
- issues in avoidance of, 548, 579
- jurisdiction to annul, more than two years old, 47
- “ to set aside, from transferees, 49
- “ to avoid, during insolvency, 537
- “ to avoid, after annulment of adjudication, 637
- “ to avoid on death of debtor, 538
- “ to go behind judgment in avoiding, 339
- limitation for application for avoidance of, 541
- made before and in consideration of marriage, 522, 525
- made more than two years old, jurisdiction to annul, 47
- nature of proceedings in Court in avoiding, 547
- near relation, to, 529
- notice of application to annul, 548
- of property, 524
- of Property Act, IV of 1882, 30

Transfer—contd

- part of property, of is not act of, insolvency, 91, 93
- partition is, 95
- presumption of fraud in case of, 549
- “ from, within two years, 522
- property, of, defined, 14 87, 524
- “ of, an act of insolvency, 83
- “ of, to creditor, 558
- “ of, what is, 87
- protection of, for valuable consideration, 522
- “ of, for valuable consideration without notice, 559
- proof of good faith in, 520
- purchaser in good faith in, 531
- receiver to apply for annulment of, 587, 589
- relinquishment or surrender is, 95
- scope of enquire in, 542
- secured creditor, to, is not preference, 564
- simultaneous order of adjudication and annulment of, 247
- subsequent purchasers, protection of, 545
- subsequent transferees to be “ impleaded in avoidance of, 547
- surety, to, is preference, 565
- transferees, from, jurisdiction to set aside, 49, 543, 545
- “ from, avoidance of, 543
- two years, computation of in avoiding, 542.
- valuable consideration for, 532
- valuable consideration, for protection of, 522.

Transfer—contd

void, are not, 536
 voidable, 536
 voluntary, avoidance of, 522
 when, not an act of insolvency
 91, 98
 who can apply for annulment
 of, 541
 with intent to defeat or delay
 creditors, an act of insol-
 vency, 94
 with a view of giving prefer-
 ence, 558, 565
 within two years from the pre-
 sentation of petition, 522,
 534

Transferee,

avoidance of transfer by, from
 544
bona fide, from preferred credi-
 tor, protected, 586
 notice to, before avoidance,
 548
 subsequent purchase from,
 how protected, 547
 transfer from, jurisdiction to
 avoid 49, 545

Trial,

place of for offences under s
 69, 707

True owner,

goods in order or disposition
 of the insolvent with con-
 sent of, vests in receiver,
 252, 299

Trust,

breach of, refusal of absolute
 discharge for, 433
cestui que, lien of 24
 deposit is not, 657
 deed of, rights of a secured
 creditor under a, 484
 goods held in, does not vest,
 301
 money held in, is entitled
 to paid in priority, 656

Trust—contd

property does not vest in re-
 ceiver, 15, 278

Trustee,

bankruptcy in, not a creditor,
 16
cestui que trust can follow, 279
 encumbrancer, is an, 527
 lien of, 24
 may be petitioning creditor,
 121
 purchaser is a, 527
 transferee is a, 527

Two years,

avoidance of transfer within
 522, 534
 computation of the period of,
 542
 jurisdiction to annul transfer
 more than, under sec 53,
 554
 transfer within relation back
 of, 534

U**Unable to pay**

allegations of, in petition of
 debtor, 161, 170, 226
 condition to a debtor's peti-
 tion, 151, 153
 debtor not entitled to present
 petition unless he is, 151,
 161
 debtor to prove that he is
 217, 226, 227
 debts as they become due
 transfer when debtor is, is
 fraudulent, 558, 563
prima facie proof that the deb-
 tor is, 217, 227
 transfer of property, payment
 made, obligation incurred
 judicial proceeding taken or
 suffered, by a person is
 liable to be annulled, 558,
 563

conditional,
 order of adjudication to be,
 246
 discharged insolvent,
 disqualification of, 713
 fresh petition by, for adjudication, 172.
 obtaining credit, penalty for, 710
 value,
 reference, refusal of discharge, for, 433, 442
 incorporated,
 company liable to adjudication, 130
 „ may be petitioning creditor, 120
 justifiable,
 extravagance, refusal of discharge for, 433, 441
 liquidated,
 damages, demands in the nature of, not provable, 259, 367.
 paid vendor,
 equitable right of, 478.
 lien of, 24.
 status of, is not that of a secured creditor unless he obtains decree, 478
 unsecured,
 creditor as distinguished from secured creditor, 16, 564.

V

validity,
 debts, of, enquiry into, 222.
 valuable consideration,
 protection of contract for, 592, 595
 purchaser in good faith and for, protected, 522, 531.
 what is, 532.

Valuation,
 amendment of, of security, 476, 483.
 security, of, 476, 482.

Value,
 property, of, specification in petition by debtor, of, 169.
 „ of, in summary administration, 716, 717.
 security of, by a secured creditor, 135, 476.

Vendor,
 unpaid, equitable rights of, 478
 „ lien of, 19.
 „ is not secured creditor until he obtains a decree, 478.

Verification,
 absence of, in petition, 168.
 petition, of, 168.

Vest,
 actionable claim, 274.
 adjudication, on, in Court or receiver, 252.
 after-acquired property, 252, 271, 304.
 agricultural holdings do not, 312, 313, 314.
 agriculturist, house of, does not, 312
 bailment, property under, 261.
 claim for damages, 276.
 compulsory deposit in private benefit fund whether, 316.
 Court, in, when no receiver, 622.
 copyright, 260
 equity of redemption, 270.
 goods held in hire-purchase, 302.
 goods in order or disposition, 298, 252, 280.
 goodwill, 265.

Vest—contd.

goods held in trust do not, 301.
 leasehold interest, 271.
 goods held by commission agent, 260.
 goods in possession, order or disposition, 260.
 gratuity does not, 317.
 Hindu-family firm, 265.
 Hindu family property in case of adjudication of karta or manager, 267.
 Hindu family property in case of attachment before adjudication, 270.
 Hindu family property in case of adjudication of a co-purchaser, 271.
 life-insurance policies, 259.
 meaning of, 282, 283.
 money, 258.
 nature of receiver's rights when, 285.
 occupancy right, that do not, 312.
 occupancy rights, 273, 313.
 partial debutter, 281.
 partnership assets, 263.
 pension does not, 314.
 personal earnings, 258.
 personal license does not, 28.
 property abroad, 262.
 permanent tenures, 273.
 properties that, 257, 258.
 „ that do not, 278, 388.
 „ with all advantages and burdens, 317.
 provident fund when, 315.
 right of action, 274.
 right, title and interest of the insolvent, 317.
 salary, 259.
 secret formulas, 259.
 security deposit does not, 317.
 shall, what it means, 282.
 statutory tenancy, 272.

Vest—contd.

subject to equities, 285.
 tools of trade do not, 311.
 vested and contingent interests 277.
 what, in the receiver, 317.
 Vested,
 abandonment of property effect of, 284.
 and contingent interests see 277.
 Vesting,
 after-acquired property, on 252, 271, 304.
 agricultural holdings at exempt from, 312.
 annulment of adjudication on, in such person as the Court may appoint, 383.
 387.
 automatic, on adjudication 256.
 Court or receiver, in, on adjudication, 252, 283.
 Court, in, when no receiver 622.
 effect of, in Court or receiver 283.
 house of an agriculturist exempt from, 312.
 Mahomedan law, under, 306.
 must be by express order, 619.
 not to be property in receiver
 . . .
 „ made by a competent foreign Court, effect of 601, 602.
 „ need not be simultaneous with annulment, 391.
 pension exempt from, 314.
 property, of, on adjudication, 252, 256.
 „ exempted from, 253, 311.

Vesting—contd

- property not liable to attachment exempt from, 253, 311
- property of, outside British India on adjudication 12, 602
- receiver, in 203, 205, 599, 601
- relation back of, 282, 602
- subject to equities, 285
- " to mortgage, 317
- summary administration, in, 717
- supplementary order of, 456
- tools of trade exempt from, 311

Vexatious,

- dismissal of creditor's petition on the ground of being 242, 244
- frivolous and, petition award of compensation on dismissal of 242, 244

Void,

- distinction between, and voidable, 536
- transfer within two years is not, but voidable, 536

Voluntary,

- preference, 558

Voluntary transfer,

- application for annulment of, to be made by receiver, 587
- avoidance of, 522
- " of amounting to preference, 558
- conditions for annulment of, 525
- effect of annulment of, 556
- exclusive jurisdiction of Insolvency Court to avoid, 538
- issues to be proved in case of annulment of, 548
- jurisdiction of Court to annul, during insolvency, 537

Voluntary transfer—contd

- jurisdiction to annul, after annulment of adjudication, 537
- limitation for application for annulment of, 541
- more than two years old, annulment of, 38, 554
- notice to transferee before avoidance of, 548
- offence under sec 69, 14, 691, 697
- onus of proof in case of, 550
- presumption of fraud in, 549
- receiver's report is no evidence in annulment of, 553
- subsequent purchaser from transferee, protection of, 545
- subsequent transferees must be impleaded to be bound by annulment of, 547
- what is, 524
- who can apply for annulment of, 541
- within two years of petition for adjudication, 522 542

Vouchers,

- production of, to prove debts, 490
- to be specified in affidavit of proof of debt, 490

W**Wages,**

- labourers, of, 650, 654
- priority of, in payment of dividend, 650, 654
- servant, of, priority of in payment of dividend, 650, 655

Warrant,

- arrest, of, issue of, after adjudication, 349
- " of, issue of, adjudication,

Winding up—contd

- condition precedent to issue for arrest, 205
- of a person, who fails to appear on summons for information regarding insolvent's property, 441.
- power to issue, for arrest of debtor, 200.

Wife,

- clothes and bedding of insolvent do not vest in receiver, 311.

Wife,

- gift to, annulment of, 526.
- " to, not a fraudulent transfer when in consideration of marriage, 526
- maintenance to, and children, 673.

Wilful,

- default of receiver, loss occasioned by, 599.
- failure to perform duties, under s 22 is offence, 691, 695.

Willingness,

- declaration of debtor's, to place all property at the disposal of Court, 169, 171.

Winding up,

- business of insolvent carried on by receiver for beneficial, 623, 631.

Winding up—contd

- incorporated company, of, 130

Withdrawal,

- appeal against order of 179
- leave for, of petition discretionary, 178.
- notice of, of petition, 179
- petition, of, 176
- " of, after adjudication, 177.
- " of, before adjudication, 176.

Woman,

- debtor when does not include married, 18
- married, may be a petitioning creditor, 121.
- " when petition lies against, 124

Words,

- not defined, 14, 31.

Writing,

- insolvency petition shall be in, 168

Y

Years,

- computation of period of two, 542
- transfer more than two, annulment of, 47, 554
- " within two, relation back of, 534.

